H e a d n o t e

to the Judgment of the First Senate of 6 February 2001

– 1 BvR 12/92 –

Decision regarding the judicial review of the content of agreements in a covenant of marriage concluded with a pregnant woman prior to the conclusion of marriage and the care and maintenance situation of the joint child after a divorce, against the standard of Article 2.1 in conjunction with Article 6.4 of the Basic Law and of Article 6.2 of the Basic Law

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 12/92 –

Pronounced
on 6 February 2001
Achilles
Amtsinspektorin
as Registrar of the
Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint

of Ms. L(…)

– authorised representatives: Rechtsanwälte Dr. Gerhard Ganzhorn und Koll., Olgastraße 108, 70180 Stuttgart –

against the judgment of the Stuttgart Higher Regional Court (*Oberlandesgericht*) of 28 November 1991 – 16 UF 280/91 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice President Papier,

Kühling,

Jaeger,

Hörnig,

Steiner

Hohmann-Dennhardt

Hoffmann-Riem

held on the basis of the oral hearing of 8 November 2000:

Judgment:

1. The judgment of the Stuttgart Higher Regional Court of 28 November 1991 – 16 UF 280/91 – violates the complainant's rights from Article 2.1 in conjunction with Article 6.4, as well as from Article 6.2 of the Basic Law. The judgment is rescinded. The case is referred back to the Stuttgart Higher Regional Court.

2. […]

R e a s o n s:

A.

The constitutional complaint relates to the question of the degree to which civil courts are constitutionally obliged to subject covenants of marriage to a review of their content insofar as statutory maintenance claims in the event of divorce are waived therein and a spouse is released from paying maintenance for joint children. […] 1

I.

1. Covenants of marriage may already be concluded prior to marriage, in other words they may be of significance for the conclusion of a marriage. General contract law applies to them, as do individual provisions of family law which pose formal requirements and set limits. Thus, according to § 1614.1 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB), it is not possible to forgo future maintenance from relatives. This provision applies to spouses *mutatis mutandis* according to § 1360a.3 and § 1361.4 sentence 4 of the Civil Code, who may however reach agreements according to § 1585c of the Civil Code regarding their mutual maintenance claims for the time after divorce, and in doing so may indeed forgo maintenance altogether. Property law agreements are also permissible according to § 1408.1 of the Civil Code. They are however subject to the formal requirement of § 1410 of the Civil Code, and must therefore be concluded for the record with a notary, and both spouses must attend. Contractual agreements regarding pension sharing, which also require the form of § 1410 of the Civil Code, are ineffective if divorce is applied for within one year after conclusion of the agreement (§ 1408.2 sentence 2 of the Civil Code). If they are made in connection with divorce, they require not only to be certified by a notary, but also the approval of the Family Court over and above this (§ 1587o.2 sentences 1 and 3 of the Civil Code). The contractual obligation of one spouse to release the other from maintenance claims for the child is regarded by the case-law as a permissible assumption of an obligation to perform within the meaning of § 329 of the Civil Code which leaves the maintenance claim of the child unaffected (Federal Court of Justice (*Bundesgerichtshof* – BGH), *Zeitschrift für das gesamte Familienrecht* – FamRZ 1987, p. 934 (935)). 2

2. […] 3

3. a) The civil court case-law sets limits on the freedom of spouses to privately and 4

