Headnotes

to the order of the First Senate of 24 June 2014

– 1 BvR 2926/13 –

1. **The protection of the family under Article 6 sec.1 of the Basic Law also includes family ties between close relatives, in particular between grandparents and their grandchildren.**

2. **This fundamental right covers the right of close relatives to be considered in choosing a guardian or supplementary curator. They take precedence over non-relatives, unless there are specific indications in an individual case that the best interests of the child are better served by choosing another person.**

3. **The Federal Constitutional Court reviews the choice [of a guardian or supplementary curator] pursuant to § 1779 of the German Civil Code on the basis of general principles as to the question of whether the challenged decision contains errors of interpretation that are based on a fundamentally erroneous view of the meaning of the fundamental rights of close relatives.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 2926/13 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Ms. B…,

- authorised representative: Rechtsanwältin Gabi Pathe,
Oppenhoffallee 29, 52066 Aachen -

against a) the decision of the Cologne Higher Regional Court (*Oberlandesgericht Köln*) of 19 September 2013 - 10 UF 16/13 -,

b) the decision of the Aachen Local Court (*Amtsgericht Aachen*) of 3 January 2013 - 229 F 74/11 -

and application for legal aid
and request for appointment of legal counsel

the First Senate of the Federal Constitutional Court

with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 24 June 2014:

1. **The application for legal aid and the request for appointment of legal counsel are denied.**

2. **The constitutional complaint is rejected as unfounded.**

R e a s o n s :

A.

The constitutional complaint concerns the question to which extent the Basic Law (*Grundgesetz* – GG) protects the interest of grandparents to be appointed as guardians (*Vormund*) or supplementary curators (*Ergänzungspfleger*) of their grandchildren. 1

I.

As the grandmother of her second granddaughter, who was born in 2008, the complainant challenges the fact that the Family Court did not appoint her pursuant to § 1779 sec. 2 sentence 2 of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) as her granddaughter's guardian. 2

1. The complainant's first granddaughter was born in 2001. After her birth, her mother, the complainant's daughter, placed her in the care of the complainant. When the granddaughter was about one year old, the mother returned to the complainant's household. In 2008, the second granddaughter was born. Until 2011, the mother lived with the two children in the complainant's household. In August 2011, the mother went to live with a boyfriend and took the younger child with her. After two weeks, she split up with this man, and she and the child went to live with a new boyfriend. The older granddaughter had, as she herself had requested, remained with the complainant. Because the complainant believed that the mother's behaviour endangered the welfare of the [younger] child, she contacted the Youth Welfare Office (*Jugendamt*). In September 2011, with the consent of the child's mother, the younger child, *i.e.* the complainant's second granddaughter, was preliminarily placed in interim foster care. 3

2. In autumn 2011, the Family Court issued a preliminary injunction removing both children from the parental custody of the mother, and preliminarily appointed the Youth Welfare Office as guardian. In December 2011, the younger granddaughter, then just about four years old, was moved to a foster family in northern Germany, where she still lives today. 4

3. In the main proceedings, the complainant moved to have the guardianship for both children transferred to her. The court-appointed expert recommended keeping the younger granddaughter in the foster family. During these proceedings, the mother, too, expressed the wish that her younger daughter remain with the foster family. Because the child had meanwhile attached to the foster family, both the *guardian ad litem* (*Verfahrensbeiständin*) and the Youth Welfare Office advocated she remain with 5

the foster family as well. With the challenged decision of 3 January 2013, the Family Court removed both daughters from the parental custody of the mother. Pursuant to § 1779 BGB, it appointed the complainant as guardian for the older daughter. For the younger daughter, however, it appointed the Youth Welfare Office as guardian. With regard to the transfer of guardianship for the younger granddaughter to the Youth Welfare Office, which is the only aspect that is challenged here, the Family Court explained that appointing the complainant as guardian was not in the best interests of the child.

4. The complainant filed a complaint against the Family Court's decision, which the Higher Regional Court dismissed as inadmissible. The court held that the complainant was not entitled under § 59 of the Act on Procedure in Family and Non-Contentious Matters (*Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* – FamFG) to file a complaint. Although grandparents must be considered when selecting a guardian, pursuant to both § 1779 sec. 2 sentence 2 BGB and for constitutional reasons, the court found that, according to the legislature's unequivocal intention, this did not entail a legal position entitling grandparents to file complaints (reference to Federal Court of Justice – *Bundesgerichtshof* – BGH –, Order of 26 June 2013 - XII ZB 31/13 -, juris, paras. 12 to 16; Order of 2 February 2011 - XII ZB 214/09 -, juris, paras. 9 et seq.). 6

II.

