Germany

STRENGTHENING CHILDREN'S RIGHTS IN GERMAN FAMILY LAW

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Résumé

En 2007, le droit familial allemand a été l'objet de plusieurs propositions de réforme dont l'objectif a été le renforcement des droits de l'enfant. On peut citer l'exemple des nouvelles règles en matière d'obligations alimentaires qui sont effectives depuis le 1er janvier 2008, de même que la réforme du droit de la filiation. Ces réformes ont été adoptées sous l'impulsion de deux arrêts de la Cour constitutionnelle fédérale. Ainsi, la réforme du droit alimentaire, initialement prévue pour mai 2007, a du être repensée à la suite d'une décision de février 2007 sur l'inconstitutionnalité de certaines limites de temps imposées par cette réforme aux obligations alimentaires pour le bénéfice des enfants. En ce qui concerne la filiation, un autre arrêt de février 2007 ordonnait au législateur allemand de revoir les règles du droit judiciaire en la matière afin de permettre à un homme de savoir s'il est effectivement le père biologique d'un enfant. En réponse à cet arrêt, une proposition de réforme présentée par le Gouvernement fédéral a entré en vigueur en 1 Avril 2008. En marge de cette proposition de réforme, les tribunaux allemands ont rendu en 2007 une série de jugements mettant le principe de la protection de l'enfant au cœur des décisions imposant des restrictions au droit de garde. À la suite de plusieurs décès d'enfants provoqués par une négligence parentale, le législateur allemand a également renforcé le système de protection de la jeunesse par réforme du 24 Avril 2008.

I INTRODUCTION

In 2007, several proposals to reform German family law had the intention of strengthening children's rights. Under the new rules on maintenance law as of 1 January 2008, for instance, the welfare of the child becomes the prime consideration. Since minor children are unable to support themselves, they are deemed to be very much in need of special protection. Consequently, the claims of children are given a privileged status. Moreover, it is the aim of the new law to remove any discrimination against single parents, thus placing the rights of children born in and out of wedlock on an equal footing. The reform of the law

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on filiation proceedings may serve as another example of the strengthening of children's rights, in particular a child's right to so-called informational self-determination, as constitutionally protected in art 2, para 1 in conjunction with art 1, para 1 of the German Constitution (*Grundgesetz* – GG). Also, recent case-law has focused on the protection of the child against a misuse of the parents' responsibility in the law regarding parental custody. In all these cases, courts have been confronted with the task of striking a fair balance between the competing interests of children, parents and the state. The major constitutional provisions that come into play where this issue is concerned, are as follows: the protection of marriage and the family (art 6, para 1 GG); the natural right and duty of parents for the care and upbringing of their children (art 6, para 2, sentence 1 GG); and the state's obligation to supervise the parents' responsibility for their children, if necessary (art 6, para 2, sentence 2 GG).

The above-mentioned law reforms were spurred by two decisions of the Federal Constitutional Court: the reform of maintenance law, which, originally scheduled to enter into force in May 2007, needed a radical rethink following a Court decision on the discriminatory time-limits for childcare maintenance in February 2007 (II). Regarding filiation, in another February decision, the Court asked the German legislator to establish rules on filiation proceedings, thereby giving a man the right to know if he is, in fact, a child's biological father. In response to the Court's ruling, the law on filiation entered into force on 1 April 2008 (III). In addition to these legislative initiatives, in 2007, German courts rendered several decisions on the welfare of the child as a standard for imposing restrictions on parental custody (IV). Due to several incidents involving abused children or children who died due to their parents' negligence, the German legislator, on 24 April 2008, enacted a new law in order to improve child protection (V).

II THE REFORM OF GERMAN MAINTENANCE LAW REVISED

In June 2006, a Bill regarding the reform of German maintenance law was introduced by the Federal Government.[1] However, the legislature failed to pass the final Act in May 2007, as originally scheduled. Following a decision by the Federal Constitutional Court on 28 February 2007[2] that declared the difference in the duration of childcare maintenance for divorced spouses in s 1570 and for unwed mothers in s 1615l of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB)[3] unconstitutional, the original version of the Bill, which was not about to change the law in this respect, needed to be reconsidered. A new version of the Bill was thereafter drafted by the Federal Ministry of Justice, passed by the

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1 See Kroll, 'The Reform of German Maintenance Law', in B Atkin (ed) *International Survey of Family Law 2007* (Jordan Publishing, 2007) p 85.

2 Federal Constitutional Court (BVerfG), 28 February 2007, FamRZ (2007) 965 et seq.

3 The same applies to unwed fathers (s 1615l, para 4 BGB).

parliamentary parties on 25 October 2007 and finally enacted by the German Parliament (*Bundestag*) on 9 November 2007. It was also approved by the Federal Council on 30 November 2007 and – after being signed by the President – entered into force on 1 January 2008.

(a) Discriminatory time-limits for childcare maintenance

Background

Notwithstanding continuing criticism,[4] the original version of the 2006 Bill to reform the law regarding maintenance was not about to change the limitations of a single mother's maintenance claim in s 1615l, para 2, sentence 3 BGB, whereby maintenance payments were generally limited to a maximum period of 3 years and could only be extended in cases of undue hardship. It was postnuptial solidarity between former spouses that was considered to justify that, pursuant to s 1570 BGB, a divorced spouse could claim maintenance for as long as she or he could not support her or himself, on account of having to take care of a joint child. According to case-law, in general, a divorced spouse who took care of a child was not therefore obliged to take on any work outside the home until the child was 8 years old.[5] The Bill intended no more than a minimal harmonisation of these divergent provisions.[6] It was proposed, therefore, that the hardship clause contained in s 1615l, para 2, sentence 3 BGB be modified so that it would become easier for the court to establish an additional period of maintenance for unwed parents. In July 2006, the Bill's position was confirmed by the Federal Supreme Court (BGH)[7] ruling that the durational limit of a single mother's maintenance claim in s 1615l, para 2, sentence 3 BGB does not place illegitimate children at a disadvantage relative to legitimate children. On 28 February 2007,[8] however, the Federal Constitutional Court declared the difference in the duration of childcare maintenance as provided in s 1570 and s 1615, para 2 BGB unconstitutional.