autonomously structure their relationships under the law on maintenance in the event of divorce by virtue of covenants of marriage, invoking § 138.1 of the Civil Code, where the agreement of necessity leads in objective terms to a spouse requiring social assistance (see Federal Court of Justice (*Bundesgerichtshof* –BGH), FamRZ 1983, p. 137; *Neue Juristische Wochenschrift* – NJW 1991, p. 913 (914); NJW 1992, p. 3164 (3165); Hamm Higher Regional Court, FamRZ 1989, p. 398; Cologne Higher Regional Court, FamRZ 1990, p. 634; Celle Higher Regional Court, (*Niedersächs. Rechtspflege* – NdsRpfl) 1990, p. 250; Hamm Higher Regional Court, *NJW-Rechtsprechungs-Report Zivilrecht* – NJW-RR 1999, p. 950). The Federal Court of Justice considers a waiver of post-marital childcare maintenance according to § 1570 of the Civil Code to be, in principle, not contrary to public policy (see BGH, FamRZ 1985, p. 788). This was said to also apply if a spouse had to engage in gainful employment because of the waiver after the divorce even though he or she had to look after a child. The assessment of whether a covenant of marriage was contrary to public policy was said to depend on its overall character. Also linking waivers of maintenance with property law agreements by itself was said not to lead to the ineffectiveness of the agreement since an economic community was said not to be included in the essence of marriage. Taking account of the child's best interests, a spouse was however said not to be denied liberty in individual cases to invoke the agreed waiver if it was incompatible with the principle of good faith because of the subsequent development, which is also applicable in maintenance law according to § 242 of the Civil Code (see BGH, FamRZ 1985, p. 788 (789); FamRZ 1987, p. 46; FamRZ 1991, pp. 306-307). Also in this context, the Federal Court of Justice took the view that it was not a matter of subjective momenta, in other words of conduct on the part of the party obliged to provide maintenance that was in breach of duty or reproachable, but that the only reason for a maintenance claim should be the needs and legitimate interests of the joint children, despite an effective waiver agreement (see BGH, FamRZ 1987, p. 46; FamRZ 1991, pp. 306-307).

The Federal Court of Justice has thus also considered covenants of marriage to be effective in which prior to concluding marriage pregnant women had waived maintenance to their future husband in the event of divorce (see BGH, FamRZ 1992, p. 1403). The husband was said not to have exploited a coercive situation since he could have refrained from marrying, thus invoking his freedom of conclusion of marriage, and could have withdrawn to the legal obligations of a non-marital father (see BGH, FamRZ 1996, p. 1536; FamRZ 1997, pp. 156 (157 et seq.)). Rather, the economic situation of the woman was said to have improved by virtue of the conclusion of marriage, despite the waiver, since as a single mother she would otherwise only have had a right to a maintenance claim that was limited to one year according to § 1615l of the Civil Code. In another case, the Federal Court of Justice had however invoked § 242 of the Civil Code to grant a maintenance claim to a child-caring mother, for reasons of the child's best interests, which was in contradistinction to the covenant of marriage, but limited the claim to the necessary maintenance. This was said to be sufficient since the child's best interests merely needed to enable the parent with cus- 5

tody to devote himself or herself to caring for and bringing up the child. […]

b) The release of a spouse from his or her maintenance obligation towards the joint child by the other spouse was regarded by the Federal Court of Justice as being contrary to public policy if it was is agreed in return for refraining to exercise his right of access, since such a connection is said to constitute an unauthorised commercialisation of parental custody (see BGH, FamRZ 1984, p. 778). However, it negated that release from a maintenance obligation occurring at the same time as a transfer of parental custody to the releasing party was contrary to public policy if the custody arrangement was in the child's best interests (see BGH, FamRZ 1986, p. 444). 6

c) […] 7

II.

1. The complainant, who was 26 at the time – that is in the early summer of 1976 –, had to care for a five-year-old child from her first marriage, and had been living with a new partner, later her husband, for two years when she discovered that she was pregnant. […] The complainant […] pressed for marriage before the birth of the child so that it would be born in wedlock. Her partner's reservations against marriage stemmed from the then immanent reform of the law on divorce and from fear of maintenance claims from his wife in the event of a divorce. 8

Therefore the complainant had a covenant of marriage drafted, which they both signed at the beginning of July. The agreement reads as follows: 9

> The parties intend to marry in August 1976 at the latest. Ms. F. is expecting a child who according to medical judgment will be born in November 1976. In the event of the marriage to be concluded being dissolved for reasons not currently apparent, the parties have reached the following agreement in the event of divorce: 10
>
> 1. Ms. B. F. and Mr. W. S. waive towards one another, for the past, present and future, all and any maintenance calculated from the legal force of the divorce, even in the event of need. 11
>
> 2. Mr. S. undertakes, also in the event of divorce, to pay to the expected child maintenance of DM 150.00 per month in advance, calculated from the legal force of the divorce, by the fifth working day of each month at the latest, payable to Ms. F. 12
>
> Ms. F. herewith releases Mr. S. from all and any further maintenance claims against Mr. S. in respect of the expected child. Stuttgart, 9 July 1976. 13

The parties concluded the marriage in the same month. Their joint son was born in November 1976. After the end of maternity protection, the complainant returned to her previous employment as an office worker at a much lower remuneration than her 14

husband earned.

