Headnote

to the Order of the First Senate of 5 February 2002

– 1 BvR 105/95 –

– 1 BvR 559/95 –

– 1 BvR 457/96 –

Decision regarding the equivalence of family work and gainful employment in the assessment of post-marital maintenance.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 105/95 —– 1 BvR 559/95 —– 1 BvR 457/96 –

IN THE NAME OF THE PEOPLE

In the proceedings on the constitutional complaints

1. of Ms V(…)

– authorised representative: Rechtsanwältin Dr. Barbelies Wiegmann, Villiper Allee 58, 53125 Bonn –

against the judgment of the Karlsruhe Higher Regional Court (*Oberlandesgericht*) of 30 November 1994 – 16 UF 201/93

– 1 BvR 105/95 –

2. of Ms E(…)

– authorised representative: Rechtsanwältin Sabine-Sara Goethert, Herdweg 44, 70174 Stuttgart –

against the judgment of the Stuttgart Higher Regional Court of 31 January 1995 – 18 UF 361/94 –

and application to grant legal aid and to assign Rechtsanwältin Sabine-Sara Goethert, Stuttgart

– 1 BvR 559/95 –

3. of Ms K.-V(…)

authorised representative: Rechtsanwältin Susanne Rünzi, Amalienstraße 21, 76133 Karlsruhe

against the judgment of the Karlsruhe Higher Regional Court of 19 January 1996 – 20 UF 8/95

– 1 BvR 457/96 –

the Federal Constitutional Court – First Senate – with the participation of Justices

Vice President Papier,

Jaeger,

Haas,

Hömig,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem,

Bryde

held on 5 February 2002:

1. The judgment of the Karlsruhe Higher Regional Court of 30 November 1994 – 16 UF 201/93 – violates the complainant re 1 in her fundamental right under Article 6.1 in conjunction with Article 3.2 of the Basic Law (*Grundgesetz* – GG). The judgment is overturned. The case is referred back to the Karlsruhe Higher Regional Court.

2. The judgment of the Stuttgart Higher Regional Court of 31 January 1995 – 18 UF 361/94 – violates the complainant re 2 in her fundamental right under Article 6.1 in conjunction with Article 3.2 of the Basic Law. The judgment is overturned. The case is referred back to the Stuttgart Higher Regional Court.

3. The judgment of the Karlsruhe Higher Regional Court of 19 January 1996 – 20 UF 8/95 – violates the complainant re 3 in her fundamental right under Article 6.1 in conjunction with Article 3.2 of the Basic Law. The judgment is overturned. The case is referred back to the Karlsruhe Higher Regional Court.

REASONS :

A.

The constitutional complaints, which have been consolidated for joint adjudication, are directed at the manner in which the impugned court rulings have considered the value of the housekeeping and child-rearing performed during marriage in the assessment of postmarital maintenance. 1

I.

According to § 1578.1 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB), the amount of postmarital maintenance is determined according to the marital circumstances. How the marital circumstances, which are not defined in greater detail by the law, are to be ascertained, and how in particular the postmarital income of the spouse 2

entitled to maintenance who was not employed at all during marriage, or was only in part-time employment, is to be taken into account here is the subject of dispute in the case-law and legal literature.

1. a) Since the entry into force of the valid maintenance law on 1 July 1977 […], the Federal Court of Justice (*Bundesgerichtshof* – BGH) has lent concrete form to the concept of marital circumstances through a large number of rulings. According to its established case-law, the marital circumstances within the meaning of § 1578 of the Civil Code are determined by the income and asset situation which had decisively characterised the standard of living of both spouses during the marriage or indeed the separation period of the spouses. Therefore, the income and assets at the time of divorce are to be decisive as a rule, unless the income of one spouse took on an unexpected development in the period between separation and divorce deviating considerably from the normal course of events (see BGH, *Zeitschrift für das gesamte Familienrecht* – FamRZ 1982, p. 576 (577-578)). By contrast, until the judgment of the Federal Court of Justice of 13 June 2001 (FamRZ 2001, p. 986), changes which did not occur until after divorce could only be taken into account if they were to be expected at the time of the divorce with a high degree of probability, and if this expectation already characterised the marital circumstances or materialised at a time close to the divorce (see BGH, FamRZ 1986, pp. 148-149). Accordingly, the Federal Court of Justice distinguished between gainful employment during marriage, and taking up of gainful employment during separation, as well as after divorce. 3