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4 See Lüderitz/Dethloff, *Familienrecht* (2007), § 11, at 88; Menne, 'Regierungsentwurf zum Unterhaltsrechtsänderungsgesetz – Sachstand und Ausblick auf die geplanten Änderungen beim nachehelichen Unterhalt und beim Verwandtenunterhalt (2 Teil)', *Forum Familienrecht* (FF) (2006), 220, at 226 et seq; K Kroll (n 1 above), at 89 et seq; with regard to the former legal situation see Puls, 'Der Betreuungsunterhalt der Mutter eines nichtehelichen Kindes', *Zeitschrift für das gesamte Familienrecht* (FamRZ) (1998), 865 et seq; Peschel-Gutzeit/Jenckel, 'Gleichstellung von ehelichen und nichtehelichen Kindern – Altfälle', *Familie und Recht* (FuR) (1996), 129 et seq.

5 As a general rule, the parent is expected to take up a part-time job when the child has reached the age of 11, and a full-time job when the child is 15 years old. For details see Kroll (n 1 above), at 89 et seq.

6 Maintenance Law Reform Bill (Bill to reform maintenance law: "Entwurf eines Gesetzes zur Änderung des Unterhaltsrechts", 15 June 2006, BT-Drucks. 16/1830).

7 Federal Supreme Court (BGH), 5 July 2006, FamRZ (2006) 1362 et seq. For a comment on the decision, see Wever, FF (2006), at 253 et seq; Kroll (n 1 above), at 90.

8 BVerfG, 28 February 2007, FamRZ (2007) 965 et seq.

Different grounds for childcare maintenance unconstitutional

The case that came up to the Court was that of a single mother claiming maintenance pursuant to s 1615l, para 2 BGB because she had to care for her child, born out of wedlock in 1997. According to a local court's (*Amtsgericht*) decision in 1998, the father had paid maintenance to the mother until the child reached the age of 3, in accordance with s 1615l, para 2 BGB. After that period, ie in 2002, the mother pleaded for judgment against the father for the continuation of payments of €451 per month. The local court rejected the applicant's request on the grounds that, under s 1615l, para 2, sentence 3 BGB, only extraordinary circumstances would justify an extension. The court considered that, in the case at hand, the claimant had failed to provide proof of exceptional circumstances as required for the application of the hardship clause.[9] Pointing to the equality of children born in and outside of wedlock as required in art 6, para 5 GG, the Court found that the difference in the time periods for the duration of maintenance in s 1570 BGB, on the one hand, and s 1615l, para 2, sentence 3 BGB, on the other, violated the prohibition against discrimination in art 6, para 5 GG and were therefore unconstitutional.[10] Note that both s 1517O BGB and s 1615l BGB do not make provision for child support, but for maintenance granted to the parent who cares for the child. The Court stated that a parent's right to childcare maintenance has, in principle, its sole focus on the well-being of the child. It enables a parent to take care of a child in person rather than being forced to take up full-time employment. The maintenance granted to the parent who cares for the child is therefore closely connected to the individual requirements of the child. The Court held that the issue of whether and how maintenance claims should be limited in time is of major importance for the welfare of the child. Since a parent caring for a child born out of wedlock is generally obliged to work full-time once the 3-year period in s 1615l, para 2 BGB has expired, he or she has no alternative but to use non-parental childcare. Unlike single parents, divorced spouses are able to obtain maintenance at least until the child has reached the age of 8 years.[11] As far as parental day care is concerned, children born in wedlock are therefore privileged. However, although the Court found that the legislator is free to determine whether or not maintenance claims regarding care of a child should be of limited duration, it considered it necessary to apply the same standards for both legitimate children and children born out of wedlock.[12]

The Court further considered neither postnuptial solidarity (*nacheheliche Solidarität*) between former spouses nor the differences in the situations of married and cohabiting partners to justify the privileging of divorced spouses as far as the duration of maintenance is concerned. Rather, the Court held that the significant variations in non-marital cohabitation do not cause any

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9 Under appeal, the question as to whether s 1615l, para 2, sentence 3 BGB is constitutional was submitted to the Federal Constitutional Court. Until the Court has reached a decision on that issue, the *Oberlandesgericht* (Court of Appeal) suspended the proceedings.

10 BVerfG, FamRZ (2007), 965, at 968.

11 Cf n 5 above.

12 BVerfG, FamRZ (2007), 965, at 969.

differences in the parent-child relationship.[13] Both parents caring for legitimate, and those caring for illegitimate, children are entitled to the natural rights and duties of parents regarding the care and upbringing of children, as provided under art 6, para 2 GG. Unlike the Federal Supreme Court in its decision of 5 July 2006, the Federal Constitutional Court is of the opinion that marriage itself – as constitutionally guaranteed in art 6, para 1 GG – may not be seen as the main reason for the differences in the durational limits of maintenance obligations between divorced spouses and unwed parents. Taking into consideration that s 1570 BGB determines the duration of childcare maintenance according to the age of the child, the Court held that the grounds for this maintenance claim are primarily the interest and the well-being of the child who requires his or her parents' personal care. Consequently, art 6, para 5 GG requires the application of the same standard with regard to maintenance for the care of children born out of wedlock.[14]

Reform of the reform of s 1615 l, para 2 and s 1570 BGB

In response to the 2007 decision of the Federal Constitutional Court, the German legislature had to modify the Maintenance Law Reform Bill.[15] Under the proposed new law, all claims by parents – whether divorced or single – for childcare maintenance will, as a general rule, have a time-limit placed upon them. As a result of the reform, the rule relating to the childcare maintenance received by a divorced spouse is, in substance, identical to s 1615l, para 2 BGB. According to the revised form of s 1570, para 1, sentence 1 BGB, a divorced spouse caring for a child born within the marriage is entitled to maintenance for a minimum period of *3 years*. In contrast to the original version of s 1570 BGB, whereby full maintenance was generally ordered until the child had reached the age of 8 years,[16] the parent will now not be expected to take up gainful employment before the child has reached his or her 4th birthday. Under the new law, both in s 1570, para 1, sentence 2 BGB and s 1615 l, para 2, sentence 3 BGB the judge is given the power to prolong the 3-year minimum maintenance period if he or she considers it just and reasonable. When exercising this discretion, first consideration must be given to the welfare of the child. Section 1570, para 1, sentence 3 BGB expressly provides that existing childcare provisions must be taken into consideration. The parent is therefore expected to use non-parental childcare, provided that the child's well-being is thereby assured. By introducing that same 3-year time period in s 1570 BGB, basic childcare maintenance for divorced spouses and single parents has been placed on an equal footing, thus properly taking into account the fact that the needs of legitimate and illegitimate children in respect of their parents' care and attention are the same.[17] However, the new s 1570, para 2 BGB allows for a further extension of childcare maintenance specifically for divorced spouses, if

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13 BVerfG, FamRZ (2007), 965, at 970.