The complainant claims in her constitutional complaint challenging the decisions by the regular courts that her rights under Art. 2 sec. 1 and Art. 6 sec. 1 GG in conjunction with Art. 8 of the European Convention on Human Rights (ECHR) were violated because the courts did not take into account her position as a close relative. She believes that she should only have been refused guardianship if, by taking her granddaughter away from the foster family, the girl's welfare would have been endangered. The complainant further claims that the Higher Regional Court violated Art. 101 sec. 1 sentence 2 and Art. 19 sec. 4 GG because it held that she was not entitled to file a complaint, and because it did not sufficiently address the constitutionality of § 59 FamFG. 7

III.

The Senate reviewed the files of the initial proceedings. The *Land* of North Rhine-Westphalia, the child's *guardian ad litem* in the initial proceedings, the mother, the father, and the Youth Welfare Office that was appointed as guardian were given the opportunity to submit statements. The Youth Welfare Office expressed the view that the child should not be sent back to live with the complainant. 8

B.

The constitutional complaint is admissible, but unfounded. 9

I.

The constitutional complaint is admissible. In particular, the complainant is entitled to lodge a complaint. Being the grandmother, she can file a constitutional complaint claiming that the Family Court, when selecting a guardian for her granddaughter, did not adequately consider her close position as a relative, which is protected by Art. 6 sec. 1 GG. 10

II.

The constitutional complaint is, however, unfounded. 11

1. The decisions do not violate the complainant's fundamental rights under Art. 6 GG. 12

a) Being the grandmother, the complainant has a constitutionally protected right to be considered in the selection of a guardian or supplementary curator for her grandchild who does not live with the child's mother. 13

aa) However, the complainant cannot herself plead the fundamental right of a parent under Art. 6 sec. 2 sentence 1 GG. The protection of this fundamental right is generally limited to a child's parents. Given that the complainant has not previously been selected as guardian but only seeks to obtain this position, her situation is not comparable to that of grandparents who have already been appointed as guardians and who care for and raise their grandchild in lieu of the parents (on this issue cf. Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE – 34, 165 <200>). 14

bb) Nor can the complainant, in her position as the child's grandmother, plead that, if a child is separated from its parents, both the parents (1) and the child (2) have a constitutionally protected right that close relatives be considered when selecting guardians or supplementary curators. 15

(1) The fundamental right of parents, which is protected by Art. 6 sec. 2 sentence 1 and sec. 3 GG, may warrant that grandparents are considered in a preferential way. The fundamental right of parents imposes considerable requirements for a child to be separated from its parents (consistent jurisprudence; cf. most recently in detail BVerfG, Order of the First Chamber of the First Senate of 24 March 2014 - 1 BvR 160/14 -, juris, paras. 27 et seq.). In this context, the principle of proportionality, which, *inter alia*, requires selecting the least intrusive of all equally suitable means (principle of necessity), mandates in particular that close relatives who are able to take over the responsibility be considered as guardians or supplementary curators (consistent jurisprudence; cf. most recently BVerfG, Order of the Second Chamber of the First Senate of 8 March 2012 - 1 BvR 206/12 -, *Zeitschrift für das gesamte Familienrecht* – FamRZ – 2012, p. 938 <939 and 940>). 16

If parents wish that relatives are appointed as guardians or supplementary curators and that their children live with these relatives, this constitutes, from the parents' point 17

of view, a less intrusive means than transferring legal responsibility and actual care of the child to persons outside the family. Under these circumstances, having the child remain in the extended family usually makes it easier for the parents to continue to show parental commitment to the child, which is protected by the parental right to arrange for their child's care and upbringing – even after having been separated (Art. 6 sec. 2 sentence 1 GG). If parental commitment is maintained, this may moreover favour a child's later return to its parents. To consider relatives when choosing a guardian or supplementary curator thus also accommodates the obligation of the state to encourage the child's return from a foster home, which is generally meant to be a temporary place, to the child's original parents (cf. BVerfGE 75, 201 <219>; 79, 51 <60>).