aa) In contradistinction to the income which was already made during the cohabitation of the spouses, income of the spouse entitled to maintenance from gainful employment taken up between separation and divorce was only to impact the measure of the maintenance if this gainful employment was commenced during the marriage, and hence would also have taken place without the separation. If this could not be ascertained, the resultant income would have to be left out of the assessment of the maintenance requirement since the party pleading for maintenance was said to bear the burden of proof for the shape of the marital circumstances (Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ 89, 108 (112) = FamRZ 1984, pp. 149-150). 4

bb) The Federal Court of Justice as a rule has not considered income from gainful employment not taken up until after divorce in determining the marital circumstances (BGH, FamRZ 1985, pp. 161-162 referring to BGH, FamRZ 1981, p. 539 (541) and FamRZ 1982, p. 255 (257)), and also if half-time employment exercised during marriage was expanded to full-time employment (BGH, FamRZ 1985, p. 161-162). The Federal Court of Justice regarded the economic value of the housekeeping and child-raising of the spouse who was not in gainful employment as not characterising the marital circumstances. These services were said to be in principle equivalent to the gainful employment of the other spouse. However, in terms of cash the family was said to have at its disposal only the income of the spouse who was in gainful employment. This existing income, and not the economic value of the services provided by 5

both spouses, was said to decisively characterise the marital circumstances (BGH, FamRZ 1985, p. 161 (163)).

cc) Income of the person entitled to maintenance which had not characterised the marital circumstances was then taken into account in application of the so-called offsetting method in the calculation of the amount of the maintenance solely in reducing need, whilst income characterising [the marital circumstances] has also been allotted to the income on which the calculation of requirement was to be based in application of the so-called difference method (BGH, FamRZ 1981, p. 539 (541); 1981, p. 752 (754-755); 1982, p. 255 (257); 1983, p. 146 (150); 1988, p. 265 (267)). In the offsetting method, the corrected net income of the person obliged to provide maintenance is divided according to the relevant maintenance ratio; the corrected net income of the person entitled to maintenance is offset against the emerging amount. With the difference method, by contrast, the difference between the corrected net income of the person obliged to provide maintenance and of the person entitled to maintenance is first of all formed, and then sub-divided according to the maintenance ratio. 6

b) The Federal Court of Justice amended its previous case-law on the offsetting method by its judgment of 13 June 2001 (*FamRZ* 2001, p. 986). The offsetting method was said not to do justice to the equivalence of child-care and housekeeping, and also to no longer reasonably account for the changed perception of marriage in the majority of cases. Without there being a need for a final ruling on the question of the need to monetarise housekeeping, the income which a spouse entitled to maintenance made or could make after divorce, and which was practically to be regarded as a surrogate of the economic value of his or her previous activity, should be included in calculating the maintenance according to the difference method. The family work carried out during marriage was said to have characterised the marital standard of living, and also to have improved it in economic terms. It was said to be regarded as a service equivalent to gainful employment. The spouses should also be entitled after divorce to the standard of living achieved by the respective work of both spouses in equal parts. If the spouse who had previously done the housekeeping took up gainful employment after divorce, or if he or she extended it beyond the previous extent, apart from exceptional cases of an unusual career development substantially deviating from the normal course of events, the value of his or her housekeeping was reflected in the income made or makeable in gainful employment. The inclusion of this income in the assessment of need with the aid of the difference calculation was said to guarantee that, just as the family work formerly benefited both spouses in equal measure, the mutual income was now shared between them according to the principle of equal participation. 7

[…] 8

II.

The constitutional complaints are based on the following facts: 9

1st set of proceedings 1 BvR 105/95 10

The complainant, who married in 1969 and gave birth to a daughter in the same year, took up her employment once more in 1972 on a half-time basis. The spouses separated in June 1991. During the divorce proceedings, the complainant expanded her employment to full-time employment in January 1992. The marriage has been legally dissolved since 29 October 1992. 11

Whilst the Local Court (*Amtsgericht*) awarded to the complainant maintenance calculated according to the difference method in response to her action, the Higher Regional Court rejected her action, overturning the judgment of the Local Court. An expansion of part-time employment to full-time employment which did not take place until after separation by the spouse demanding maintenance was said to be able to characterise the marital circumstances only if it would also have taken place without the separation. In the case of the complainant, it could not be ruled out on the basis of the information provided by her husband that she had taken up full-time employment once again solely as a result of the separation. 12

2nd set of proceedings 1 BvR 559/95 13

The complainant concluded a marriage in 1983 which gave issue to a daughter in 1984. The spouses separated at the beginning of 1988. The marriage was legally dissolved in October 1992. Parental custody for the daughter was assigned to the divorced husband. 14