The marriage was dissolved in December 1989 and custody for the son transferred to the complainant, who subsequently remarried. 15

2. In 1990, the son claimed against his father for information and child maintenance by means of an action by stages. After the Local Court (*Amtsgericht*) had sentenced the father by partial judgment to provide information on his income on grounds that the agreement from 1976 was contrary to public policy, the latter filed against the complainant for release from any maintenance claim against him for the child over and above DM 150 per month. The Local Court rejected the action as unfounded. The agreed release claim was said to circumvent the statutory prohibition of a waiver of maintenance between relatives. 16

In response to the appeal of the divorced husband on points of fact and law, the Higher Regional Court sentenced the complainant as requested, thus amending the ruling that had been handed down at first instance. The covenant of marriage was said to be effective. The child was said to retain his statutory maintenance claim against the father regardless of this agreement. Within the framework of their freedom to come to an agreement, spouses could divide the burden of child maintenance between themselves prior to the conclusion of marriage as they wished. Invoking the agreement that had been reached was said not to constitute a misuse of rights. It was said that the husband could make the marriage contingent on such an agreement since everyone was at liberty with regard to the conclusion of marriage. The agreement was also said not to be contrary to public policy with regard to its content, and to the motives and purpose of the agreement. The complainant had failed to provide evidence in this respect. It was said that there was neither a link between the release and a custody arrangement, nor an objectionable link with a considerable economic advantage. Given that the complainant was in employment, there was said to be nothing to suggest an agreement based on the coercive situation of economic dependence. The appeal on points of law was not admitted. 17

III.

The constitutional complaint, with which the complainant complains of a violation of her rights under Article 6.1, 2 and 4 […] of the Basic Law, addresses this ruling of the Higher Regional Court. 18

In reviewing whether the release agreement was contrary to public policy, the Higher Regional Court is said to have disregarded the mandate of fundamental rights protection from Article 6 of the Basic Law. Giving concrete form to the obligation imposed on parents in Article 6.2 of the Basic Law to care for and bring up their child, the maintenance claim of a child against his or her parents was said to be indispensable. It was hence said to be incompatible with Article 6.2 of the Basic Law and its protection of the child’s best interests if only one parent were to be one-sidedly burdened with this obligation, where that parent also had to provide sole care for the child. The view 19

of the Higher Regional Court that such an agreement was permissible as a condition for conclusion of marriage, since the father had been free to refrain from the conclusion of marriage altogether, was said to be erroneous. The court was said to disregard here the fact that the release, particularly coupled with a waiver of post-marital maintenance on the part of the mother, released the father from all marital and parental obligations in the event of divorce. He was however said to be obliged to pay child maintenance regardless of conclusion of marriage with the mother.

Even if, in principle, the agreement on release from child maintenance was possible according to the case-law of the Federal Court of Justice, the Higher Regional Court should have taken into account the special circumstances applying on conclusion of the agreement and the interplay of the individual contractual agreements. The complainant was said to have waived not only her own maintenance in the event of divorce in the covenant of marriage, but also to have taken on the unpredictable, life-long maintenance obligation of the father towards the unborn child without receiving anything at all in return. Hence, the father was said to have rid himself de facto of his natural tie and relationship with the child to the disadvantage of the mother. This was said not to comply with the protection of marriage and family and the parental obligation towards the child entrenched in Article 6.1 and 2 of the Basic Law. 20