(2) Moreover, the child's fundamental right that guarantees parental care and upbringing (Art. 2 sec. 1 in conjunction with Art. 6 sec. 2 sentence 1 GG; cf. BVerfGE 133, 59 <73 et seq.>) demands that close relatives be considered when choosing a guardian or supplementary curator if this helps maintain the child's relationship with the parents and is in the best interests of the child. 18

(3) From this does not, however, follow that grandparents have a fundamental right of their own – a right on which the complainant could base her constitutional complaint – under Art. 6 sec. 2 sentence 1 GG. While the above-mentioned rights of parents and children will in practice regularly lead to grandparents standing a good chance to be appointed as the child's guardian or supplementary curator if desired by the parents or the child, this chance is merely a legal reflection of the fundamental right of parents and children that does not entail that the grandparents' subjective interests are protected by a fundamental right of their own. 19

cc) Being the grandmother, the complainant does, however, have a right of her own under Art. 6 sec. 1 GG to be considered in the selection of a guardian or supplementary curator. 20

(1) The protection of family pursuant to Art. 6 sec. 1 GG extends to family ties between grandparents and their grandchild. 21

Art. 6 sec. 1 GG protects family as, first and foremost, a living arrangement and child-raising community of children and their parents. When parents and their children live together as a family, their community gains particular significance, because the physical and mental development of the children, who tend to be in need of protection, is based to a large degree on their family and the upbringing they receive from their parents (cf. BVerfGE 80, 81 < 90>; 133, 59 <82>). But the protection of the fundamental family right goes beyond the purpose of securing a special environment that gives room for child development. It also aims more generally at protecting specific family ties (cf. BVerfGE 133, 59 <82 and 83> with further references), such as those that can exist among adult family members (cf. BVerfGE 80, 81 <91> with further references) and – although usually less prominently – over several generations among the members of an extended family. Family ties tend to be of great importance 22

to the image an individual has of itself and frequently have particular practical relevance in the day-to-day lives of the family members. They stand out due to the fact that they are not chosen but determined by fate, and may be characterised by particular closeness and affection as well as by a sense of responsibility, and a willingness to support each other (cf. BVerfGE 57, 170 <178>; 112, 332 <352>). Not least because of the particular importance family ties have in the development of one's personality, the right to free personal development, protected by Art. 2 sec. 1 GG, has been reinforced by the constitutional guarantee of family under Art. 6 sec. 1 GG (cf. BVerfGE 57, 170 <178> with further references). This reinforcement protects family life and thereby grants the individual the opportunity to lead a life in accordance with its family ties.

Close family ties occur not only in the relationship between children who are still growing up and their parents, but may also exist among the members of an extended and multi-generational family. Particular affection and closeness, mutual familial responsibility, thoughtfulness and willingness to support each other may particularly exist in the relationship between grandchildren and grandparents, but also between close relatives in the lateral line. If close relatives are connected by strong ties that are characterised by family solidarity and attachment, those ties are protected by Art. 6 sec. 1 GG (cf. Jarass, in: Jarass/Pieroth, *Grundgesetz*, 12th ed. 2012, Art. 6 para. 10; Kingreen, in: *Jura* 1997, p. 401 <402>; Pirson, in: *Bonner Kommentar*, vol. 2, Art. 6 sec. 1, para. 21 <August 1976>; Robbers, in: v. Mangoldt/Klein/Starck*, Grundgesetz*, vol. 1, 6th ed. 2010, Art. 6 sec. 1, para. 88 with further references; Uhle, in: Epping/Hillgruber*, Grundgesetz*, 2nd ed. 2013, Art. 6 para. 14; in the same vein ECHR, judgment of 13 June 1979 - *Marckx - Neue Juristische Wochenschrift* – NJW – 1979, p. 2449, para. 45 on the protection of "family life" within the meaning of Art. 8 ECHR. Different: Burgi, in: Friauf/Höfling, *Grundgesetz*, vol. 1, Art. 6 para. 20 <April 2002>; von Coelln, in: Sachs, *Grundgesetz*, 6th ed. 2011, Art. 6 para. 17. To the extent that this could lead to different conclusions, the Senate does not maintain its decision of 31 May 1978 <BVerfGE 48, 327 [339]>.). There is nothing to suggest that Art. 6 sec. 1 GG was intended to exempt the relationship between grandparents and grandchildren from the protection of family. To the contrary, the wording of Art. 6 sec. 3 GG, which explicitly safeguards against separating a child from its "family", points to the fact that the legislature that passed the Constitution considered a family to comprise more than just the community of children and parents. Lesser degrees of kinship among the family members will be taken into account when determining the level of protection and the content of Art. 6 sec. 1 GG (cf. Robbers, loc. cit., para. 89; Uhle, loc. cit., para. 14; Brosius-Gersdorf, in: Dreier, *Grundgesetz*, 3rd ed. 2013, Art. 6 para. 112). 23