14 BVerfG, FamRZ (2007), 965, at 972.

15 'Formulierungsvorschlag der Koalitionsfraktionen' of 25 October 2007.

16 Cf n 5 above.

17 Caspary, 'Zur Verfassungswidrigkeit der unterschiedlichen Dauer des Unterhalts für eheliche und nichteheliche Kinder', *Neue Juristische Wochenschrift* (NJW) (2007), 1741, at 1742.

such an extension is just, taking into consideration the division of tasks during the marriage and the duration of the marriage. This new provision, which was introduced as a political compromise, is expressly aimed at granting maintenance for reasons of postnuptial solidarity. Even if it thereby successfully avoids the verdict of discrimination, its effect is to grant children whose parents were once married more favourable conditions for their upbringing than those who were born out of wedlock.

Quite apart from this differentiation, it is questionable whether the approach taken by the German legislature may be considered the best option with a view to giving single parents the same rights as divorced couples in the best interests of their children. An alternative solution might have been to create a central rule applying to both divorced spouses and single parents that not only harmonizes the maintenance claim period but also eliminates the other significant differences that continue to exist: first, the amount of childcare maintenance for divorced parents will still be calculated in accordance with the spouses' standard of living during the marriage. As far as maintenance of a single mother is concerned, ss 1610, para 1, 1615l, para 3, sentence 1 BGB, in contrast, provide that this maintenance should correspond to *her* previous standard of living. Taking into consideration that both divorced spouses and single parents caring for children should be compensated for the disadvantages resulting from the fact that they are unable to be gainfully employed, the standards used in the calculation of maintenance are not convincing.[18] Where parents have lived together, whether married or as cohabitants, the amount of maintenance ought to be calculated according to their prior standard of living during cohabitation. Only by enabling the caretaking parent to maintain his or her prior standard of living is he or she able to forego gainful employment and take care of the child.

Secondly, s 1579 BGB, which provides for the limitation, termination or even denial of maintenance to the divorced spouse in cases of exceptional hardship, directs the court to consider at all times whether limiting, terminating or denying a maintenance claim would run contrary to the child's (or children's) welfare. By contrast, s 1611 BGB, in dealing with the limitation or denial of maintenance for the single parent, makes no provision for the child's well-being. It would, therefore, appear reasonable to apply s 1579 BGB *mutatis mutandis* to the maintenance claims of single mothers.[19] Finally, it is worth mentioning that the differences between maintenance claims of divorced spouses and single parents can also work the other way round, ie to the

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[18] Maier, 'Comment on the decision of the Federal Constitutional Court of 28 February 2007', FamRZ (2007), 1076, at 1077; see also Maier, 'Vom Wert des Aufstockungsunterhalts', FamRZ (2005), 1509, at 1510.

[19] For an application of s 1579 BGB to childcare maintenance for single mothers, see Peschel-Gutzeit, 'Verwirkung des Unterhaltsanspruchs nicht verheirateter Eltern', *Familie, Partnerschaft und Recht* (FPR) (2005), 344, at 347 et seq; Wellenhofer, 'Die Unterhaltsrechtsreform nach dem Urteil des BVerfG zum Betreuungsunterhalt', FamRZ (2007), 1282, at 1287; for a different opinion proposing a different interpretation of the word 'reasonableness' in s 1611 BGB, see Menne, 'Der Betreuungsunterhalt nach § 1615l BGB im Regierungsentwurf zum Unterhaltsrechtsänderungsgesetz', FamRZ (2007), 173, at 177.

detriment of a divorced spouse. To give an example, unlike divorced spouses who are – at least as a general rule – given the freedom to stipulate the economic consequences of a divorce,[20] single parents cannot agree to a waiver of their right to childcare maintenance.[21] Consequently, single parents are, in fact, protected against contracts that are essentially one-sided and thereby unreasonably place the waiving party and thus the welfare of the child at a disadvantage.[22]

To sum up, the classification of single parents' maintenance claims as an obligation to maintain relatives (ss 1601–1615 BGB) turns out to be the main reason for the remaining differences between the legal position of single parents, on the one hand, and divorced spouses, on the other. Taking into consideration the fact that s 1615l BGB as well as s 1570 BGB deal with parental responsibility for childcare, the German legislature may be criticised for stopping short of providing a *central rule* on childcare maintenance that applies to both divorced spouses and single parents. An alternative solution that has been proposed[23] would be to categorise childcare maintenance as *part of child support*, as provided under s 1610 BGB,[24] thereby giving the child a claim in their own right. Under this solution, it would no longer be the parent caring for the child who is granted the right to childcare maintenance according to s 1570 BGB and s 1615l, para 2 BGB, respectively. Rather, the debtor would, as part of his or her obligation to pay child support, also be responsible for the provision of childcare maintenance. When the amount is established according to s 1610 BGB, this solution proposes that the loss of income resulting from the fact that the parent caring for the child was not able to be gainfully employed is taken into account.[25] Such a solution would guarantee the equality of children born in and outside wedlock as required in art 6, para 5 GG. Childcare would be provided without giving consideration to the status of the child, whether legitimate or illegitimate.[26] From a psychological point of view, debtors are more willing to pay child support than to meet maintenance obligations in respect of a divorced spouse or the mother of an illegitimate child.[27] However, as such a solution would not be consistent with the general principle enshrined in German maintenance law, whereby a creditor's right to claim support is not

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[20] It should be noted that agreements waiving spousal support pursuant to s 1570 BGB are not indefinitely enforceable, following a 2004 decision of the Federal Supreme Court. For details see Dethloff/Kroll, 'The Constitutional Court as Driver for Reforms in German Family Law' in A Bainham (ed) *International Survey of Family Law 2006* (Jordan Publishing, Bristol, 2006) 217.