Over and above this, the impugned ruling was said to violate the complainant's constitutional right as a mother to receive protection and care from the community. This right was said to prohibit legally recognising an agreement with which a pregnant woman in a mentally vulnerable and highly strained personal situation rashly undertook an obligation to largely release the father for life from any maintenance obligations towards their as yet unborn child, and to shoulder this obligation, in addition to her responsibility for bringing up and caring for the child. It was said to be a task for the state to provide expectant mothers with special protection in order to help and encourage them to shoulder responsibility for the new life. Case-law which failed to protect a pregnant woman against making an agreement by means of which she alone took on the overall responsibility for bringing up, caring for and maintaining the child was said not to do justice to this principle of protection. Expectant mothers in particular were said to especially require protection against entering into one-sided agreements that ill-considered and where nothing material was given in return. The fact that the covenant had enabled the complainant to give the child a father, in line with her wish to bring him into the world in wedlock, and hence to ensure a civil future for him, could not be regarded as a legally recognisable counter payment for the contractual burdens which she shouldered. The Higher Regional Court was said to have disregarded this by imposing on the complainant – with regard to the justification of the breach of public policy – the burden of proof as to whether it had been suggested to her to have an abortion. Also as an indication that the agreement was contrary to public policy, the negation of the complainant's economic dependence on conclusion of the agreement was said not to take into account the fact that the dependence itself was revealed in the way the agreement entailed a one-sided burden. 21

[…] 22

IV.

[…] 23-26

B.

The constitutional complaint is well-founded. The impugned ruling violates the complainant's right under Article 2.1 in conjunction with Article 6.4 of the Basic Law. Over and above this, it violates Article 6.2 of the Basic Law. 27

I.

The Higher Regional Court has disregarded the right of the complainant under Article 2.1 in conjunction with Article 6.4 of the Basic Law for protection against unreasonable disadvantage caused by the covenant of marriage. 28

1. a) The fundamental rights develop their impact in private legal transactions as constitutional value decisions by the medium of the provisions which directly dominate the respective legal field, and also above all by the civil law general clauses (see BVerfGE 7, 198 (205-206); 42, 143 (148)). Also in this respect, the state has to protect the fundamental rights of the individual and to protect them against violation by others (see BVerfGE 46, 160; 49, 89; 53, 30; 56, 54; 88, 203). It is incumbent on the courts to grant this fundamental right to protection by interpreting and applying the law and to lend it concrete form in individual cases. The Federal Constitutional Court can only counter the courts' evaluation of fundamental right positions and the balancing of such positions against one another if an impugned ruling reveals errors in interpretation which are based on a fundamentally incorrect view of the significance of a fundamental right, in particular of the scope of its area of protection, and which are also of some import in their substantive significance for the legal case (see BVerfGE 18, 85 (93); 42, 143 (149); established case-law). These preconditions for a correction by the Federal Constitutional Court apply in the instant case. 29

b) The principle of freedom of action guaranteed by Article 2.1 of the Basic Law is conditional on the prerequisites of the self-determination of the individual actually applying (see BVerfGE 81, 242 (254-255)). The material instrument for the realisation of free action taken on autonomous responsibility in relationships with others is the agreement with which the parties determine for themselves how their individual interests are to be suitably equalised. Mutual ties and the exercise of freedom are hence given their concrete form. Hence, as a rule the agreed decisions, expressed between the parties to the agreement, permit a proper equalisation of interests to be concluded from the agreement which the state must in principle respect (see BVerfGE 81, 242 (254)). If however it is evident from the particularly one-sided burdening of contractual responsibilities and of a highly unequal negotiating position of the partners to an agreement that one partner has such a weight in a contractual relationship that he or she can de facto one-sidedly determine the content of the agreement, it is a matter 30

for the law to work towards maintaining the fundamental right positions of both partners to the agreement in order to prevent one party's self-determination being turned into a third-party determination (see BVerfGE 89, 214 (232)).

c) This also applies to covenants of marriage with which spouses regulate their highly personal relationships for the time of their marriage or thereafter. Article 6.1 of the Basic Law gives them the right here to freely shape their respective community inwardly in marital and family responsibility and respect (see BVerfGE 80, 81 (92)). Having said that, the protection provided by the state system, which explicitly guarantees marriage and family in Article 6.1 of the Basic Law, is contingent on a statutory structure of marriage (see BVerfGE 31, 58 (69)). It must be taken into account here that the marital and family domain of freedom also experiences its constitutional structure through Article 3.2 of the Basic Law. A marriage, in which a man and a woman are in an equal rights partnership towards one another, is therefore constitutionally protected (see BVerfGE 37, 217 (249 et seq.)). As a result, the state must impose limits on the freedom that spouses have, using covenants, to shape their marital relationships and mutual rights and obligations where the covenant is not an expression and outcome of a community based on equal rights, but reflects a one-sided dominance by a spouse based on unequal negotiating positions. In such cases of disturbed agreement parity it is a task for the courts via the general clauses of civil law to subject the content of the agreement to a review for impaired fundamental right positions of a party to a covenant of marriage, and where appropriate to correct them (see BVerfGE 89, 214 (234)). 31