As to her career, the complainant submitted in the original proceedings that she had worked as a travel agent prior to giving birth to her daughter. After the birth, she had devoted herself to child-rearing. From 1989 she had then wished to reintegrate into working life, and had commenced re-training as an industrial clerk in January 1990. After her stay in a rehabilitation clinic from December 1992 to March 1993, she had unsuccessfully applied for jobs. She had received a pension for inability to work since July 1994. 15

The Higher Regional Court amended the first-instance ruling and awarded her a lower maintenance claim with the impugned judgment, and furthermore found that the complainant only had a maintenance claim against her husband until 16 January 1995 since the pension for inability to work which had been granted to her had caused her need for maintenance to cease. The marital circumstances of the complainant were said to have been characterised by the employment of the husband, and not also by her income from gainful employment or pensions. The complainant was said to have wanted to re-commence gainful employment only as a result of separation. There were said to be no indications that she would have taken up employment had the separation not occurred. It was said that she had been able to cover her maintenance requirement since December 1994 by her own pension income, which she had to offset according to § 1577.1 of the Civil Code. 16

3rd set of proceedings 1 BvR 457/96 17

Two children, born in 1972 and 1973, had issued from the marriage of the complainant, which had been concluded in 1968. According to her own information, the complainant had worked as a housewife and mother after the birth of her children, as well as occasionally teaching painting courses for children, and had tried to find a job as an architect. After the separation of the spouses in 1982, she worked for a time on a half-time basis as an intern for an architect. Her marriage was legally dissolved in August 1986. In 1987 the complainant started preparatory service to work in a vocational school, and was later taken on. According to a court agreement concluded between the spouses, a maintenance claim of the complainant beyond August 1993 was to be in line with the legal provisions applicable at that time. 18

The Local Court rejected the complainant's maintenance claim, with which she applied for maintenance from January 1995. The complainant's appeal on points of fact and law of was also unsuccessful. The Higher Regional Court ruled that no maintenance amount could be calculated in favour of the complainant. The basis of the complainant's maintenance claim was said to be solely the salary income of her divorced husband, which had characterised the marital circumstances. Personal employment income of the complainant should not be considered. Possible income from teaching painting courses had also ceased back in 1981 according to her information. Gainful employment of the complainant had hence only commenced after divorce, so that maintenance was not to be calculated by the difference method. It was said to be calculated by offsetting her income against the maintenance quota based solely on the income of the divorced husband. No maintenance claim was calculated here in favour of the complainant. 19

III.

With their constitutional complaints addressing in each case the decision of the Higher Regional Court, the complainants complain in particular of the violation of Article 3.1 and 3.2, as well as of Article 6 of the Basic Law. As grounds, they refer to the equivalence of housekeeping and gainful employment in marriage. The protection of marriage is said to also comprise the family service. In particular parents bringing up children may not be placed at a disadvantage in terms of maintenance if they restricted or gave up their employment in the interest of the family. The burdens of the joint decision of spouses regarding their division of tasks may not unilaterally encumber the party who had taken on the family work. Moreover, it is said to be a matter of coincidence according to the case-law on which their proceedings were based in which cases employment income of the housekeeping spouse is categorised as characteristic for the marriage. If divorce takes place at a time when the children were still small, so that the person taking care of the children did not engage in gainful employment, subsequent income is said not to be considered. If it takes place at a time when the children were older, the person taking care of the children has frequently taken up gainful employment once more, which is then included in the calculation of the maintenance requirement. In order to do justice to the protection of marriage and to the equal rights of spouses, in terms of the law on maintenance it should not be a matter 20

of the time when the caring parent has returned to employment once more.

IV.

[…] 21-26

B.

The constitutional complaints are well-founded. The impugned court rulings violate the complainants' fundamental rights under Article 6.1 in conjunction with Article 3.2 of the Basic Law. 27

I.