[21] See s 1614, para 1 and s 1615l, para 3, sentence 1 BGB.

[22] Some demand, therefore, that provisions which are considered to be disadvantageous to the spouse who has agreed to run the household and to care for the children be prohibited; cf Schumann, 'Zur Gleichbehandlung ehelicher und nichtehelicher Eltern-Kind-Verhältnisse', FF (2007), 227, at 229; Maier (n 18 above), at 1077.

[23] Maier (n 18 above), at 1077; Schwab, 'Brühler Schriften zum Familienrecht', Bd 7 (1992), at 47, 56.

[24] Maier, ibid.

[25] Ibid.

[26] Ibid.

[27] See Schwab (n 23 above), at 47, 56; Willutzki, 'Die neue Rangfolge im Unterhaltsrecht – ein Beitrag pro Reform', FPR (2005), 505, at 507.

allowed to be used to meet another person's needs[28] – as would be the case regarding child support compensating the childcaring parent for loss of income – it is unlikely to be adopted in the near future.

(b) Ranking of single parents' maintenance claims

The ranking of maintenance claims made by single parents who care for a child turned out to be one of the most contested parts of the maintenance law reform. In cases where the debtor is not able to satisfy the needs of all maintenance creditors, as is more often the case than not, the ranking of the claims is of the utmost importance. Claims in lower ranks will often not receive any payment at all. The real bone of contention here, and as it turned out, the main object of criticism, was the *equal ranking* of divorced spouses and single parents as recommended by the 2006 Bill.[29] It was proposed, therefore, to change the original version of the Bill to allow divorced spouses to take preference over single parents as regards maintenance claims. However, the decision of the Federal Constitutional Court of 28 February 2007[30] made it necessary to rethink this proposed order of priority. Note that the Court did not explicitly decide on the question as to how maintenance creditors should be ranked. But since the Court declared the distinction between married and unmarried parents with regard to the duration of childcare maintenance unconstitutional, it is suggested that, consequently, any discrimination against single parents with regard to their ranking position ought to be removed.[31] If the claims of single parents were to be ranked below those of divorced spouses, the amount awarded to them would in many cases not be sufficient to maintain them at subsistence level. In this scenario, there is the concern that the provision of care for children born out of wedlock can no longer be guaranteed and that, as a consequence, the equality principle as enshrined in art 6, para 5 GG is violated.[32] We must not forget that the decision whether to be born within wedlock or outside is not the child's. Consequently, the child should not suffer disadvantages arising from factors over which he or she has no influence.[33] Finally, since the main ground for childcare maintenance is

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28 Martiny, 'Unterhaltsrang und –rückgriff: Mehrpersonenverhältnisse und Rückgriffsansprüche im Unterhaltsrecht Deutschlands, Österreichs, der Schweiz, Frankreichs, Englands und der Vereinigten Staaten von Amerika' (1995), 338 et seq.

29 It was the aim of the 2006 Bill to privilege the claims of minor children, i e to rank them first. As these children are unable to maintain themselves, the expectation that they should share assets was no longer deemed to be reasonable. The Bill further recommended that creditors caring for children should come next in order of priority. This means that every spouse, former spouse, single parent or cohabitant caring for a child should occupy the same rank under the proposed new law. It was proposed to rank spouses divorced following a long-term marriage alongside those who have care of children. Any other creditor who did not fall into one of these categories should be ranked lower. For further details, c f Kroll (n 1 above), at 87 et seq.

30 BVerfG, 28 February 2007, FamRZ (2007), 965 et seq.

31 See Willutzki (n 27 above), at 507.

32 Cf Born, 'Comment on the decision of the Federal Constitutional Court of 28 February 2007', FamRZ (2007), 973, at 974.

33 Willutzki, 'Neuordnung des Unterhaltsrechts', *Zeitschrift für Rechtspolitik* (ZRP) (2007), 5, at 8.

parental responsibility, postnuptial solidarity cannot serve as a reason to justify the difference in the ranking positions of single parents and divorced spouses.[34] The responsibility that former spouses have towards each other, in contrast, can justify only some of those grounds for post-divorce maintenance, to which single parents are not entitled anyway, eg old age (s 1571 BGB) or sickness (s 1572 BGB).[35] Furthermore, post-divorce solidarity may be taken as an argument lending legitimacy to calls for the claims of spouses divorced following a long-term marriage to be ranked alongside claims of those who look after children.[36]

Reflecting these arguments, the new law as per 1 January 2008 provides for a solution that harmonizes with the Court's opinion. According to s 1609, no 1 BGB, the claims of minor children as well as those of adult children – if unmarried, not yet 21 years old, still living with their parents and attending school – are ranked first. Adult creditors caring for children – whether single parents, divorced or spouses of a new marriage – come next in order of priority (no 2). Spouses divorced following a long-term marriage are to be ranked alongside those who look after children. Any other divorced spouse who does not fall into the category mentioned in no 2 is ranked third. Any other child not covered in no 1 is ranked fourth. Maintenance claims made by any other descendant or relative of the debtor are ranked lower. What is worth mentioning is the fact that, unlike the original version of the 2006 Bill, in order to define what constitutes the 'long duration' of a marriage, s 1609, no 2 BGB refers to the factors listed in s 1578b BGB. Even though the law still leaves the problem to the court's discretion, it indicates the significant criteria the court ought to take into account. The legislative purpose behind this is to allow maintenance creditors – mostly women – who during their marriage have taken care of the children and household to be compensated for the disadvantages resulting from the fact that they are unable to support themselves after divorce.