(2) The constitutional protection of family relationships between close relatives beyond the parent-child relationship includes the right to be considered in the choice of a guardian or supplementary curator, as long as there are indeed close family ties to the child. Guardianship or supplementary curatorship make it possible for relatives to 24

take the child into their home, to look after it, and to bring it up in their own responsibility. This way they are able to continue their family ties with the child and exercise the due responsibility of relatives. Grandparents and other close relatives therefore take precedence over non-relatives in choosing a guardian or supplementary curator, unless in an individual case there are specific indications that the best interests of the child, which are decisive for such a choice (cf. BVerfGE 75, 201 <218>; 68, 176 <188> on the relationship between the child's interests and the interests of the parents), are better served by choosing another person.

b) The challenged decisions satisfy the requirements of Art. 6 sec. 1 GG with regard to considering close relatives in choosing a guardian. 25

aa) In the case at hand, the complainant can base her complaint on the right close relatives have to be considered in the choice of a guardian, which is protected by Art. 6 sec. 1 GG, because it may be assumed that close family ties to her granddaughter either actually exist or at least existed before the child went to live with the foster family. The complainant used to live in the same household as her granddaughter during the first years of the child's life. 26

bb) In the present case, the Federal Constitutional Court reviews the way the regular courts interpreted and applied ordinary law on the basis of general principles. Accordingly, the form of the proceedings, the determination and assessment of the facts, as well as the interpretation and application of such rules to the individual case that are unproblematic from the point of view of the Constitution, pertain to the competent regular courts and are exempt from review by the Federal Constitutional Court. Its task is merely to examine whether the challenged decision contains errors of interpretation that are based on a fundamentally erroneous view of the meaning of a fundamental right or of the scope of its protection (cf. BVerfGE 72, 122 <138>; consistent jurisprudence). 27

The situation is different if a child is separated from its parents against their will. Due to the weight of the interference with the fundamental rights of parents and children, a judicial decision that deprives parents of custody over their child in order to separate them from the child gives the Court a reason to exceed its general scope of review (cf. BVerfGE 72, 122 <138>; consistent jurisprudence). In such cases, the Federal Constitutional Court examines particularly whether the Family Court reasonably assumed that there was permanent danger to the child's welfare and that this danger could only be averted by separating the child from the parents instead of by less intrusive means. Due to the particular weight of such interference, constitutional review may, as an exception, be extended to individual errors of interpretation (cf. BVerfGE 60, 79 <91>) as well as to clear mistakes in the determination and assessment of the facts. 28

However, such strict constitutional review applies only to the protection of the fundamental rights of the parents and the child. Should they be separated, they are awarded particular protection under the Constitution pursuant to Art. 6 sec. 2 sentence 1 and sec. 3 GG (parents) and Art. 2 sec. 1 in conjunction with Art. 6 sec. 2 sentence 1 29

and sec. 3 GG (child) (cf. BVerfGE 60, 79 <89>; 79, 51 <60>). When performing a constitutional review of the question whether a court's selection of a guardian or supplementary curator is compatible with the fundamental rights of close relatives, however, there is no reason for applying this strict constitutional review. Relatives who want to be appointed as guardian of a child that has been separated from its parents are not subject to the Constitution's special protection of the parent-child relationship. The intensity of interference tends to be less severe in a selection decision pursuant to § 1779 BGB that chooses not to select relatives than in a possible separation of the child from its parents.

cc) The challenged decisions show no disregard of the extent of the complainant's interests protected under Art. 6 sec. 1 GG. When choosing the guardian, the Family Court proceeded from the assumption that the complainant held a special position, and it did not make exaggerated requirements for appointing her. In particular, it did not assume that the complainant should be chosen only if the well-being of the child were better served by doing so as compared to her remaining with the foster family. Based on easily understandable arguments, the Family Court instead reached the conclusion that the child's well-being would be better served if it remained in the foster family than if it were moved to the care of the complainant. 30

