Headnotes

to the Order of the First Senate of 26 March 2019

– 1 BvR 673/17 –

1. **Excluding solely non-marital families from stepchild adoption violates the general requirement of equal treatment.**

2. **General concerns regarding stepchild adoption cannot justify the exclusion of solely non-marital families.**

3. **The legislature pursues a legitimate aim when it limits stepchild adoption to relationships between parent and step-parent that are likely to be stable (see also Art. 7(2) second sentence of the European Convention on the Adoption of Children of 27 November 2008 (amended), Federal Law Gazette II 2015, p. 2 <6>).**

4. **In the context of adoption law, the legislature may consider parental marital relationships to be a positive indicator of stability. However, excluding all non-marital families from stepchild adoption cannot be justified. The stepchild's protection from an adoption with detrimental impacts can be effectively ensured by other means.**

5. **The legislature may use statutory typification not only to govern mass administrative procedures, but also, for instance, when setting out a provision on circumstances or events that cannot be determined with certainty, not even by means of a detailed assessment of the individual case. However, unequal treatment resulting from such typification is constitutionally justified only under certain conditions.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 673/17 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

1. of Ms S...,

2. of Mr S...,

3. the minor S...,
   represented by his mother S...,

4. of Mr D...,

– authorised representatives: Rechtsanwälte Dr. Koenig & Partner GbR, Spiekerhof 36 / 37, 48143 Münster -

1. directly against

a) the Order of the Federal Court of Justice (*Bundesgerichtshof*)
   of 8 February 2017 - XII ZB 586/15 -,

b) the Order of the Hamm Higher Regional Court (*Oberlandesgericht*)
   of 3 November 2015 - II-3 UF 9/14 -,

c) the Order of the Ahaus Local Court (*Amtsgericht*)
   of 9 December 2013 - 12 F 235/13 -,

2. indirectly against

§ 1754(1) and (2) and § 1755(1) first sentence and (2) of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) in the version of the Act on the Reform of the Law of Parents and Children (*Kindschaftsrechtsreformgesetz*) of 16 December 1997 (Federal Law Gazette – *Bundesgesetzblatt* I page 2949)

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Harbarth,

Masing,

Paulus,

Baer,

Britz,

Ott,

Christ,

Radtke

held on 26 March 2019:

1. **To the extent that a child cannot, under any circumstances, be adopted by their step-parent who lives in a non-marital partnership with the child's legal parent without this severing the child's legal relationship to its legal parent, § 1754(1) and (2) and § 1755(1) first sentence and (2) of the Civil Code in the version of the Act on the Reform of the Law of Parents and Children of 16 December 1997 (Federal Law Gazette I page 2949) are incompatible with Article 3(1) of the Basic Law (*Grundgesetz* – GG).**

2. **The legislature must enact provisions that are compatible with the Constitution by 31 March 2020. Until new provisions are enacted, the current law must not be applied to non-marital stepfamilies; ongoing proceedings must be suspended until the new provisions have been enacted.**

3. **The Order of Federal Court of Justice of 8 February – XII ZB 586/15 –, the Order of the Hamm Higher Regional Court of 3 November 2013 – I-3 UF 9/14 – and the Order of the Ahaus Local Court of 9 December 2013 – 12 F 235/13 – violate Article 3(1) first sentence of the Basic Law and are reversed. The matter is remanded to the Ahaus Local Court.**

4. **Half of the complainants' necessary expenses must be reimbursed by the Federal Republic of Germany and the other half by the *Land* North Rhine-Westphalia.**

R e a s o n s :

A.

[*Excerpt from press release no. 33/2019 of 2 May 2019*]

I. As the law currently stands, stepchild adoption resulting in joint parenthood is possible only if the step-parent is married to the legal parent, whereas, in non-marital

stepfamilies, the step-parent cannot adopt the children of the legal parent without the children's legal relationship to the legal parent being severed (§ 1754(1) and (2) and § 1755(1) first sentence and (2) of the Civil Code, *Bürgerliches Gesetzbuch* – BGB). The step-parent would then be the child's only legal parent, which is usually not in the parties' interest. Thus, under the applicable law, stepchild adoption in non-marital families is factually ruled out. There are no special statutory relationships between the unmarried step-parent and the child. This also applies where the step-parent lives in a social and family relationship with the other parent and the child. The unmarried step-parent is neither entitled to custody nor obliged to care for the child. Even after the legal parent has died or the couple has separated, there are no special statutory relationships between a step-parent and a child, apart from a possible right to contact pursuant to § 1685(2) BGB.

II. Complainant no. 1 is the biological mother of the children to be adopted, complainants nos. 2 and 3. The biological father of the children, who had been married to the mother, died in 2006. Since 2007, complainant no. 1 and complainant no. 4 have lived in a non-marital partnership. They claim they did not marry because complainant no. 1 is eligible for a widow's pension that she considers to be an essential part of their livelihood and that she would lose if she remarried. The couple has a son together, who was born in 2009. The Local Court (*Amtsgericht*) rejected the application for an adoption order declaring complainant no. 2 and complainant no. 3 their joint children. The complaint lodged before the Higher Regional Court (*Oberlandesgericht*) and the complaint on points of law (*Rechtsbeschwerde*) before the Federal Court of Justice (*Bundesgerichtshof*) remained unsuccessful.

[*End of excerpt*]

[…] 1

I.

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II.

[…] 14-18

III.

[…] 19-22

IV.

The opportunity to submit a statement was provided, *inter alia*, to the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*), the *Länder* Governments, the Federal Court of Justice, the Federal Association of the *Land* Offices of Youth Welfare (*Bundesarbeitsgemeinschaft Landesjugendämter*), the Central Committee of German Catholics (*Zentralkomitee der* 23

deutschen Katholiken), the German Caritas Association (*Deutscher Caritasverband e.V.*), the German Family Law Association (*Deutscher Familiengerichtstag e.V.*), the Scientific Association for Family Law (*Wissenschaftliche Vereinigung für Familienrecht e.V.*), the German Women Lawyers' Association (*Deutscher Juristinnenbund e.V.*), the Professional Association of German Psychologists (*Berufsverband Deutscher Psychologinnen und Psychologen e.V.*), the Professional Association of Child and Adolescent Psychotherapists (*Berufsverband der Kinder- und Jugendlichenpsychotherapeutinnen und Kinder- und Jugendlichenpsychotherapeuten e.V.*), the German Society for Psychology *(Deutsche Gesellschaft für Psychologie e.V.*), the Federal Association of Foster and Adoptive Families (*Bundesverband der Pflege- und Adoptivfamilien e.V.*), the German Institute for Youth Welfare and Family Law (*Deutsches Institut für Jugendhilfe und Familienrecht e.V.*), the German League for the Child in Family and Society (*Deutsche Liga für das Kind in Familie und Gesellschaft e.V.*), the German Youth Institute (*Deutsches Jugendinstitut e.V.*) and the Association of Analytic Child and Adolescent Psychologists in Germany (*Vereinigung Analytischer Kinder- und Jugendlichen-Psychotherapeuten in Deutschland e.V.*).