III FILIATION

(a) Protecting the child's right to 'informational self-determination'

In its decision of 13 February 2007,[37] the Federal Constitutional Court asked the German legislator to establish rules on 'proceedings to verify biological filiation' thus giving a man the right to find out whether a child is his or not. It was the Court's opinion that art 2, para 1 GG in conjunction with art 1, para 1 GG requires that the biological parent of a child be determined without

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[34] For a different opinion, see Kirchhof, 'Förderpflicht und Staatsferne', FamRZ (2007), 241, at 246.

[35] Cf Schwab, 'Koinzidenz – Zur gegenwärtigen Lage der Unterhaltsrechtsreform', FamRZ (2007), 1053, at 1055; Born (n 32 above), at 974; Klinkhammer, 'Die Rangfolge der Unterhaltsansprüche in der gesetzlichen Entwicklung', FamRZ (2007), 1205.

[36] See the information for practice ('Praxishinweis'), FuR (2007), at 316.

[37] BVerfG, FamRZ (2007), 441 et seq.

establishing any of the legal consequences that are inherent in this status. In this regard, paternity proceedings in s 1600 BGB et seq that allow a father to seek a rebuttal of paternity are not deemed an appropriate means of meeting a man's right to know whether a child is his or not.[38] The reasons are as follows: first, the knowledge of his biological fatherhood is not the primary aim of a father challenging his paternity in paternity proceedings. Rather, a man who is presumed to be the legal father of the child according to s 1592 BGB, ie the husband of the woman giving birth to the child (no 1) or the man who has acknowledged his paternity (no 2), is thereby intending to cancel his legal status as father if it is proven that he is not the biological parent of the child.[39] Secondly, if the presumed legal father is not actually the biological parent of the child, a court order will have far-reaching consequences for the child. It cuts off the line of filiation and therefore terminates any parental obligation as regards child support payments, custody or visitation, for instance. Due to these consequences, in order to protect the welfare of the child in particular, a paternity suit needs to meet strict requirements: an action must be brought within a 2-year time-limit (s 1600b BGB). Moreover, according to s 1600c BGB, the father must rebut the presumption of fatherhood as provided under s 1592 BGB. In order to initiate proceedings he is therefore obliged to prove the existence of circumstances that are weighty enough to give rise to his doubts concerning fatherhood (*Anfangsverdacht*). Thirdly, if there is a close parent-child relationship, it may well be that a father who finds out that he is not the child's progenitor may nevertheless prefer to uphold his status as legal father according to s 1592 BGB. Here one might also think of a father wishing to exclude all possible doubt regarding fatherhood before thinking about taking legal action. Under all of these aforementioned circumstances, a father might want to know about his fatherhood without being forced to file a paternity suit.

According to the Court's ruling, the legislator is free to choose how the father's right to know whether a child is his or not is realised. However, in doing so, the legislator is barred from allowing medical expertise to be obtained covertly in order to determine who the biological parent is. The Court ruled that proving paternity by DNA testing made without the consent of both the child and the mother violates the child's right to 'informational self-determination' as protected by the Constitution.[40] It thereby confirmed two 2005 judgments of the Federal Supreme Court, which ruled against the admission of covertly gathered DNA evidence in paternity suits.[41] Note that according to art 2, para 1 GG in conjunction with art 1, para 1 GG, it is a person's exclusive right to dispose of personal data, ie inter alia, information about one's genetic make-up.[42] However, since the father's right to know if a child is his is also constitutionally protected, the Court was confronted with a considerable

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38 Cf BVerfG, FamRZ (2007), 441, at 446.
39 Cf BVerfG, FamRZ (2007), 441, at 445.
40 Cf BVerfG, FamRZ (2007), 441, at 443.
41 For a comment on these judgments, see Blauwhoff 'Motherless Paternity Tests and Minors in Europe' [2005] International Family Law Journal (IFLJ) 146.
42 BVerfG, 14 December 2001, NJW (2001), 879, at 880.

dilemma: determining the biological parent of a child necessitates the use of genetic evidence obtained from the child, thus making a violation of the child's right to informational privacy inevitable. Hence, absolute protection of the child's constitutional rights would make it impossible for a man to verify his fatherhood. Moreover, the mother, in her position as the child's legal representative, would be given the opportunity to deny the father his right to know whether the child is actually his. Bearing these factors in mind, the Court concluded that the only appropriate solution to the diverging interests of mother, child and father would be the establishment of rules for 'proceedings to verify biological filiation'.[43]

(b) Determination of Paternity Act

In response to the Court's decision, on 16 May 2007 a Bill regarding the genetic examination of children in order to establish filiation[44] was introduced by the Federal Council of Germany (*Bundesrat*). The main aim of the Bill was to entitle the man who is presumed to be the father of a child pursuant to s 1592 BGB to bring an action against the child in order to obtain the child's consent to DNA testing. At the same time, the father can claim his right to know whether the child is his or not in the context of a paternity suit. Irrespective of the proposals made by the *Bundesrat*, on 11 July 2007 a different Bill regarding rules on 'proceedings to verify biological filiation' was brought in by the Federal Government (*Bundestag*).[45] Both proposals were discussed during a hearing on 12 December 2007 by a panel of experts. Since the latter goes beyond the proposal of the *Bundesrat* and is said to correspond to the Court's ruling, it was taken as a basis for the new law as enacted on 26 March 2008.[46] It will also be the version to be discussed in the following.

The new law's main purpose is to allow parents as well as children to obtain a declaration of filiation from the court without being forced to meet the strict requirements of a paternity suit in s 1600 BGB. Henceforth, in doing so, thanks to the new law it will no longer be necessary for men to procure medical expertise that has been illegally obtained by DNA testing without the consent of the child. The law provides for a statutory basis for the determination of filiation but without establishing any legal consequences that are inherent in this status. According to s 1598a, para 1 BGB, the father (no 1), the mother (no 2) and the child (no 3) are entitled to have their consent requested for a blood test[47] in order to confirm or establish parenthood. If these proceedings would cause exceptional hardship to the child, such as worsening an illness the child is suffering from or advancing suicidal tendencies, they could be suspended for a

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43 BVerfG, FamRZ (2007), 441, at 444.

44 'Entwurf eines Gesetzes über die genetische Untersuchung zur Klärung der Abstammung in der Familie', BT-Drucks. 16/5370.