2. The complainant's fundamental rights have not been violated by the fact that she was denied a complaint pursuant to § 59 FamFG. 31

a) Under the Constitution, neither the right of recourse to the courts, nor Art. 101 sec. 1 GG oblige the legislature to make available to close relatives a legal remedy against the choice of guardian by the Family Court judge. If – as in the present case – the decision under § 1779 BGB is not taken by the senior judicial officer pursuant to § 3 no. 2a, § 14 of the Act on Senior Judicial Officers (*Rechtspflegergesetz* – RPflG), but by the Family Court judge pursuant to § 6, § 8 sec. 1 RPflG, there is no claim under constitutional law to access to another judicial authority. Under Art. 19 sec. 4 GG, as well as under the general right of recourse to the courts, the Basic Law guarantees the right of access to justice. However, the right to judicial review against alleged violations of the law does not guarantee a right to pursue the legal process over several instances. For the sake of legal certainty and legal concord, the rule of law requires that every dispute eventually come to an end. It is the law that decides when this is the case. For these reasons, it is generally sufficient that the legal system provide one opportunity to obtain a judicial decision. It is the responsibility of the legislature to decide by weighing and balancing the various interests at stake, whether one judicial instance suffices or whether multiple instances shall be provided, and under which conditions they may be accessed (cf. BVerfGE 107, 395 <401 and 402>; consistent jurisprudence). 32

b) Nor does the Higher Regional Court's interpretation of § 59 sec. 1 FamFG, according to which the complainant as the grandmother is not entitled to a complaint, violate the complainant's right to judicial protection, or her right to her lawful judge, 33

which is a right equivalent to a fundamental right.

An interpretation and application of a legal remedy's admissibility requirements is incompatible with the obligation to provide effective legal protection, which for civil proceedings is guaranteed by Art. 2 sec. 1 GG in conjunction with the principle of the rule of law enshrined in Art. 20 sec. 3 GG (cf. BVerfGE 93, 99 <107>), if the interpretation and application cannot be justified by objective reasons, thus proves to be arbitrary, and unacceptably impedes access to the next judicial instance (cf. BVerfGE 125, 104 <137>; BVerfG, Order of the First Senate of 16 July 2013 - 1 BvR 3057/11 -, NJW 2013, p. 3506 <3508>; consistent jurisprudence). A court's decision not to allow a legal remedy also violates the guarantee to one's lawful judge pursuant to Art. 101 sec. 1 sentence 2 GG if it is based on an arbitrary interpretation or application of procedural law (cf. BVerfG, Order of the Second Chamber of the First Senate of 21 March 2012 - 1 BvR 2365/11 -, NJW 2012, p. 1715 with further references). 34

It has neither been claimed, nor is it otherwise apparent, that the Higher Regional Court interpreted the requirements of § 59 Abs. 1 FamFG in an arbitrary way. Under § 59 sec. 1 FamFG, the person entitled to file a complaint is the person whose rights have been interfered with by the order in question. It is true that the selection of another person as guardian under § 1779 BGB affects the complainant's fundamental right under Art. 6 sec. 1 GG as the child's grandmother. In view of this fact, she would under § 1779 sec. 3 sentence 1 BGB generally have had to be heard by the Family Court when it chose a guardian. However, the Higher Regional Court followed the jurisprudence of the Federal Court of Justice, which, continuing its previous jurisprudence on § 20 sec. 1, § 57 sec. 1 no. 9 of the former Act on Procedure in Non-Contentious Matters (*Gesetz über die Freiwillige Gerichtsbarkeit*), assumes that the new § 59 sec. 1 FamFG does also not generally grant grandparents a right to file a complaint in proceedings in which the court appoints a guardian or supplementary curator for their grandchild (cf. BGH, Order of 2 February 2011 - XII ZB 214/09 -, juris; Order of 26 June 2013 - XII ZB 31/13 -, juris). This interpretation of § 59 sec. 1 FamFG is not arbitrary. It is based upon an understandable systematic interpretation (cf. BGH, Order of 26 June 2013 - XII ZB 31/13 -, juris, para. 16) and takes account of the legislature's legitimate aim to keep the number of persons entitled to file a complaint manageable in order to ensure that court proceedings may be rapidly concluded, which is particularly important in custody proceedings (cf. BGH, Order of 26 June 2013 - XII ZB 31/13 -, juris, para. 14; Order of 2 February 2011 - XII ZB 214/09 -, juris, para. 10). 35

III.

Since the constitutional complaint lacked sufficient prospects of success, the application for legal aid and the request for appointment of legal counsel had to be rejected in analogous application of § 114 of the Code of Civil Procedure (*Zivilprozessordnung*) (cf. BVerfGE 1, 109 <110 et seq.>). 36

IV.

The decision was unanimous but for section II.2., which was taken with 7:1 votes. 37

Kirchhof	Gaier	Eichberger
Schluckebier	Masing	Paulus
Baer		Britz

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 24. Juni 2014 - 1 BvR 2926/13

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