[…]

B.

The constitutional complaint is admissible. 45

In particular, complainant no. 2 continues to have a recognised legal interest in bringing an action, even though he reached the age of majority on 28 December 2018. While the adoption as a minor sought by complainant no. 2 thus became impossible, an adult adoption with the effects of the adoption of minors (§§ 1767, 1772 BGB) as sought by complainant no. 2 remains possible. However, it is restricted by the same provisions as the adoption of minor step-children. In particular, the legal relationship to the mother would also be severed in this case (§ 1772(1) first sentence in conjunction with § 1755(1) first sentence BGB). 46

[…] 47

C.

The constitutional complaint is well-founded. The constitutionally guaranteed parental right (see I below), the right of adoptive children to having parental care and upbringing guaranteed by the state (see II below) or the constitutionally guaranteed right to family (see III below) are not violated as such. The relevant provisions do not violate Art. 6(5) of the Basic Law (*Grundgesetz* – GG) either (see IV below). However, the current legal situation leads to unconstitutional unequal treatment (Art. 3(1) GG), given the consequence that a child cannot, under any circumstances, be adopted by its step-parent who lives in a non-marital partnership with the child's legal parent without this severing the child's legal relationship to the legal parent; whereas a child can be adopted by its step-parent who is married to the child's legal parent with- 48

out this severing the legal relationship to the remaining parent and the child can thus become the joint child of both parents (see V below). The challenged decisions are based on these unconstitutional provisions and are therefore also unconstitutional.

I.

The statutory restrictions on stepchild adoption do not violate the constitutionally guaranteed parental right (Art. 6(2) GG). 49

1. Prior to the adoption of the child, the step-parent cannot assert the constitutionally guaranteed parental right. In that respect, the matter at hand does not fall within the scope of protection of this fundamental right. Prior to the adoption, the step-parent is not a holder of this fundamental right even if the step-parent lives with the other parent and the child in a social and family relationship. In principle, social parenthood alone does not establish the status of a parent within the meaning of Art. 6(2) first sentence GG and thus does not lead to a right to adoption either. The protection of the family ties between a child and its social parent who is not its legal parent is constitutionally provided for by means of the protection of families under Art. 6(1) GG which is independent of the formal parental status (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 133, 59 <81 and 82 para. 59>). 50

2. The challenged provisions also do not violate the constitutionally guaranteed parental right of the other parent, in this case the mother. Neither the fact that another person is barred from obtaining the status as second legal parent by adoption, nor the fact that, according to the challenged provisions, the legal relationship is severed as a consequence of an adoption by the step-parent constitute an interference with the constitutionally guaranteed parental right. According to § 1747 BGB, it is generally impossible to go through with an adoption against the will of the legal parent; thus, a legal parent is not at risk of losing their parental status to the step-parent without being involved in the adoption procedure. The effect of the challenged provisions that is perceived as an impairment derives not from the compulsory loss of the present parent's status as legal parent, but rather from the fact that the step-parent cannot adopt the child without such a loss. 51

II.

The statutory restriction of stepchild adoption also does not violate the right of those children affected to having parental care and upbringing guaranteed by the state under Art. 2(1) in conjunction with Art. 6(2) first sentence GG. 52

1. The right of children to the free development of their personality obliges the legislature to put in place the necessary safeguards to enable children to grow up to become responsible personalities within society. However, under constitutional law, the direct responsibility for protecting the development of the children's personality is mainly placed on the parents pursuant to Art. 6(2) first sentence GG. In this respect, the state has a duty to guarantee the exercise of fundamental rights under Art. 2(1) 53

in conjunction with Art. 6(2) first sentence GG. The state retains the responsibility of overseeing and ensuring the child's development into a responsible personality while in its parents' care. The responsibility remaining with the state includes the duty to enable and ensure specifically parental care for the children. In this respect, Art. 2(1) in conjunction with Art. 6(2) first sentence GG establishes a child's subjective right vis-à-vis the state to guarantee the actual fulfilment of responsibilities by parents (cf. BVerfGE 133, 59 <74 and 75 para. 43>). The right of children to having parental care and upbringing guaranteed by the state according to Art. 2(1) in conjunction with Art. 6(2) first sentence GG is affected in this case since the step-parent willing to adopt is factually barred from taking on the legal status of parent and thus cannot, as another parent with parental responsibility in a legal sense, act in the best interest and for the protection of the child (cf. BVerfGE 133, 59 <75 para. 44>).

2. This, however, does not constitute neglect on the part of the legislature of its responsibility vis-à-vis the children affected by this provision (cf. BVerfGE 133, 59 <75 *et seq.* para. 45 *et seq.*>). The legislature has latitude when it comes to the question of how it effectively ensures that parents exercise their care and upbringing responsibilities (cf. BVerfGE 133, 59 <75 and 76 para. 45 *et seq.*>). The limits of this latitude have not been exceeded. In the case of stepchild adoption, children already have one parent who is legally and factually obliged and willing to assume parental responsibility, namely the remaining parent. Thus, these children are not without parents. In this situation, the child's right vis-à-vis the state to guarantee the actual exercise of responsibilities by parents does not result in any entitlement of the child to having the legislature provide the possibility of obtaining a second legal parent actually willing to take on parental responsibility (cf. BVerfGE 133, 59 <76 para. 46>). 54

III.

The statutory restrictions on adoption also do not violate the right to family life under Art. 6(1) GG, which all members of a stepfamily can invoke. 55

1. The scope of protection of the right to family life is affected. The actual community of parents living with and bringing up children is protected as a family under Art. 6(1) GG (cf. BVerfGE 79, 256 <267>; 108, 82 <112>). In this respect, the protection of the family pursuant to Art. 6(1) GG exceeds the parental right of Art. 6(2) first sentence GG given that it also encompasses family communities in a broader sense, which, as social families, exist independent of legal parenthood (cf. BVerfGE 68, 176 <187>; 79, 51 <59>; 80, 81 <90>; 99, 216 <231 and 232>; 108, 82 <107, 116>; 133, 59 <82 and 83 para. 62>). In order to claim protection under the right to family life, it is irrelevant whether parents are married or not; the protection of families also covers non-marital families (cf. BVerfGE 10, 59 <66>; 18, 97 <105 and 106>; 45, 104 <123>; 79, 256 <267>; 108, 82 <112>). The right to family life guarantees in particular family members' life together and their freedom to decide for themselves how to shape their family life (cf. BVerfGE 61, 319 <347>; 99, 216 <231>; 133, 59 <84 para. 67>). The challenged provisions affect family life because the step-parent is barred from exer- 56

cising typical legal powers of a parent vis-à-vis the child so that the two partners cannot readily share the duties for the upbringing on equal terms (cf. BVerfGE 133, 59 <84 para. 67>).