45 'Entwurf eines Gesetzes zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren'. The text of the Bill (in German) can be found in FPR (2007), 403 et seq.

46 'Gesetz zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren', BGBl. I 2008, 441.

47 In exceptional cases, a buccal swab may also be taken.

given period of time (s 1598a, para 3 BGB). If a person listed in s 1598a, para 1 BGB withholds their consent, the consent may instead by supplied by the family court if so requested (s 1598a, para 2 BGB).[48]

Other than those already mentioned, the Bill provided for further modification of the rules on paternity proceedings in s 1600 BGB et seq. Since a rebuttal of the presumption of paternity by the father has far-reaching consequences for the child, it was the aim of the Bill to make the initiation of paternity claims more difficult, thus protecting the welfare of the child. Hence, the Bill's purpose was to offer a father who entertains considerable doubts concerning his fatherhood the incentive to bring 'proceedings to verify biological filiation' instead of initiating a paternity suit. Therefore, s 1600 BGB in its original version was proposed to be extended by para 5 providing for a hardship clause on behalf of the child. If a judgment decreeing that the claimant was not the legal father of the child seemed to be unreasonable with regard to the well-being of the child (*erhebliche Beeinträchtigung des Kindeswohls*), the father's claim according to s 1600, para 1 BGB should be dismissed (s 1600, para 5, sentence 1 BGB-E). Where extraordinary child-related circumstances were of a temporary nature only, the father would be free to initiate, once more, paternity proceedings at such a time when the child was no longer expected to suffer bodily or mental harm as a result (s 1600, para 5, sentence 2 BGB-E). However, in the cause of the final legislative proceedings, the introduction of such a hardship clause was not deemed necessary. With regard to the welfare of the child, it should be noted that the application of the hardship clause in s 1600 para 5 BGB-E would have required the taking, in court, of extensive evidence regarding possible threats to the child's health.[49]

As far as the time-limit prescribed in s 1600b BGB is concerned, attention should be paid to the proposed amendment of para 7. Note that according to s 1600b, para 1 BGB, a suit to challenge paternity must be filed within 2 years of the father learning of circumstances that would seem to argue against his paternity. According to the Bill, the statutory 2-year period for the initiation of a paternity suit should recommence if the father or the child established, as a result of DNA testing that the claimant was not the father of the child. However, the proposed recommencement of the time-limit required that the rebuttal of legal paternity did not run contrary to a minor child's best interests. The question as to when a paternity suit would be unreasonable was said to be left to the court's discretion. It would have been up to the judge then to take the individual parent-child-relationship as well as the child's emotional stress into consideration. However, it is appreciated that the proposed recommencement of the statutory 2-year time limit eventually did not become law. If it had entered into force the father would have been given the right to seek the rebuttal of paternity for an unlimited time. Consequently, paternity proceedings themselves would have run contrary to the welfare of the child, as they would

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48 Each of the persons listed in s 1598a, para 1 BGB is entitled to demand such a replacement of consent.

49 Cf Klosinski, 'Ist der Anspruch auf Abstammungsabklärung und anschließender Vaterschaftsanfechtung dem Familienwohl förderlich?', FPR (2007), 385, 389.

have jeopardised an existing parent-child relationship.[50] Note that the child's interest in preserving his or her social and personal environment is constitutionally guaranteed in art 6, para 1 GG.[51] It is difficult to understand why a father who, due to the existence of substantial evidence, doubts that the child originates from him should not be asked to comply with the 2-year time limit set for the filing of a paternity suit.[52]

Providing for rules on 'proceedings to verify biological filiation' that enable a party to obtain a declaration of filiation without facing any of the legal consequences that are inherent in this status is unique in Europe.[53] There is one aspect here open to criticism: under the new law the court is only allowed to determine whether the man who is presumed to be the father of the child according to s 1592 BGB is the genetic father or not. However, if the man is not the father, the question as to who is the biological father of the child remains unanswered. Satisfying the interests of the legal father but not the legitimate interests of the child regarding parentage is, therefore, considered one-sided.[54] In addition, some critics suggest that apart from the parties listed in s 1598a, para BGB, other persons, in particular the genetic (but not legal) father ought to be entitled to file filiation proceedings.[55] Note that the Bill explicitly emphasised that the biological father is barred from claiming filiation, and thus directed him to initiate a paternity suit (s 1600 BGB et seq). Some critics have argued, however, that denying the man who considers fatherhood possible the right to obtain a declaration of filiation according to s 1598a, para BGB forces him to obtain a covert – ie illegal – paternity test.[56] It was therefore proposed that the genetic father should at least be entitled to file filiation proceedings if the court has dismissed the legal father's claim according to s 1598a, para 1 BGB.[57]

IV PARENTAL CUSTODY

(a) Welfare of the child as standard for restrictions

Under German law, the family court is entitled to take the measures required to fend off threats to the child's physical and mental welfare that are caused by a

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[50] Cf Frank/Helms 'Kritische Bemerkungen zum Regierungsentwurf eines "Gesetzes zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren"', FamRZ (2007), 1277, at 1278; Klinkhammer, 'Der Scheinvater und sein Kind – Das Urteil des BVerfG vom 13.2.2007 und seine gesetzlichen Folgen', FF (2007), 128, at 130.

[51] Cf BVerfG, FamRZ (2007), 441, at 445.

[52] Cf Frank/Helms, (n 50 above), at 1280; Willutzki, 'Heimliche Vaterschaftstests – Anstoß für den Gesetzgeber', ZRP (2007), 180, at 184.

[53] See Frank/Helms, (n 50 above), at 1278.

[54] For a critical opinion, see Frank/Helms, ibid.

[55] Cf Muscheler, 'Die Zukunft des heimlichen Vaterschaftstests', FPR (2007), 389, at 391; Frank/Helms (n 50 above), at 1279.

[56] Cf Muscheler, ibid.