The Higher Regional Court wrongly presumed that the freedom of conclusion of marriage countered such a content review. It does not follow from the right of the individual to enter into marriage with a partner whom they have chosen themselves, or to refrain from doing so, and hence not to experience any unjustified hindrance in this on the part of the state (see BVerfGE 31, 58 (67)) that the state may not review any covenant of marriage if it contains a promise of marriage. The freedom of conclusion of marriage does not justify the freedom to shape the covenant of marriage without limit, and in particular it does not justify a one-sided distribution of burdens in a covenant of marriage. Accordingly, a part of the law on marriage is traditionally imperative law. 32

2. a) If a covenant of marriage contains a recognisably one-sided distribution of burdens placing a woman in an unfavourable position, and if it has been concluded prior to marriage and in connection with her pregnancy, the claim to protection and care of the expectant mother from Article 6.4 of the Basic Law also requires that the covenant of marriage is to be subject to a special judicial review of its content. This applies all the more, given that the legislature has refrained, concerning maintenance agreements in prenuptial agreements, unlike agreements regarding the accrued marital gains or pension sharing, from offering a certain protection against disadvantages of a party to the covenant via formal requirements or procedural regulations. In this case, it is primarily incumbent on the courts to implement the constitutional mandate 33

of protection in carrying out the review of the content and to grant to the pregnant woman protection against pressure and distress from her social environment or on the part of the child's father (see BVerfGE 88, 203 (296-297)), in particular if she is pushed thereby to conclude contractual agreements which are extremely counter to her interests.

b) A situation of inferiority can be presumed to exist as a rule if an unmarried pregnant woman is faced in the future with the alternative to either shoulder responsibility and care alone for the expected child, or to include the child's father in the responsibility by conclusion of marriage, albeit at the expense of concluding a covenant of marriage with him which considerably impairs her interests. Her negotiation position will be weakened here by the de facto situation in which she finds herself, by her legal position as a single mother and in particular by the efforts to ensure her own livelihood and that of the expected child. 34

Pregnancy means existential turbulence in the life of any woman. A pregnant woman undergoes a development process which makes her physically experience changes and which entails risks for her own health and that of the child. She unavoidably incurs a change in her lifestyle and life planning with the child. New tasks, obligations and responsibilities arise. Particularly for unmarried mothers, this frequently occurs hand-in-hand with the failure of the relationship with the child's father (see Vaskovics/Rost/Rupp, *Lebenslage nichtehelicher Kinder*, 1997, pp. 59 et seq.). Over and above this, societal and social coercions also remain today as a result of which an expectant mother may feel herself to be under pressure to justify – not least towards the child – why she is not married. With regard to the time of the conclusion of the covenant of marriage disputed here, scientific studies still speak of the stigma faced by the single mother and of her much greater mental strain compared to married mothers, which also explains the phenomenon of the higher mortality of infants born out of wedlock (see Anthes, *Vorurteile gegenüber ledigen Müttern*, in: Neumann, *Sozialforschung und soziale Demokratie, Festschrift für Blume*, 1979, p. 157 (162 et seq.)). 35

Added to this, an unmarried pregnant woman faces the certainty of having to bear sole responsibility and care for the child. Also according to the law now applicable, she remains solely responsible for the child if the father is not willing to undertake joint custody. What is more, she had and still has today only a restricted maintenance claim against the father. Whilst, in the period that is material here, this claim was still restricted to the duration of one year after the birth of the child, and then only if the mother is able to engage in gainful employment to an insufficient degree, or if the child cannot be taken care of by other means, according to § 1615 l.2 sentence 3 of the Civil Code it now applies as a rule for three years, but is not comparable with the safeguarding of married women under the law on maintenance to which children born in wedlock are entitled. An unmarried mother is generally faced in the child's early years with the problem of ensuring childcare and her own livelihood in equal measure. 36