Ultimately, however, the legislature's authority to structure families in legal terms also includes ruling out the possibility of adoption. The fact that the right to family life also protects relationships equivalent to parent-child-relationships without their being covered by the constitutionally guaranteed parental right (Art. 6(2) first sentence GG) does not imply that the legislature must provide this protection precisely in the form of full parental rights (cf. BVerfGE 133, 59 <84 *et seq.* para. 67 *et seq.*>). 57

2. a) Taking account of the European Convention on Human Rights and the case-law of the European Court of Human Rights as guidelines for the interpretation of the content and scope of fundamental rights (cf. BVerfGE 111, 307 <317>; 138, 296 <355 and 356 para. 149>; 141, 186 <218 para. 73>) does not lead to any other conclusion. In the *Emonet* case, the European Court of Human Rights held that a Swiss provision on the adoption of step-children, similar to the one in Germany, violated the European Convention on Human Rights on the grounds of its incompatibility with the right to respect for family life protected under Art. 8 ECHR (cf. ECtHR, Emonet et al. v. Switzerland, Judgment of 13 December 2007, no. 39051/03; […]). In that case, an adult woman with disabilities had been adopted by her mother's long-time partner, to whom the mother was not married. As a consequence of the adoption, the legal relationship with the mother was severed in accordance with the applicable Swiss law, which is the same effect the adoption of minors at issue in these proceedings would have under German law. The Court found a violation of Art. 8 ECHR. However, the decision concerned the adoption of an adult. By contrast, with regard to the adoption of minors, the Court explicitly held that the severing of the legal relationship with the biological parent due to adoption is compatible with the Convention. 58

b) The revised European Convention on the Adoption of Children of 27 November 2008, too, does not lead to a different result. Art. 7(2) second sentence of this Convention gives the Contracting States the option of extending its scope of application to cover same-sex or opposite-sex couples if they are living "in a stable relationship" (Federal Law Gazette, *Bundesgesetzblatt* – BGBl II 2015, p. 2 <6>). It does not, however, oblige the Contracting States to actually do so. 59

IV.

The right of children under Art. 6(5) GG are not affected. Only children whose parents were not married at the time of birth are holders of the fundamental right under Art. 6(5) GG. In the case of children living in non-marital stepfamilies, the parent is also not married to the step-parent. Yet this does not rule out that the child was born while the parent was married to the former spouse and is thus a child of married parents. The complainant children in this case were also born while their biological parents were married. The father's death does not alter this circumstance. 60

V.

The provisions at issue violate Art. 3(1) GG because they disadvantage children in non-marital stepfamilies compared to children in marital stepfamilies without sufficient reasons. 61

1. According to the provisions at issue, children in non-marital stepfamilies in which the step-parent is not married to the legal parent are treated unequally compared to children in marital stepfamilies. Unlike children in marital stepfamilies, they are denied any possibility of being adopted by the step-parent while maintaining the legal relationship to their legal parent and thus of also becoming the joint child of both parents with whom they live in a non-marital stepfamily. 62

2. Strict proportionality requirements apply to the justification of this disadvantaging of children in non-marital stepfamilies. 63

a) Art. 3(1) GG does not preclude any differentiation on the part of the legislature. Differentiations, however, must always be justified by factual reasons commensurate with the aim and the extent of the unequal treatment. The standard of constitutional review applicable here is a fluid one that is based on the principle of proportionality. Its limits cannot be determined in the abstract but rather on the basis of the particular subject matter and areas affected. Depending on the subject matter of the legislation and the criteria for differentiation, different constitutional requirements regarding the factual reasons justifying the unequal treatment will result from the general guarantee of the right to equality; the legislature's limits in this respect may range from a mere prohibition of arbitrariness to strict proportionality requirements. Stricter requirements for the legislature may arise depending on the freedoms affected in a given case. Moreover, the less the individual can influence the criteria on which the legislative differentiation is based, or the more closely such criteria resemble those listed in Art. 3(3) GG, the stricter the constitutional requirements will be (BVerfGE 138, 136 <180 and 181 para. 121 and 122>; established case-law). 64

b) According to these principles, a stricter standard of review applies to this case. The constitutional requirements are considerably stricter than a mere prohibition of arbitrariness given that adoption concerns fundamental rights of the child that are essential for the development of its personality (see aa below), and that the differentiation criterion that is material in the provisions at issue – i.e. the marriage between the parent and the step-parent – cannot be influenced by the children nor can their parents' possibilities of influencing the criterion be attributed to them (see bb below). However, the criterion does not closely resemble the ones listed in Art. 3(3) GG. 65

aa) Excluding adoption affects fundamental rights of children that are essential for the development of their personality, and, overall, this exclusion is to their disadvantage. By excluding stepchildren in non-marital families from adoption regardless of the specific circumstances of the individual case, these children are specifically not provided those possibilities for development and for shaping their lives that would follow from the adoption by the – thus far – merely factual parent, i.e. the step-parent 66

(cf. already BVerfGE 133, 59 <87 para. 73>).

(1) Firstly, the right of the children affected by the exclusion of stepchild adoption to having parental care and upbringing guaranteed by the state according to Art. 2(1) in conjunction with Art. 6(2) first sentence GG is affected (see para. 53 above). Excluding adoption by the partner who is not married to the child's parent rules out that the partner can fully take on the responsibility for the child's development. Secondly, the restrictions of parental powers resulting from the denial of a legally complete parental status render the child's family life, protected under Art. 6(1) GG, more difficult because such restrictions rule out that both partners may assume their parental responsibilities on equal terms (see para. 56 above). 67

Without adoption, the unmarried step-parent has neither custody nor any duty towards the stepchild [...]. Furthermore, unlike a married step-parent, the unmarried step-parent is neither granted "lesser custody" (§ 1687b BGB) nor entitled, for instance in case of imminent danger (§ 1687b(2) BGB), to carry out legal acts that are necessary with respect to the best interests of the child. 68

In the course of the legislative proceedings concerning the introduction of stepchild adoption for registered civil partners, the specific advantages of stepchild adoption for the child were emphasised (*Bundestag* document, *Bundestagsdrucksache* – BT-Drucks 15/3445, p. 15): 69

> "In the event that a child lives with one parent and this parent has entered into a civil partnership, they usually live together as a family. The civil partner, who is not the parent, also assumes responsibility for the child. In the event of the dissolution of the civil partnership due to separation or the death of one partner, the child may be faced with an uncertain situation. While specific contracts may alleviate the problems, they are not always sufficient. The legal position of the child vis-à-vis the non-parent is considerably improved by stepchild adoption: in case of an adoption, the responsibility that a civil partner assumes for their civil partner's child can be carried on as shared parental responsibility."