[57] Another requirement would be that the genetic father's paternity claim according to s 1600, para 1 BGB be dismissed due to the existence of a close relationship between the legal father and the child (s 1600, para 1, no 2 BGB). For details see Frank/Helms (n 50 above), at 1279.

misuse of parental custody, whether through neglect of the child, through a failure that cannot be attributed to the parents or through the conduct of a third person if the parents are not willing or able to avoid the aforesaid threats (s 1666, para 1 BGB). Consequently, according to art 6, para 2, sentence 2 GG, whereby the state is constitutionally obliged to ensure that the parents' right and duty to care for the child is properly exercised, the court is – as a last resort[58] – entitled to restrict parental custody.[59] It is therefore up to the court to determine whether the interference with the parents' right to custody is an appropriate means to protect the well-being of the child.[60] However, in exercising its discretion the court is only permitted to entail a separation of the child from the parents if the danger may not be otherwise averted, ie through public aid for instance (s 1666a, para 1 BGB). Pursuant to s 1666a, para 2 BGB, before the decision is made to deprive parents of their custody, it must be shown that other measures have turned out to be unsuccessful or, with due regard to the best interest of the child, insufficient. Where the parents had joint custody but only one of them is deprived of custody, the other parent will have sole custody of the child unless he or she is not deemed able to cope with the responsibility.[61] If neither maintains custody, the care for the child is entrusted to a curator appointed by the family court.[62]

(b) Schooling

In recent years, courts have repeatedly had to deal with parents who did not allow their children to attend a public school but preferred to home-school them for religious reasons. In this respect, the Federal Supreme Court in its decision of 17 October 2007 regarded such behaviour as a misuse of parental custody according to s 1666, para 1 BGB. The Court stated that, in order to protect the welfare of the child, the parents must be deprived of their joint custody and the care for the child entrusted to a curator. The case that came up before the Court was that of believing Baptists coming to Germany as late repatriates from Eastern Europe who did not allow their two children to go to elementary school in Germany. By judgment of the trial court, the parents were deprived of their custody as far as the schooling of their children was concerned, and a curator was entrusted with their care in this regard. According to the Supreme Court's reasoning, the parents' right to care for their children as constitutionally guaranteed in art 6, para 2, sentence 1 GG ranks behind the interests of their children in the matter of school attendance. In this respect, the Federal Constitutional Court has already ruled that the public interest requires the state to prevent the creation of parallel societies.[63] Practising tolerance is considered to be one of the main tasks elementary schools must perform. The Court held that this interference with the parents'

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58 For further measures the court can take, see Lüderitz/Dethloff (n 4 above), § 13 at 103.
59 Cf Lüderitz/Dethloff, ibid, at 102.
60 Cf Palandt/Diederichsen, 'Bürgerliches Gesetzbuch' (annotated) (67 edn, 2008), § 1666 at 31.
61 Cf Schwab, *Familienrecht* (2007), at 643.
62 For details concerning curatorship, see Schwab, ibid.
63 Cf BVerfG, 29 April 2003, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 2003, 1113; decision of 31 May 2006, FamRZ (2006), 1094, at 1095.

right to care for their children was necessary in order to promote the formation of responsible and emancipated citizens at school. Members of denominations or other religious groups must therefore accept that, in school, their children are exposed to the dominant ideal of a pluralistic society in Germany. Unless attending school causes mental harm to a child, the Court found that parents do not have the right to home-school their children.

On a European level, the restriction of parental custody with regard to compulsory schooling can be seen as an interference with the parents' right to have their family life respected, as guaranteed by Art 8(1) of the European Convention on Human Rights, unless this interference is 'in accordance with the law', in pursuance of an aim or aims that are legitimate under para 2 and can be regarded as 'necessary in a democratic society'. The European Court of Humans Rights (ECtHR) considered, in its decision of 5 February 2007, the last-mentioned requirement to be fulfilled:[64] the case that came up to the Court was that of a German mother claiming that restrictions on her parental custody and the separation from her daughter by force violated the Convention, Art 8 in particular. Unlike the cases regarding home-schooling, it was the mother's aim to secure her daughter's attendance at an ordinary nursery school. However, the competent German authorities were of the opinion that the child, who displayed behaviour that was clearly autistic, should be sent to an institution capable of meeting her needs, though this decision restricted the mother's custody in respect of these issues according to ss 1666, 1666a BGB. The ECtHR held that the contested interference with the mother's right to have her family life respected, as guaranteed by Art 8(1) of the Convention, was 'necessary in a democratic society'. In determining what constitutes 'necessary in a democratic society', the Court held that the best interest of the child is of crucial importance. Moreover, the Court considered its task to be a review, in the light of the Convention, of the decisions taken by the domestic authorities. In applying these standards, the Court found that the German courts' decisions based on the consideration that the mother was endangering her daughter's mental welfare, could be understood to have been made in the child's best interest. The separation of mother and child and the placement of the daughter in an institution individually educating children with autistic behaviour were considered to be a 'measure of last resort' that became necessary on account of the mother's insistence on sending her daughter to an ordinary nursery school. The Court came to the conclusion that in the circumstances of the present case the German courts based their decisions, which interfered with the mother's right to have her family life respected, on relevant and sufficient grounds and struck a fair balance between the competing interests.

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[64] ECHR, 5 February 2007 (*Köhler v Germany*), no 1628/03.
The decision is available in English at http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=k%F6hler&sessionid=7880766&skin=hudoc-en.

(c) Breaking off life-supporting measures

Regarding restrictions of parental custody, one final case is worth mentioning. On 24 May 2007, the Court of Appeal in *Hamm* had to rule on the parents' decision to discontinue the life-supporting measures for their severely disabled child, who was in a coma, thus letting the child die.[65] The trial court, in restricting the parents' custodial right to decide on their child's health care and appointing a special curator to deal with these issues, was of the opinion that the parents were endangering the child's welfare and misusing their right to care for the child. The Court of Appeal, on the contrary, held that in light of the fact that the child was not expected to ever regain consciousness or to communicate with other persons, the parents had come to a responsible decision by stopping the life-supporting measures. The Court stressed that no other reasoning was required since the parents' decision would probably cause the child's death. Taking into account a person's right to humane medical treatment, the Court considered the parents' decision to be in the child's best interest. However, despite the Court's clear ruling it seems at least questionable whether parents ought to be allowed to decide on the termination of life-supporting measures.[66] First, many parents may not be deemed competent to correctly assess the full medical situation. Secondly, from a psychological perspective, parents who have to make a decision about the life or death of their child are often thrown into a mental crisis and consequently not able to reach a rational decision that is in their child's best interest.[67] Thirdly, taking into account the Supreme Court's judgment on the custody of persons of full age, it has to be asked whether the Court's considerations do not also apply to the case at hand. On 17 March 2003,[68] the Federal Supreme Court ruled that a curator's refusal of life-supporting measures needs to be confirmed by a guardianship court, unless such measures are no longer indicated, possible or reasonable. The Court considered the guardianship court's permission necessary to uphold the cared-for person's decision as completely as it possibly can. Although the approach in cases concerning minor children should take into account the fact that such cases do, in fact, differ from those involving incompetent adults, its reasoning should aim to be consistent with that used in such cases.