As a rule, the economic prospects for mothers of children born out of wedlock are particularly poor. After the birth of the child, her income falls in most cases to less than half of its previous level because of bearing sole responsibility for the child. The consequence of this is that roughly one-third of them only have financial security below or at social assistance level for themselves and their children, whilst only 15 per cent of children born in wedlock live in such straightened circumstances (Vaskovics/ Rost/Rupp, loc. cit., p. 126). This situation is further exacerbated by a much worse payment morality of fathers towards children born out of wedlock. As a consequence, children born out of wedlock are very much over-represented among beneficiaries according to the Maintenance Advance Act (*Unterhaltsvorschussgesetz*) (see Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (ed.), *Die wirtschaftlichen Folgen von Trennung und Scheidung*, 2000, pp. 139-140). The special, difficult situation of unmarried pregnant women, which is not comparable with that of married pregnant women or of unmarried women without children, also impacts the circumstances on conclusion of a covenant of marriage that is to be a condition for conclusion of marriage. Particularly because of their concern also about the future of the child and under the pressure of the immanent birth, pregnant women typically find themselves in a position which is far inferior to that of the other partner to the agreement. 37

c) Having said that, being pregnant on conclusion of a covenant of marriage is only an indication of contractual disparity necessitating subjecting the agreement to a more stringent judicial review. The property situation, vocational skills and outlook, as well as the envisioned sharing out of gainful employment and family work in the marriage by the parties to the covenant of marriage, are further material factors determining the situation of the pregnant woman. In an individual case, they may lead to equalising her inferior position, even if statutory legal positions are contracted out by virtue of the covenant of marriage. 38

d) If however the content of the covenant of marriage also expresses such a position of inferiority of the unmarried pregnant woman, the need of protection becomes manifest. This is the case if the pregnant woman is one-sidedly burdened by the agreement and her interests are not suitably taken into account (see BVerfGE 89, 214 (234)). 39

Whether the contractual agreements are much more burdensome on the woman than on the man also largely depends on what family constellation the partners to the agreement are striving for and on which they base their agreement. If the spouses waive any mutual post-marital statutory maintenance claims, this does not constitute an unequal burden in marriages in which both partners pursue roughly equivalent gainful employment and share housework and family work. If, however, the life planning of the partners provides that in the marriage one of the two, giving up employment, largely devotes himself or herself to childcare and housekeeping, the waiver of post-marital maintenance constitutes a disadvantage for the person who has devoted himself or herself to the care of the child and to work in the home. The more statutory 40

rights are contracted out in the covenant of marriage or additional obligations assumed, the more this effect of one-sided disadvantage can be amplified.

The promise to marry contained in the covenant of marriage does not outweigh the one-sided burden of a partner to the agreement. The partners are free in their decision as to whether they wish to enter into marriage. If they opt to do so, the marriage entails rights and also obligations for both and shares these equally between the man and the woman; the benefits which they provide to one another are of the same rank (see BVerfGE 37, 217 (251)). The promise to marry as such does not give rise to any one-sided burden on one of the promising parties. It is true that spouses hence assume new obligations as against their former state as single persons, and they are thereby restricted in their own dispositions. This however applies equally to both spouses. 41

3. The obligation of protection following from Article 2.1 in conjunction with Article 6.4 of the Basic Law was disregarded by the Higher Regional Court in the impugned ruling. It neither took account of the special situation in which the complainant found herself as a pregnant woman already having one child on conclusion of the covenant, nor did it explore the question of whether the covenant of marriage constitutes an unreasonable burden on the complainant, although the content of the agreement gave rise to one. 42

The complainant thus firstly waived her own post-marital maintenance in the covenant. In view of the small amount of her income and of the circumstance that both spouses presumed that she would care for the joint child in the event of divorce, she permanently weakened her economic situation by virtue of this waiver. She could not count on considerably improving her income situation through her own efforts, given that she had two children. By contrast, the husband did not give up anything with his own waiver; he could not expect to be able to assert a maintenance claim against the complainant in the event of divorce. 43