As some of the expert statements in these constitutional complaint proceedings have pointed out, the equal legal status of both parents can have stabilising effects within the family and on the children because shared custody strengthens children's sense of belonging and the responsibility of parents and can make joint child-rearing by the parents easier (cf. already BVerfGE 133, 59 <91 para. 83>). It has also been emphasised that the exclusion of stepchild adoption places a burden on family structures where both the stepchildren and joint children of the partners live in the family, as this results in unequal parent-child-relationships compared with the half-siblings. In particular, this constellation poses the risk that stepchildren will not consider themselves complete children next to their half-siblings. 70

Ruling out stepchild adoption also burdens the child with the risk of losing the step-parent following a separation or the legal parent's death. Without adoption, the relationship between the child and the step-parent has no legal basis and is merely mediated by the legal parent and their relationship to the step-parent. If the legal parent dies or the couple separates, this basis is eliminated without any legal protection of the relationship between step-parent and child, which factually continues to exist. Even if a child has lived in a family with a step-parent for several years and perceived that person as factual parent, the law does not provide for any special relationship between the child and the step-parent in this constellation – apart from the right to contact pursuant to § 1685(2) BGB. A court order pursuant to § 1682 BGB to the effect that the child remain with the step-parent is also ruled out. For these cases, relationships between children and step-parents cannot be comprehensively secured by contract. Without an adoption, the affected children do not have any certainty as to whether they will have any relationship to the step-parent in the event of the loss of their biological parent. 71

(2) In financial terms, stepchild adoption tends to have equal advantages and disadvantages. The child loses maintenance and inheritance claims against the relinquishing parent, but receives comparable claims against the new parent. While the child itself may become obliged to pay maintenance for its new parent, it is at the same time absolved from a potential maintenance obligation vis-à-vis the relinquishing parent. 72

(3) Yet stepchild adoption also entails risks for children in marital as well as in non-marital families; the Federal Government in particular pointed this out in these proceedings [...]. Particularly where a lasting and autonomous relationship does not develop between the new parent and the child, and where the family relationship is in fact based on the couple's relationship instead, in the event of a subsequent separation of the parents, the continuation of the parent-child-relationship with the former step-parent, established by adoption, may have a detrimental effect on the child [...]. Stepchild adoption can also have a detrimental impact on the child given that the parent who is not part of the stepfamily and generally also that parent's relatives (e.g. grandparents) can be legally and factually excluded from the child's life as a result of the adoption. 73

(4) Stepchild adoption may pose problems for a child in certain cases, but this does not change the fact that, in principle, it may also be in the child's best interests. Therefore, the legislature allowed adoption in marital stepfamilies subject to the outcome of specific case-by-case assessments. In contrast, a child in a non-marital stepfamily is deprived from the outset of adoption-related possibilities, and an assessment of the advantages and disadvantages of the adoption in the specific case is not even carried out. 74

bb) It is true that an adoption in a stepfamily becomes possible as soon as the parents get married. However, the children cannot influence the criterion of marriage. It 75

is only for the parent and the step-parent to decide whether they get married. Children are unable to influence marriage as a requirement for adoption. There is no reason for attributing the parents' decision against marriage to the children. Indeed, children are rarely in a position to act in a legally relevant manner themselves. Rather, their parents must usually act for them in legal terms. In this respect, acts of the parents are attributed to the children. This case, however, does not involve legal acts or omissions of the parents in matters concerning their children, which the parents would have to undertake. Rather, it concerns marriage, which is a legal act or omission that is a matter which is solely for the parents to decide. Thus, there is no reason to attribute this act or omission to the children.

3. The challenged provisions do not satisfy the stricter justification requirements that are thus applicable. Ultimately, disadvantaging the affected stepchildren is disproportionate. From the outset, general concerns regarding stepchild adoption cannot justify disadvantaging children in non-marital stepfamilies (see a below). In contrast, the intention of preventing children from growing up in inadequate family conditions is indeed a legitimate purpose. This aim, however, cannot be achieved by ruling out adoption in the specific situation of the stepchild (see b below). It is also a legitimate legislative purpose to limit stepchild adoption to relationships that are likely to be stable in order to prevent the adoption of a child by a step-parent if that step-parent's relationship to the legal parent is not likely to continue much longer; the complete exclusion of stepchild adoption in non-marital families, however, is not an appropriate means to achieve this purpose (see c below). Finally, the decision enshrining marriage as a constitutional value in Art. 6(1) GG also does not justify the challenged differential treatment (see d below). 76

a) General concerns regarding stepchild adoption (see para. 73 above) cannot justify disadvantaging children in non-marital families given that these concerns do not relate to problems of stepchild adoption that only arise in non-marital families, but rather occur in both marital and non-marital families. 77

b) When limiting adoption to married couples, the legislature was guided by the expectation that an adopted child would grow up in more beneficial conditions in a marital family than in a non-marital family. However, this cannot justify limiting stepchild adoption to marital stepfamilies. Aiming to prevent a child from getting into an inadequate life situation is in the child's best interest, and thus legitimate (see aa below). Regardless of whether a family of unmarried parents really indicates living conditions that are less favourable for the adoptive child, ruling out adoption cannot protect the stepchild against living under unfavourable circumstances from the outset (see bb below). 78

aa) When limiting adoption to married couples in 1975, the legislature's primary focus was on the legal certainty guaranteed by the institution of marriage and the quality of the relationships which it considered to be typically stronger in a marital family than in a non-marital one. The explanatory statements to the government's draft law 79

relate only to joint and not to stepchild adoption. However, it can be assumed that limiting stepchild adoption to married partners is based on the same reasons as limiting joint adoption to married couples:

> "The child that will be adopted is to be received in a harmonious and functioning family. This family is usually grouped around a married couple; thus an adoption of a child by a married couple offers the best preconditions for the child's development." (BTDrucks 7/3061, p. 28).

> "Any partnership other than marriage is not secured by law and cannot justify joint adoption of a child by its members. The requirements for legally placing a child in such a community are lacking." (BTDrucks 7/3061, p. 30).

In the decision challenged in these proceedings, the Federal Court of Justice [...] also refers to advantages for the child when it grows up in a marital family; in this respect, the Federal Court of Justice reiterates what the Federal Constitutional Court held in its Judgment of 2007 concerning limits to costs covered by statutory health insurance providers in relation to artificial insemination (BVerfGE 117, 316 <328 and 329>): The Court held that in an assessment drawing on typical situations, the legislature was allowed, given the particular statutory framework of marriage, to consider marriage to be a basis for the child's life which accommodated the best interests of the child to a greater extent than a non-marital relationship. In general, marital ties offered a child more legal security of being cared for by both parents. According to § 1360 BGB, spouses were also statutorily obliged to provide for the family through their work and assets. The Court held that this maintenance was also oriented towards the needs of joint children and to their benefit; it substantially determined their economic and social situation. In addition, the economic and social situation of the child of a married couple was strengthened by the particular provisions applying to marriage and governing property, maintenance and inheritance rights. 80

bb) However, these considerations ultimately disregard the specific situation of stepchildren. 81

(1) From the outset, ruling out adoption in the situation of the stepchild cannot achieve the aim of preventing a child from growing up in unfavourable family conditions – an aim which doubtlessly is in the child's best interests. Unlike in cases of joint adoption but also in the case of artificial insemination, the child usually already lives in a specific – marital or non-marital – family with its parent and step-parent. If the child's legal parent is not married to the step-parent, a marital family is simply not available to the child. Whether a marital family offered the stepchild better conditions is thus irrelevant in this respect. 82

(2) It may also not be assumed that the living conditions of a stepchild in an already existing non-marital stepfamily deteriorate precisely due to the adoption. In fact, ac- 83

cording to the Federal Court of Justice's assessment of the advantages of the legal status, the opposite may be the case. In the present case, the child cannot obtain the emphasised advantages resulting from the married parents' status. However, while it is intended to effectively ensure the child's care and custody in personal as well as financial matters also with regard to its relationship with the step-parent, ruling out adoption has the opposite effect since only adoption establishes the parental status by which the current laws on children effectively ensure the child's relationship to its parents – whether married or not. Meanwhile, the laws on children comprehensively provided for the rights of children of unmarried parents. Differing from the time when the provisions challenged in these proceedings were enacted, children of unmarried couples are almost completely equivalent to children of married couples today (see only § 1615a BGB).