1. a) Article 6.1 in conjunction with Article 3.2 of the Basic Law protects marriage as a life community of equal partners (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 35, 382 (408); 103, 89 (101)), in which spouses take joint responsibility for determining their personal and economic lives (see BVerfGE 57, 361 (390); 61, 319 (347)). In addition to the decision as to whether the spouses wish to have children, the responsible shaping of their lives in particular includes agreement on the division of labour within the family and the decision as to how the joint family income is to be ensured by gainful employment (see BVerfGE 61, 319 (347); 66, 84 (94); 68, 256 (268)). Spouses are free here to maintain their marriage such that one spouse alone engages in employment and the other devotes himself or herself to family work, just as they can decide for themselves to both engage in employment entirely or partly and to share housekeeping and child-raising or to have this carried out by third parties (see BVerfGE 39, 169 (183); 48, 327 (338); 99, 216 (231)). 28

b) If spouses have the same rights and the same responsibility in shaping their married and family lives, the services which they provide respectively in the context of the allocation of work and tasks which they made in a joint decision are also to be regarded as equivalent (see BVerfGE 37, 217 (251); 47, 1 (24); 53, 257 (296); 66, 84 (94); 79, 106 (126)). Housekeeping and child-care do not take on a lower value for the joint lives of spouses than income which is available to the household. They equally characterise the marital circumstances and contribute towards the maintenance of the family. 29

Having said that, the equivalence of the family maintenance contributions of spouses is not calculated by the amount of the employment income which one or both spouses make, or by the economic value of family work and by its scope. It rather expresses the fact that the services provided by each of the spouses for the marital community are equivalent, regardless of their economic valuation, and hence no contribution by a spouse may be valued higher or lower than that of the other. […] 30

c) If the contributions made by spouses within their joint maintenance community are equivalent, both spouses in principle also have a right to participate equally in 31

what they have earned together, which is to be allotted to them in equal parts. This applies not only to the time of the existence of the marriage, but after the separation and divorce of the spouses also has an impact on their relationship as to maintenance, pensions and division of the joint assets (see BVerfGE 47, 85 (100); 63, 88 (109)). This corresponds to the statutory regulations regarding pension sharing (see BVerfGE 53, 257 (296)) and the equitable division of accrued gains (see BVerfGE 71, 364 (386)) on divorce. In particular, however, the claim to equal participation in what was earned jointly also includes the relationship between the divorced spouses in terms of maintenance (see BVerfGE 63, 88 (109)). When calculating the maintenance, the income which characterised the standard of living in the marriage is in principle to be equally allotted to the spouses. Its amount is calculated as a rule from the total of the income which the spouses had at their disposal for their lives together, regardless of whether it was earned by only one spouse or by both spouses. In general, half this joint total income is the part which – if the other statutory preconditions are met – is to be ensured in terms of the law on maintenance for the spouse who does not have his or her own income in the respective amount after divorce.

2. The established case-law of the civil courts also takes into account when calculating the maintenance increases in income which were not achieved by one or both spouses until after divorce insofar as this increase corresponds to normal income and career development (see A I 1 a above). Such an interpretation of the concept of marital circumstances, according to which the amount of postmarital maintenance is determined pursuant to § 1578.1 of the Civil Code, is constitutionally unobjectionable if both spouses' right to an equal standard of living being ensured also after marriage, arising from the equivalence of the marital maintenance contributions, is in principle protected in the calculation of postmarital maintenance. 32

3. The impugned rulings, based as they are on the earlier case-law of the Federal Court of Justice, do not do justice to this in that they take account as an element of the total income corresponding to the marital circumstances of the increase in income which the spouse achieves after the divorce who already engaged in full-time employment during the marriage when calculating the maintenance, but not of that which the spouse who was not or only partly in gainful employment during the marriage made by virtue of resuming part-time or full-time employment after divorce. They hence violate Article 6.1 in conjunction with Article 3.2 of the Basic Law. 33

a) The non-consideration of postmarital income growth resulting from the resumption of gainful employment in the total income on which the maintenance calculation is based leads to a situation in which, measured against the marital income situation, which is based on the contributions of both spouses, the spouse who was already in employment during the marriage experiences a unilateral reduction of his or her financial burden as to his or her maintenance obligation when the other takes up employment. He or she is hence left with a higher share of his or her income than what was at his or her disposal during the marriage. By contrast, the additional income of the spouse who during the marriage was not or only partly in gainful employment in 34

the amount of this income reduces his or her maintenance claim. It does not have an impact on his or her maintenance requirement, but simply reduces his or her need. The income growth which he or she has achieved does not benefit him or her, but only the other divorced spouse. This result does not do justice to the equivalence of the contribution which the non-employed spouse has provided during the marriage. This contribution, in addition to the income of the other spouse, has equally characterised marital life. If this contribution, which is not expressed in a monetary value, made during marriage, is replaced by one which is remunerated, the non-consideration of the income thus made in the determination of the marital income situation leads in hindsight to disregard for the value of the family work which has been performed, to the disadvantage of the person having provided it during the marriage.