Over and above this, the complainant contractually assumed the obligation to largely release the father from his maintenance obligation towards the joint child despite her comparably poor economic situation. The cash maintenance of the child, which is in line with the father’s higher income, had to be financed from her income. Hence, in the event of divorce she was allocated the task of sole care for the child and of ensuring her own maintenance and at the same time that of the joint child. This unambiguous burden on the complainant contrasted with the husband divesting himself of any maintenance claim on the part of the complainant, as well as of any amount over and above DM 150 for the child. Hence, he was in fact in a better situation than the father of a child born out of wedlock in view of the amount that was standard at that time. Invoking the freedom of conclusion of marriage, the court did not take this agreement constellation as a reason for a review of the content of the covenant, thereby disregarding the fact that this freedom does not open up the freedom to contractually establish interests in an unreasonably one-sided manner. 44

II.

Over and above this, the Higher Regional Court disregarded protection from Article 6.2 of the Basic Law, which imposes limits on contractual agreements between parents in the child's best interests. 45

1. Article 6.2 sentence 1 of the Basic Law gives rise for the parents in equal measure to the right and the obligation to care for and bring up their children (see BVerfGE 24, 119 (143-144)). This responsibility, which is allocated to the parents first and foremost, must serve the child's best interests, and is therefore a fundamental right in the interest of the child (see BVerfGE 59, 360 (382); 75, 201 (218)). The right of the parents to freely organise their care for the child therefore does not deserve protection where parents withdraw from their responsibility towards the child and there is a threat of the child being neglected (see BVerfGE 24, 119 (143-144)). If parental misconduct reaches such a level that the child's best interests are persistently placed in danger, the state is not only entitled, but is indeed obliged to exercise its watchdog function according to Article 6.2 sentence 2 of the Basic Law to ensure the care and bringing up of the child, given that the child, as a holder of fundamental rights, has a right to state protection against the irresponsible exercise of the parental right (see BVerfGE 24, 119 (144); 55, 171 (179); 72, 122 (134)). The protection measures are determined here according to the degree of parental failure and by what is necessary in the interest of the child (see BVerfGE 24, 119 (144-145); 60, 79 (91, 93)). 46

The responsibility of the parents also includes ensuring maintenance of the child which corresponds to their own ability and at the same time is reasonable, and to ensure his or her care (see BVerfGE 68, 256 (267); 80, 81 (90-91)). How parents divide these tasks among themselves, and whether in doing so they avail themselves of the support of third-party professionals, is part of their freedom to decide (see BVerfGE 47, 46 (70); 68, 256 (267-268); 99, 216 (231-232)). This also applies in the event of divorce. If parents conclude a contractual agreement for this case, because of the responsibility towards their child they must ensure that the mental burdens on the child, which as a rule are linked with the separation of the parents, are where possible alleviated and a sensible solution is found meeting the interests of the child for his or her care and up-bringing (see BVerfGE 31, 194 (205); 61, 358 (372-372)). 47

2. If in the event of divorce it is the intention of the parents for one parent to be responsible for custody of the joint child, and also to take on his or her care, and if the parents agree for this case that the parent who is not the carer is to be released from child maintenance by the parent who is the carer, they do not do justice to their responsibility towards the child, and place his or her well-being at risk if care which is in the interest of the child and cash maintenance in line with what both parents can afford is thus no longer ensured. 48

a) Maintenance payments for the child must be orientated in line with the ability to pay of the party obliged to provide maintenance and the need of the child (see § 1602.2 and §§ 1603 and 1610 of the Civil Code). Its amount is hence also determined 49

by the social situation of the parents and is as such not an indication of a risk to the child's best interests. Even in financially straightened circumstances, a child may experience favourable development due to being cared for and brought up by his or her parents as they are able, where there are appropriate state benefits guaranteeing the family's basic financial security.