Generally, the advantages of stepchild adoption coincide with the disadvantage of the termination of the family relationship of the child and its children to the former relatives and the termination of rights and obligations associated with it (§ 1755(1) first sentence BGB). Yet the fact that § 1741(1) first sentence BGB provides for a decision on the individual case that is guided by the child's best interests accommodates for these circumstances when taking a decision on the specific adoption. Thus, based on this aspect alone, it cannot be assumed that the stepchild's life circumstances deteriorate due to the adoption. 84

Unlike in the case of limits to costs covered by statutory health insurance providers in relation to artificial insemination, stepchild adoption – as any other adoption – is generally preceded by a thorough assessment of the child's best interests (§ 1741(1) first sentence BGB). Thus, stepchild adoption can and must be ruled out in individual cases when it is not in the child's best interests [...]. An adoption may not be approved if there is a risk that it will lead to a deterioration of the child's life situation. 85

c) Another aim of the law is ensuring that children are placed in families which are as stable as possible and in which the relationship between parent and step-parent is likely to be long-term. Ultimately, this also cannot justify that children in non-marital stepfamilies are excluded from the option of being adopted by their step-parent without any exception. In that regard, the legislature does pursue a legitimate aim (see aa below). However, the statutory provision chosen provides a disproportionate framework. Regardless of whether it is suitable (see bb below) or necessary (see cc below), completely excluding unmarried couples from stepchild adoption is, in any case, no appropriate means for achieving this purpose (see dd below). 86

aa) The aim of the law (see 1 below) of limiting stepchild adoption to relationships between parent and step-parent that are likely to be stable, is legitimate (see 2 below). 87

(1) It can be inferred from the legislative materials that the provisions aim at preventing children from being adopted in a setting of unstable families. The legislative documents state that 88

> “the aim of adoption is to provide the child with a stable and harmonious home [...]. Thus, adoption should only be an option if it can be assumed that the marriage of the adoptive parents is likely to last.” (*BTDrucks* 7/3061, p. 28).

It is true that this refers solely to joint adoptions and states reasons for giving this possibility to married couples only. The legislative materials do not comment on limiting stepchild adoption to married couples. However, it seems reasonable to assume that, when limiting stepchild adoption to married couples, the legislature intended to reflect the presumed stability of family situations on the grounds of marriage and thus to prevent children from being adopted in a setting of unstable families. In its decision challenged in these proceedings, the Federal Court of Justice also invoked stability considerations to justify the exclusion of unmarried couples from stepchild adoption. 89

(2) Limiting stepchild adoption to relationships between parent and step-parent that are likely to be stable is a legitimate legislative aim (see also Art. 7(2) second sentence of the amended European Convention on the Adoption of Children of 27 November 2008, BGBl) II 2015, p. 2 <6>). 90

(a) Ruling out stepchild adoption in non-marital families cannot protect a child which is to be adopted from the experience of another end to a relationship as a consequence of a separation of the parents. In this respect, the child usually lives with the step-parent and the legal parent as a family already. It will have to bear the risk that precisely this family is separated. Parents can separate or not, regardless of whether the stepchild adoption went through. As a step-parent-child relationship is not legally guaranteed in itself, a child which has a close relationship to the step-parent would in fact suffer more after the parents’ separation if it was not adopted by the step-parent. The most effective way to legally protect the relationship between child and step-parent in case of a separation is establishing an independent legal parent-child-relationship by means of adoption that is currently ruled out. 91

However, limiting stepchild adoption to relationships that are as stable as possible is legitimate to protect children against disadvantages that they could suffer due to the adoption if the parent and the step-parent separated even before a reliable relationship had developed between step-parent and child, and the child remained tied in a full legal relationship to the step-parent because of the adoption. 92

In general, stepchild adoption is considered beneficial to the child’s best interests also with regard to a possible separation of the parents (see para. 67 *et seq.* above) because adoption prevents the relationship between child and new parent from losing its basis in case of a separation of the parents (cf. BTDrucks 15/3445, p. 15). In individual cases, however, precisely this legal continuation of the parent-child-relationship to the step-parent can become a burden on the child. [...] In particular, this is conceivable if the relationship of the parents as a couple ends without the child and the adopting parent having developed an independent, reliable parent-child-relationship. This may be the case if the parent-child-relationship was primarily based on the 93

parents' relationship that has now ended. In such a case, the child remains legally tied to a parent to which it is not reliably attached in emotional and social terms (cf. regarding the significance of legal family ties for the development of one's personality BVerfGE 141, 186 <202 para. 35>). In such a case, the disadvantages of a continued legal relationship to the step-parent can prevail.

In light of this, it is legitimate under constitutional law to allow stepchild adoption only in the context of relationships that are likely to be stable in order to limit the burden on the child, in the event that the parents separate, that may be associated precisely with an established legal parent-child-relationship. If the parents' relationship is permanently stable, this burden does not even become relevant. Even if the parents separate again, it is more probable after a longer relationship that an independent and stable relationship has developed between step-parent and child, which is worth preserving for the child's benefit after a separation of the parents. Limiting stepchild adoption to cases in which the parents' relationship seems likely to be stable complements and reinforces the already existing statutory stipulation of allowing adoption only if it is to be expected that a parent-child-relationship develops between the person adopting and the child (§ 1741(1) first sentence BGB). This also prevents the child from being exposed to quickly changing relationships of its legal parent with regard to its family ties. 94

bb) The differentiation criterion of the parents' marriage is suitable for covering one part of relationships that are likely to last longer. 95

(1) If parents are married, it suggests a more serious commitment that goes beyond the short-term desire for a relationship, and thus a more stable relationship. Thus, it is constitutionally unobjectionable that the legislature uses the parents' marriage as stability indicator in the context of adoption law. It is true that marriages can end after shorter periods, too. In addition, around half of divorced couples had children under 18 in 2016 (cf. Federal Statistical Office, Data Report 2018, https://www.destatis.de, p. 58). Yet with regard to stepchild adoption, whether a marriage appears to be unstable in a specific case can and must be examined more closely in the context of the individual decision that is guided by the child's best interests according to § 1741(1) first sentence BGB. If necessary, adoption must be denied. 96

(2) However, the statutory provisions are not suitable for identifying stable non-marital stepfamilies. The provision rests on the irrefutable presumption that non-marital stepfamilies are not sufficiently stable. This presumption is only tenable to a limited extent, if at all, given that there cannot be any doubt that non-marital stepfamilies exist in which the parents' relationship is long-term and actually stable. 97

Statistical data indicates that non-marital families have become significantly more relevant as another type of family besides marital families. While the number of married couples with children has continuously decreased, the number of single parents and unmarried couples with children has increased. [...] In particular in family law literature, it has been emphasised that non-marital families are an established family 98

type alongside marital families and that it is no longer acceptable to typify them as an unstable form of family [...].