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65 Cf OLG Hamm, NJW (2007), 2704 et seq.

66 For an opinion supporting the parents' competence on this issue, see Palandt/Diederichsen (n 60 above), § 1626 at 14.

67 See Balloff, 'Zum Teilentzug der elterlichen Sorge für ein im Koma liegendes Kind', NJW (2007), 2705.

68 BGH, 17 March 2003, NJW (2003), 1588 et seq.

V ACT ON THE IMPROVEMENT OF CHILD PROTECTION

On 24 April 2008, a new law on the improvement of child protection was adopted by the German legislature.[69] It is based on a Bill that was introduced by the Federal government in August 2007. The aim of the law is to protect the welfare of children who are neglected, abused or disturbed. To that end, family courts are given the power to act at an early stage. Under the new law, in cases where the welfare of a child is in jeopardy, family courts will be able to exert their influence over parents in the matter of requesting public aid. The restriction of parental custody is expressly considered to be a last resort with regard to the protection of children. In order to improve child protection, the law modifies s 1666, para 1 and para 3 BGB. Unlike the original version of para 1, the new law no longer requires that threats to the welfare of the child be caused by a misuse of parental custody. Since proving the parents' failure to care for their child tended to be highly difficult, the Bill proposed to reduce the obstacles to the family court's intervention by cutting the relevant requirements. The new legal situation may be explained using the example[70] of a mentally disturbed child on whom the parents no longer have any educational influence. The question as to whether (and how) the threat to the child's welfare was caused by the parents' failure or was due to health reasons is often impossible to answer. Finding a reasonable solution for those cases is considered to have been rendered easier under the new law. However, it is open to doubt whether the new version of s 1666, para 1 BGB is an appropriate means of allowing family courts to act at an early stage. One criticism that could be levelled is that the other requirements in s 1666, para BGB, for example the parents' unwillingness to avert threats to their child, are not deemed a matter for modification.[71]

Moreover, s 1666 BGB ought also to be modified as far as the legal consequences are concerned. Note that under current law, the family court is allowed to take the measures necessary to avert any threats to the well-being of the child. However, until the reform, s 1666 BGB did not define which measures the court was empowered to take. That is the reason why courts in most cases opted for a restriction on parental custody. According to the Bill, the revised form of s 1666, para 3 BGB exemplifies the further steps that may be taken to avert a threat to the child. Under the new law, the court is entitled to order the parents to request public aid, ie child and youth welfare services or health services, for instance. Furthermore, the court is entitled to order the parents to observe compulsory schooling. If deemed necessary, it may also restrict parental custody. If the court has refrained from ordering a specific measure

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[69] 'Gesetz zur Erleichterung familiengerichtlicher Maßnahmen bei Gefährdung des Kindeswohls'. The text (in German) is available at http://www.bmj.de.

[70] Example taken from a press release of the Ministry of Justice dated 11 July 2007. The text (in German) is available at www.bmj.de.

[71] Cf Röchling, 'Neue Aspekte zu Kinderschutz und Kindeswohl? – Zum Entwurf eines "Gesetzes zur Erleichterung familiengerichtlicher Maßnahmen bei Gefährdung des Kindeswohls"', FamRZ (2007), 1775, at 1777.

pursuant to s 1666 BGB, according to the new s 1696, para 3, sentence 3 BGB, it is obliged to regularly reconsider its decision. Another important aspect favoured by the Bill was the introduction of a 'round table', thus motivating parents and the competent court to discuss threats to the welfare of the child and to consider possible solutions (new s 50f FGG). The child as well as the competent Youth Office (Jugendamt) should also participate. The court is confronted with the task of coordinating the meeting, of indicating any relevant problems, of working towards solutions and encouraging co-operation between the parents and the Youth Officer. Another aim of the Bill was to expedite proceedings where children are involved. The new law therefore provides that the family court should hold an early hearing to avoid a conflict between the parents from culminating. However, despite all of these proposals the Bill avoided redefining the 'threats' to the welfare of the child according to s 1666, para 1 BGB. The wording of s 1666, para 1 BGB has therefore been criticised for ignoring the latest research findings as regards the question of when the child's well-being can be assumed to have been placed in jeopardy.[72]

VI CONCLUSION

In view of the 2008 law reforms as well as of recent case law, there is no doubt that children's rights in Germany are becoming increasingly important and are being consequently strengthened by law. Several incidences of abused children or children who died due to negligence and abuse by their parents have provoked an ongoing discussion concerning how children could be protected against the failure and incompetence of their parents. Due to the fact that children's rights do not appear in the Constitution, a constitutional amendment is currently under discussion. While some recommend the introduction of specific fundamental rights for children, others want to give children rights that may be claimed against their parents.[73] Yet others do not agree that the Constitution needs to be amended, but deem the application of art 6 GG a sufficient means to protect the well-being of children. Whatever solution is eventually adopted, a fair balance between the competing interests of children, parents and the state must be struck. Even if the law is not about to be changed at all, an alliance at federal, state and municipal level has already been built, which seeks to provide for the better protection of children in Germany.

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[72] Cf Röchling, ibid, at 1779.

[73] For a critical view of the different positions, see Kirchhof, 'Kinderrechte in der Verfassung – zur Diskussion einer Grundgesetzänderung', ZRP (2007), 149 et seq.