How parents meet their responsibility of bringing up the child, and how they shape the child's circumstances, lies in their primary decision-making responsibility according to Article 6.2 sentence 1 of the Basic Law, which is based on the consideration that they as a rule are best placed to defend the interests of their child. This also applies if the child does not appear to receive optimal promotion according to objective standards (see BVerfGE 34, 165 (184); 60, 79 (94)). If parents keep the standard of living of their child low in relation to their income, for instance as an expression of their ideas for bringing up a child to promote their personality development, this by itself does not justify state interference. If the financial resources available to cover the life needs of the child are however persistently restricted by the parents only because at least one parent wishes to withdraw in financial terms from care for his or her child, this is no longer a form of exercise of parental interest for the child. If the parent wishes to divest himself of herself of the task of defending the interests of the child, Article 6.2 sentence 2 of the Basic Law obliges the state to act to protect the child's best interests. 50

b) The release of one parent from child maintenance by the other however has no legal impact on the maintenance claim of the child against his or her parents. In fact, the economic situation of the child undergoes major changes if the carer parent does not have considerable financial resources. If this contractual obligation affects the carer parent, the latter not only does not receive payments to cover the maintenance of the child from the other parent, but at the same time his or her disposable income is reduced by this obligation to cover child maintenance and has de facto the same impact as forgoing maintenance. The income which is at the disposal of the joint household of the carer parent and of the child hence clearly falls as a result. Over and above this, it is necessary to care for the child so that the possibility of further gainful employment is restricted. 51

c) If the agreement between the parents leads to a situation in which, in the event of divorce, the carer parent is no longer able to cover either his or her maintenance or that of the child through income or assets due to taking on the other parent's burden of child maintenance, this impairs the living conditions of the child in a manner which runs counter to parental responsibility. 52

If the carer parent wishes to care for the child personally so that after separation from a parent the child does not also have to do without care by the other parent, this necessarily leads with younger children either to a restriction on, or to the impossibility of, his or her return to external gainful employment, and hence to a reduction in, or to the cessation of, his or her own income. Only if the income thus remaining remains 53

sufficient to also cover the maintenance needs of the child, or if the cessation of income can be balanced by assets or by his or her own maintenance claims, in the case of a release agreement both the personal and material care of the child remain safeguarded. If this is however not the case, and if the carer parent, in addition to the release, also forgoes his or her own post-marital maintenance, the circumstances caused by the agreement force him or her either to place the care of the child in the hands of strangers, or to live with the child in circumstances which restrict his or her possibilities for development much more than would be in keeping with the joint parental assets. Both options are sustainedly detrimental to the interests of the child and are a consequence of a lack of parental responsibility towards the child.

Even if the carer parent is able to engage in gainful employment and would like to place the child in care, an impairment of the child's interests caused by the release agreement can only be ruled out if the income achievable is sufficient to be able to ensure the care costs and the suitable life maintenance for the child without also imposing considerable restrictions on the parent's own maintenance. If this is manifestly not guaranteed on agreeing the release, the parents' contractual agreement is detrimental to the child's best interests here too. 54

3. The Higher Regional Court did not take this into account in its ruling although the complainant's situation required such a review on conclusion of the covenant of marriage. It satisfied itself with pointing out that the child's right to maintenance is not affected by a release agreement. This is legally correct, but already fails to take into account whether the mother is able to fulfil the concrete claim without excessive effort or a considerable reduction in the family's standard of living. It did not consider, finally, that the release can exert an influence on the establishment of this right of the child, and hence on the interests of the child. Thus, the Higher Regional Court disregarded the fact that the complainant already had her own child to care for at the time of the conclusion of the covenant, and that in the event of divorce the agreement meant that she was burdened with care for the children, as well as with making her own living and with the entire maintenance of both children. In view of her rather modest earning capacity as a commercial clerk, it should have been obvious to the court to ask the question of whether the release did not violate the interests of the joint child under such circumstances and run counter to the responsibility incumbent on the parents. Hence, it disregarded the scope and significance of the protection provided by Article 6.2 of the Basic Law against irresponsible exercise of the parental right to the disadvantage of the child's best interests. 55

III.

The impugned ruling is to be rescinded. The case is to be referred to the Higher Regional Court. 56

Papier	Kühling	Jaeger
Hörnig	Steiner	Hohmann-Dennhardt

Hoffmann-Riem

Bundesverfassungsgericht, Urteil des Ersten Senats vom 6. Februar 2001 - 1 BvR 12/92

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 6. Februar 2001 - 1 BvR 12/92 - Rn. (1 - 56), http://www.bverfg.de/e/rs20010206_1bvr001292en.html

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