Not least with a view to the increasing number of these family relationships, it is clear that non-marital stepfamilies in which the parents' relationship is long-term and actually stable do exist. The statutory provisions are not suitable for identifying these stable non-marital stepfamilies given that they draw on the parents' marriage as the necessary indicator of stability and do not allow for alternative indicators that may establish stability expectations. 99

(3) However, according to established case-law, the constitutional requirement of suitability does not demand that the aim be achieved completely, but that measures be suitable for promoting the aim (cf. BVerfGE 138, 136 <189> with further references). At least, the criterion of marriage allows for identifying a part of relationships that are likely to be stable, namely the ones of married couples. In addition, strictly excluding unmarried couples from stepchild adoption certainly ensures that adoption does not go through for unmarried couples whose relationship turns out to be short-term; however, for married couples an assessment of stability expectations in the individual case is sufficient under statutory law. 100

Whether the provision may be considered suitable under constitutional law does not have to be decided in this case because ruling out adoption completely is not appropriate in any event (see para. 110 *et seq*. below). 101

cc) Whether it is necessary under constitutional law to exclusively tie stepchild adoption to the requirement of marriage between legal parent and step-parent may ultimately also remain unanswered because it is in any case not appropriate that means that would be less intrusive than the complete exclusion from adoption have not been taken (see para. 110 *et seq.* below). 102

(1) Unequal treatment may be deemed necessary only if no means for achieving the aim of differentiation are available that would be equally effective yet less intrusive in relation to the holders of fundamental rights (cf. BVerfGE 138, 136 <190> with further references) and would not entail a greater burden for third parties or the general public (BVerfGE 148, 40 <57 para. 47> with further references). 103

(2) Allowing stepchild adoption also in non-marital stepfamilies where the relationship of the couple is likely to be stable is a less intrusive means [...]. As the law currently stands, all non-marital stepfamilies, and thus also families in which parents have a stable relationship, which is likely to continue to be stable in the future, are affected by the exclusion from stepchild adoption. Measured against the purpose of differentiation, there is no reason in these cases to exclude stepchild adoption. Thus, the provision has an excessive impact in this respect. As can be seen in provisions of other legal orders, which are largely more recent, there are various more adequate possibilities, which allow for stepchild adoption in non-marital stepfamilies that are likely to be stable. 104

(a) The legislature could enact a provision requiring an individual assessment of whether the relationship of the unmarried couple is likely to be stable. Some legal orders chose this option (cf., e.g., for Sweden: § 1 of the Act (2003:376) Concerning Cohabiting Persons in conjunction with Chapter 4 § 6(2) first sentence of the Parents Code in the version of the Code of 29 June 2018; for Slovenia: Art. 4(1) in conjunction with Art. 213(1) of the Family Act in the version of 21 March 2017; for the United Kingdom: Sec. 144(4)(b) in conjunction with Sec. 49(1)(b) in conjunction with Sec. 51(2) of the Adoption and Children Act 2002 and Sec. 30(1), (3) in conjunction with Sec. 29(3) in conjunction with Sec. 119(5) of the Adoption and Children (Scotland) Act 2007; for Iceland: Art. 2(2) and (5) of the Adoption Act no. 130/1999; for Norway: Sec. 6(1) second sentence of the Adoption Act (no. 48) of 16 June 2017; for Serbia: Art. 4(1) in conjunction with Art. 101(2) of the Family Act; outside Europe: for Australian states: Sec. 3, Sec. 30(1) of the Adoption Act 2000 in conjunction with Sec. 21C(1)-(3) of the Interpretation Act 1987 New South Wales, Sec. 92(1)(a) of the Adoption Act 2009 in conjunction with Sec. 5AA(1)(b) of the Succession Act 1981 in conjunction with Sec. 32DA(1), (2) of the Acts Interpretation Act 1954 Queensland as well as Sec. 67(1)(a) of the Adoption Act 1994 in conjunction with Sec. 3(1), Sec. 13A of the Interpretation Act 1984 Western Australia). 105

(b) In order to make decisions more predictable, the legislature can – additionally or alternatively – provide for specific indicators of stability for the assessment of whether the relationship of an unmarried couple is likely to be stable. In particular, it is possible to require a specifically defined minimum period for the relationship or for living with the other person, the child, or both (cf., e.g., for Belgium: Art. 343 § 1 b and Art. 356-1(3) of the Civil Code; for Denmark: § 1 no. 1 of the Executive Order on Adoption (no. 1863); for Ireland: Sec. 3(1)(a) of the Adoption Act 2010 in the version of Sec. 3(a) of the Adoption Amendment Act 2017 and Sec. 37(5)(a), (b) of the Adoption Act 2010 in the version of Sec. 18(b) of the Adoption Amendment Act 2017; for the Netherlands: Art. 227(2) second sentence of the Civil Code; for Portugal: Art. 1(2), Art. 7 Act (no. 7/2001) concerning the protection of factual couples in the version of 29 February 2016 in conjunction with Art. 1979(1), (2) of the Civil Code; for Spain: Art. 234-1 in conjunction with Art. 235-32(1) second sentence lit. a) of the Civil Code of Catalonia; for Switzerland: Art. 264c(1) no. 3, (2) of the Civil Code; for Norway: Sec. 13(1) second sentence and (4) of the Adoption Act (no. 48) of 16 June 2017; outside Europe: for Australian states: Sec. 30(1)(b) of the Adoption Act 2000 New South Wales, Sec. 92(1)(c) of the Adoption Act 2009 Queensland, Sec. 10A(b) in conjunction with Sec. 11(1) of the Adoption Act 1984 Victoria, Sec. 67(1)(a) of the Adoption Act 1994 Western Australia; for Canada: Art. 546, Art. 555 second sentence of the Québec Civil Code; for New Zealand: High Court, Judgment of 24 June 2010, Re Application by AMM and KJO to adopt a child, (2010) NZFLR 629, paras. 35 and 36 regarding Sec. 3 of the Adoption Act 1955, cf. also for Sec. 1C(2)(b) of the Property (Relationships) Act 1976, Sec. 60(1) of the Family Proceedings Act 1980). 106