b) If in respect of the inclusion of such growth in the total income on which the maintenance calculation is to be based, and which characterises the income situation of the spouses, the impugned rulings require that resumed gainful employment should at least be based on a joint life plan of the spouses which had at least been partly realised prior to divorce, this ignores the protection provided to each spouse by Article 6.1 in conjunction with Article 3.2 of the Basic Law. The spouses may shape their marital relationship freely and in a joint decision which is based on equal rights. The decision on their respective tasks within the marriage determines their marital circumstances. If one spouse takes on the family work here, he or she forgoes personal income, also to the benefit of the other. The reasoning of this waiver lies in marriage. If it is terminated by divorce, the foundation is removed from the marital agreement. To force the spouse forgoing personal income during marriage to adhere to this in terms of the law on maintenance on termination of the marriage means now allocating to him or her alone the ensuing financial disadvantages which both spouses had to bear on the basis of the joint decision that was made in the marriage. This places at a disadvantage the spouse shouldering the family work as against the one who was able to continuously engage in gainful employment also during marriage. 35

c) What is more, the legal view supposed by the courts with this finality of a division of tasks once decided jointly by the spouses no longer corresponds to the real situation in marriage. The conduct of women in terms of training, gainful employment and family establishment has undergone continuous change since the seventies. Whilst the average age on marriage of single women was as low as 22.7 in 1975, single women in 1998 on average did not marry until they were 28 (1985, p. 72 and *Statistisches Jahrbuch* 2000, p. 69). This permits one to reach the conclusion that women today do not conclude marriage until completing their vocational training and until after several years at work […]. Many women also remain in work during child-care […] or also resume employment once more after the end of the child-care phase. For instance, 74 per cent of women whose youngest child was between 15 and 18 were engaged in gainful employment in May 2000 (result of the Microcensus 2000, see Federal Statistical Office (*Statistisches Bundesamt*), *Zentralblatt für Jugendrecht* 2001, p. 278). Accordingly, the employment rate of married women in the age group of 40- to 36

45-year olds, i.e. in an age in which child-care has been largely completed, is highest at 78 per cent […]. 61 per cent of women with at least one minor child worked part-time in May 2000 […]. It is thus shown that the housewife marriage, which was still dominant in the fifties and sixties, has in the meantime given way to a now predominant concept of marriage which is based on reconciliation of work and family in which the type of bread-winner marriage has only largely been retained during the active parenthood phase. Here, the majority of women are looking to combine private child-raising and gainful employment on the basis of temporary part-time work […]. One may therefore presume that a spouse temporarily forgoing gainful employment in order to take on the task of child-rearing characterises the marital circumstances, as does previous employment and the subsequent resumption or attempted resumption of gainful employment. The impugned judgments fail to take this into account if they are based solely on the time of the divorce before which gainful employment must be resumed in order to be taken into consideration in calculating the total income characterising the marital circumstances in terms of the law on maintenance.

4. It is a matter for the non-constitutional courts to judge as to how the equivalence of family work and marital income required by Article 6.1 in conjunction with Article 3.2 of the Basic Law is to be brought to bear in the interpretation of the term “marital circumstances” according to § 1578.1 of the Civil Code in assessing postmarital maintenance, and how the maintenance is to be calculated. With its ruling of 13 June 2001 (*FamRZ* 2001, p. 986), the Federal Court of Justice amended its previous case-law and now carried out an assessment of maintenance which takes account of the equivalence of the maintenance contributions of both spouses. By virtue of having regarded the new employment of the spouse previously not in gainful employment as a “surrogate” of the housekeeping and child-raising previously carried out, the Federal Court of Justice has demonstrated a possible, constitutionally unobjectionable way to have the value accruing to the marriage from family work make a difference in terms of the law on maintenance. 37

II.

In their impugned rulings, the courts did not take account of the equivalence of the marital maintenance contributions provided, and based the assessment of postmarital maintenance on a calculation which does not do justice to the value of the family work performed in marriage, thereby applying an unconstitutional interpretation to the term “marital circumstances”. In all three sets of proceedings, the resumption of gainful employment by the complainants shortly before or after divorce only had a payment-reducing impact on their maintenance claim, without the family work performed in their marriage having been adequately reflected in the assessment of their maintenance requirement. The rulings are hence to be overturned and the cases referred back to the Higher Regional Courts. 38

C.

[…] 39

Papier	Jaeger	Haas
Hömig	Steiner	Hohmann- Dennhardt
Hoffmann-Riem		Bryde

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 5. Februar 2002 - 1 BvR 105/95, 1 BvR 457/96, 1 BvR 559/95

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