(c) It is unobjectionable under constitutional law to use the criterion of marriage of 107

parents as a stability indicator if, in addition, the provision also allows for a determination of stability in relation to unmarried couples (see para. 104 above). This approach has also been chosen in other legal orders. Several legal orders that allow non-marital stepchild adoption subject solely unmarried couples to particular requirements regarding the duration of the relationship, but not couples whose relationship has a formal legal status due to marriage or registration (cf. for Belgium: Art. 343 § 1 of the Civil Code; for Denmark: § 1 no. 1 of the Executive Order on Adoption [no. 1863] and §§ 5, 5a of the Adoption Act; for Austria: § 191(1) in conjunction with § 197(4) of the Civil Code, as well as Supreme Court of Justice, Order of 21 August 2013 – 3 Ob 139/13g –, para. 2, with further references; for Portugal: Art. 7 of the Act (no. 7/2001) Concerning the Protecting of Couples Living Together in the version of 29 February 2016 in conjunction with Art. 1979(1) of the Civil Code; for Sweden: § 1 of the Act (2003:376) Concerning Cohabiting Couples in conjunction with Chapter 4 § 6(2) first sentence of the Parent Act in the version of the Act of 29 June 2018; for Spain: Art. 234-1 in conjunction with Art. 235-32(1) second sentence letter a) of the Civil Code of Catalonia; for the United Kingdom: Sec. 144(4)(b) in conjunction with Sec. 49(1)(b) in conjunction with Sec. 51(2) of the Adoption and Children Act 2002 as well as Sec. 30(1), (3) in conjunction with Sec. 29(3) in conjunction with Sec. 119(5) Adoption and Children (Scotland) Act 2007; for Serbia: Art. 3(1), Art. 4(1) in conjunction with Art. 101(2) of the Family Act; outside Europe: for Canada: Art. 546, Art. 555 second sentence of the Québec Civil Code; for New Zealand: High Court, Judgment of 24 June 2010, Re Application by AMM and KJO to adopt a child, (2010) NZFLR 629, paras. 35 and 36 regarding Sec. 3 of the Adoption Act 1955, cf. also for Sec. 1C(2)(b) of the Property (Relationships) Act 1976, Sec. 60(1) of the Family Proceedings Act 1980).

(d) Other countries have begun to harmonise adoption requirements for couples and to rely on the duration of the relationship as the criterion determining the stability of the relationship, regardless of the type of relationship (cf. for Ireland: Sec. 37(5)(a), (b) of the Adoption Act 2010 in the version of Sec. 18(b) of the Adoption Amendment Act 2017 and Sec. 3(1)(a) of the Adoption Act 2010 in the version of Sec. 3 of the Adoption Amendment Act 2017; for the Netherlands: Art. 227(2) second sentence of the Civil Code; for Norway: Sec. 13(1) to (3) of the Adoption Act (No. 48) of 16 June 2017; outside Europe: for Australian states: Sec. 30(1)(b) of the Adoption Act 2000 New South Wales, Sec. 92(1)(c), Sec. 128 of the Adoption Act 2009 Queensland, Sec. 10(1)(b), Sec. 10A(b) in conjunction with Sec. 11(1) of the Adoption Act 1984 Victoria, Sec. 67(1)(a) of the Adoption Act 1994 Western Australia; for Canada: Sec. 62(1), Sec. 63(3) of the Child, Youth and Family Enhancement Act Alberta, Sec. 29(2), 35(1)(a) of the Adoption Act British Columbia, Sec. 199(2)(c), Sec. 202(1)(a) in conjunction with Sec. 179(1) of the Child, Youth and Family Services Act in conjunction with Sec. 10(1) of the Human Rights Code Ontario). 108

(3) Given that it does not allow for stepchild adoption in non-marital families, the current law certainly rules out adoptions in seemingly stable relationships of unmar- 109

ried couples, which then turn out to be short-term. However, if stepchild adoption is made possible for non-marital families, the stability assessment may be wrong in individual cases. In this respect, with a view to ruling out that a child is adopted by a step-parent in an unstable couple that breaks up after a short while, complete exclusion from adoption is indeed more effective than a provision that allows for more specific assessments with regard to stability expectations. However, in cases of stepchild adoption in marital families, which can also break up, the law accepts a stability risk (see para. 96 above). There is no need to decide whether the differentiation is necessary under constitutional law given that it is at least inappropriate.

dd) The challenged provision is not proportionate in the strict sense. 110

(1) To the extent that the protection of children that can be achieved by means of excluding non-marital families from adoption completely is more effective than the protection that can be achieved by a statutory adoption framework based on a specific stability prognosis in the individual case, this advantage is disproportionate to the disadvantages of complete exclusion from adoption. It does not compensate for the disadvantages that can arise for children in non-marital stepfamilies when adoption is denied even if the parents' relationship is stable and the adoption would generally be in the best interests of the child. The stepchild's protection from an adoption with detrimental impact can be effectively ensured by providing for a statutory adoption framework based on specific stability prognoses (see para. 104 *et seq*. above); within such a framework, the legislature is not prevented from expecting the same level of stability from unmarried couples that it legitimately expects from married couples. 111

(2) The fact that the indirectly challenged provisions nevertheless completely rule out stepchild adoption in stable stepfamilies can also not be justified on the basis of the legislature's authority to simplify and typify. 112

(a) Under certain circumstances, the legislature may use provisions drawing on types without violating the general guarantee of the right to equality merely because these provisions inevitably place some individuals at a disadvantage. 113

(aa) According to established case-law, the legislature does not have to be concerned with all conceivable individual cases under all circumstances, in particular when setting out a framework for mass phenomena (cf. BVerfGE 84, 348 <359>; 145, 106 <145 and 146 para. 106>; 148, 147 <202 para. 136>; established case-law). Even if the legislature sets out a framework for procedures that are evidently not mass administrative procedures, such as the assessment of adoption requirements, typifying provisions are not ruled out from the outset. This may be an option if uncertain circumstances or events must be addressed by a provision – such as the stability of a couple's relationship in the case at hand – that cannot be determined with certainty even in a detailed assessment of the individual case. It can contribute to legal certainty if the legislature uses types, tying legal consequences to constituent elements that can be more clearly defined and that – as representative criteria – cover 114

the uncertain circumstances or events as precisely as possible. In that respect, the more lenient means of an adoption framework relating to the duration of a relationship, which has been taken into account here, still is a provision drawing on types.

bb) However, unequal treatment that is linked to typification can only be constitutionally justified under certain conditions. 115

In particular, the legislature must not choose an atypical case as the model; rather, it must realistically use the typical case as standard (cf. BVerfGE 145, 106 <146 para. 107>; 148, 147 <202 para. 136>; established case-law). The hardship and injustices resulting from typification may merely affect a relatively small number of persons (cf. BVerfGE 84, 348 <360>; 145, 106 <146 and 147 para. 108>; established case-law). 116

In addition, the extent of unequal treatment must not be very intense (cf. BVerfGE 84, 348 <360>; 145, 106 <146 and 147 para. 108>; established case-law). 117

Furthermore, it is relevant whether the hardship is difficult to avoid; practical experiences made by administrative authorities are significant in that respect (cf. BVerfGE 84, 348 <359 and 360>; 145, 106 <146 and 147 para. 108>; 148, 147 <202 para. 136>; established case-law). Thus, the advantages arising from typification must be in adequate relation to the unequal treatment it necessarily entails (cf. BVerfGE 145, 106 <146 and 147 para. 108>; 148, 147 <202 para. 136>; established case-law). 118

(b) Based on these standards, the strict differentiation of adoption possibilities in stepfamilies on the basis of the criterion of marriage is not covered by the legislature's authority to use typification. 119

Strictly excluding non-marital families from stepchild adoption is not realistically based on the typical case. Non-marital families have become more and more common as another family type besides marital families. Today, there is no basis for assuming that a couple's relationship in a non-marital family is, in general, particularly fragile, and only rarely stable. Thus, the provisions do not merely affect a relatively small proportion of the wrong families, but will often affect stable stepfamilies where a lasting parent-child relationship develops and the adoption by the step-parent would be in the child's best interests. 120

Furthermore, the extent of unequal treatment is intense. The marital status of the children's parents determines whether the children's social parent can become their legal parent. This concerns fundamental requirements for their personal development. Also in this regard, typification on the basis of marriage, which is at issue in this case, is significantly different from limiting the costs covered by health insurance providers in relation to artificial insemination to married couples, which was found to be constitutional (cf. BVerfGE 117, 316 *et seq*.); that limitation does not take anything away from an already existing child, but concerns financial support to realise the desire to have children. 121

The hardship could be avoided without too much difficulty by not strictly excluding 122

non-marital stepfamilies from adoption. In this constellation, too, it would be possible to assess whether adoption is in the best interests of the child in the individual case and to use alternative indicators of stability, such as the duration of the relationship so far, instead of or in addition to the criterion of marriage. The fact that more resources are required to also assess adoption requirements for non-marital stepfamilies instead of categorically denying such applications on the basis of the current laws – as has been done so far – cannot justify the disadvantaging of the children concerned, especially since adoptions are always subject to an assessment of the individual case.

d) The decision enshrining marriage as a constitutional value in Art. 6(1) GG also does not justify the different treatment of stepchildren in marital and non-marital families. 123

aa) In Art. 6(1) GG, the Basic Law provides marriage and the family with special protection of the state. Thus, the Constitution not only guarantees marriage as an institution, but, as a binding value decision regarding the complete area of private and public law concerning marriage and the family, also requires special protection by the state (BVerfGE 124, 199 <224 and 225>; 126, 400 <420>). It follows that the state is subject to a prohibition on impairing marriage and the family and an obligation to advance these. In order to satisfy its mandate of protection, it is the state's special responsibility to refrain from taking any measure that might adversely affect marriage in any way and to advance it by suitable measures (BVerfGE 124, 199 <224 and 225>; 126, 400 <420>). Due to the constitutional protection of marriage, the legislature is, in principle, not barred from favouring it over other ways of life (BVerfGE 124, 199 <225>; 126, 400 <420> with further references). Provisions entailing preferential treatment of married couples with regard to maintenance, support and tax law can be justified on the basis of the shared lives of married couples (BVerfGE 124, 199 <225>; 126, 400 <420>). 124

If, however, advancing marriage involves disadvantaging other ways of life even though these are comparable to marriage with regard to life circumstances and legislative aims, merely referring to the requirement to protect marriage does not justify such a differentiation (BVerfGE 126, 400 <420> with further references; similar BVerfGE 124, 199 <226>). The state is not required to ensure an interval between marriage and other ways of life (*Abstandsgebot*) or to resort to disadvantaging (*Benachteiligungsgebot*) that could in themselves justify disadvantaging other ways of life. When fulfilling and setting out details of the constitutional mandate to advance marriage, an imperative of disadvantaging other ways of life vis-à-vis marriage enshrined in Art. 6(1) GG cannot be derived from the authorisation to favour marriage over other ways of life. Under constitutional law, there are no discernible reasons to infer from the special protection of marriage any obligation to treat other couples differently and grant them fewer rights (BVerfGE 124, 199 <226>). Rather, a special reason for differentiation is required that must be based on the difference between marriage and other ways of life and be particularly and factually relevant to the life 125

situation at issue. In this respect, merely referring to Art. 6(1) GG is not sufficient; rather, a sufficiently weighty factual reason is required that justifies disadvantaging other ways of life based on the respective subject matter of the provisions and the legislative aim (BVerfGE 124, 199 <226>; similarly BVerfGE 126, 400 <421>), and that goes beyond an abstract advancing of marriage (cf. BVerfGE 124, 199 <226>).

bb) In that respect, the challenged provision disadvantages a way of life that is comparable to marriage given that it strictly rules out adoption of stepchildren by their step-parents in non-marital families, even if these families are as stable as marital families. Based on the subject matter of the provisions and the legislative aim, there is no sufficiently weighty factual reason for ruling out stepchild adoption in non-marital families. 126

(1) The subject matter of the provisions is allowing stepchild adoption in marital families, on the one hand, and ruling it out in non-marital families on the other hand. There are indeed differences between married and unmarried couples. In particular, unmarried couples living together are different from married ones in that unmarried partners are not subject to binding provisions. Family law provisions concerning the relationship of unmarried couples (e.g. maintenance obligations of mother and father by reason of birth of a child pursuant to § 1615l BGB or provisions for care and contact under §§ 1626a, 1684 BGB) relate to joint parenthood, but do not create mutual responsibilities for the couple. Ending such a domestic partnership is also dependent only on the simple decision of one or both partners and not subject to any legal prerequisites or procedures. 127

(2) Measured against the aim of the provisions, however, unequal treatment of stepchildren in marital and non-marital families is not justified. It serves the aim of ruling out adoptions in unstable stepfamilies. It is based on the irrefutable presumption that non-marital stepfamilies are unstable and not permanent. However, the strictness of this presumption is not sufficiently tenable (see para. 97 *et seq.* above) and cannot justify disadvantaging a non-marital vis-à-vis a marital family situation without allowing for any exception. 128

4. Given that the exclusion of stepchild adoption disadvantages at least the children concerned in an unjustified manner and is thus unconstitutional for that reason alone, there is no need to decide in this case whether the disadvantaging of unmarried couples in relation to married couples under adoption law amounts to a violation of Art. 3(1) GG in itself, even though couples could go through with the planned adoption after getting married. 129

D.

I.

§ 1754(1) and (2) BGB and § 1755(1) first sentence and (2) BGB violate Art. 3(1) GG given that they rule out the severing of the legal relationship to the parent in cases of adoption by the parent’s spouse, and allow the child to obtain the status of joint 130

child, whereas a child cannot be adopted under any circumstances by the step-parent who is not married to the parent without this severing the child's legal relationship to the parent. Given that the challenged decisions are based on these unconstitutional provisions, they are also unconstitutional.

II.

If a statutory provision is unconstitutional, it is usually void (§ 95(3) in conjunction with § 78 first sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). Given that the legislature has several options for remedying the violation of the right to equality, the provisions are declared incompatible with the Constitution (cf. BVerfGE 133, 59 <99 para. 106>; established case-law). 131

III.

The legislature has to enact new provisions by 31 March 2020. Until the legislature has enacted new provisions, the current law must not be applied to non-marital step-families. Ongoing proceedings must be suspended until new provisions are enacted. 132

IV.

The decisions are reversed and the matter is remanded to the Ahaus Local Court. These proceedings must be suspended until new provisions are enacted if they do not become moot for other reasons. 133

V.

[…] 134

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Baer Britz Ott

Christ Radtke

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 26. März 2019 - 1 BvR 673/17

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