The Reform of German Child and Parent Law on the Background of European Legal Development

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On 1 July 1998, three statutes came into force in Germany introducing a fundamental reform of the law on parents and children: the Children Law Reform Act of 16 December 1997 (KindRG), the Family Assistance Act of 4 December 1997 and the Maintenance of Minors Act of 6 April 1998 (KindUG). Three months before, on 1 April 1998, another statute had entered into force which also affected the child and parent law, namely the According of Equal Status in Matters of Inheritance Act of 16 December 1997. These statutes were enacted by the legislator with the intention:

(a) to abolish the remnants of unequal treatment of legitimate and illegitimate children;
(b) to improve the rights of children in general; and
(c) to strengthen the legal position of the parents and to protect them from unnecessary interference by the state.

This reform has in part been set off by the Federal Constitutional Court which, in a series of decisions, had insisted on an entirely equal treatment of legitimate and illegitimate children, and in part by international agreements, especially the UN Convention on the Rights of Children of 26 November 1989 which has been in force in Germany since 5 April 1992, and the European Convention on the Legal Status of Illegitimate Children of 15 October 1975 (which had not been signed by the Federal Republic on the grounds that another modification of the law on the legal status of the illegitimate children of 19 August 1969 had been enacted only a few years ago) as well as the European Convention on the Exercise of Children's Rights enacted and submitted for signature by the European Council to its Member States in January 1996. After the German reunification and as a result of the equal status of legitimate and illegitimate children in the former GDR, the pressure for reform of the relevant law increased.

The reform laws were preceded by extensive research work in the field of comparative law. One can mention in particular the omnibus volume edited by Peter

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Dopffel, *Child and Parent Law in a State of Change* of the Max-Planck-Institut für Ausländisches und Internationales Privatrecht (1994) with 12 national reports, and the conference volume of the first of the Regensburg International Symposiums on European Family Law (*Developments of the European Child and Parent Law*, Dieter Schwab and Dieter Henrich (eds.) 2nd ed. 1996) which also contains ten national reports and a summary exploring the comparative law aspect. The reform laws clearly reflect the legal development which has taken place in the last few decades in Europe.

The following contribution proposes to describe the German child and parent law reform in the European context.

A. The According of Equal Status to Legitimate and Illegitimate Children

Since the 1 July 1998 the term 'illegitimate children' is no longer found in German legal terminology. The law only recognizes children. There is no longer any difference between legitimate and illegitimate parentage. The heading of §§ 1591 et seq. BGB now only refers to 'parentage'. The special regulations for the illegitimate child and his or her mother in the law of maintenance have been almost entirely abandoned. What remains in this field are, on the whole, only the regulations concerning the right of maintenance of the mother of the child from the father of the child when they are not married (§ 1615 l BGB). The name of the child is no longer dependent on his or her legitimate or illegitimate descent but on parental custody. The heading of the chapter preceeding §§ 1626 et seq. no longer reads 'parental custody for legitimate children', but only 'parental custody'. The legal institution of legitimation has been abolished. And finally, even in the law of succession illegitimate children are now placed on an entirely equal standing with the legitimate children. There is, however, one fact which the legislator was unable to change. There are as many children as ever whose parents are not married to each other. This actual situation gives rise to certain peculiarities.

I. Parentage

If the mother of the child is married at the time of the child's birth, the husband is as much as ever presumed to be the father of the child. If the mother of the child is not married, the person who has acknowledged paternity or whose paternity has been legally established is presumed to be the father of the child (§ 1592 BGB). The legislator has not complied with the proposal[1] to deduce from a non-conjugal

[1] Cf. Schwenzer, *Vom Status zur Realbeziehung* (1987) at p. 235.

community a presumption of paternity.[2] If a child was born within 300 days after the dissolution of the marriage it was under the hitherto existing law inferred from the fact that the child had been begotten during marriage that the (former) husband was the father. The KindRG has restricted this presumption. It is as valid as ever if the marriage has been dissolved by the death of one of the spouses, but no longer if the marriage has come to an end by divorce (§ 1593, 1 BGB). Norwegian and Swedish law offered a model for such a renovation which everybody found reasonable.

A further restriction to the supposition of parentage has provoked criticism. If the child is born within the period of marriage but at a time when divorce proceedings are already pending, the supposition of parentage shall no longer be presumed if a third person has acknowledged paternity within one year since the divorce and if the mother as well as the (former) husband give their consent to the acknowledgement (§ 1599 II BGB). The criticism here is aimed at the fact that the determination of parentage has been left to the private autonomy of the mother and her two 'partners'.[3] But this innovation, as well, seems absolutely in accordance with the facts of life. If a child is born during the proceedings for divorce, the probability that the husband of the mother to be the father is not great. If, in addition to this, a third person acknowledges parentage and not only the mother but also her husband consent to it, everybody concerned must consider it an unnecessary chicanery if the acknowledgement of a third person has to be subjected to previous annulment proceedings.

The old law provided that the husband of the mother could contest the legitimacy of the child, whereas the father of an illegitimate child had the possibility to contest his former acknowledgement of paternity. The new law covers in both cases of the contesting of paternity (§ 1600 BGB). According to the old law only the husband of the mother of a legitimate child was entitled to contest paternity (or after the death of the latter, his parents) and – under strictly limited prerequisites – the child. In the case of an illegitimate child, the person who acknowledged paternity (or after his death his parents) and the mother and the child were entitled to contest paternity. According to the new law in all cases not only the person whose paternity is presumed or who has acknowledged paternity, but also the mother and the child are entitled to contest paternity (§ 1600 BGB). The contesting authority of the parents of the father has been abolished. If the mother has exclusive parental custody, she is entitled to contest paternity in the name of the child as well as in her own name. In this context it seems odd that while it is only admissible to contest in the name of the child if it serves the welfare of the child (§ 1600a IV BGB), the question of the welfare of the child is not taken into consideration if the mother contests in her own name.[4]

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[2] Cf. BT-Drucks. 13/8511 at p. 70:
In these cases a precise point of reference is lacking. The existence of an illegitimate community cannot be ascertained unequivocally.

[3] Gaul, 'Die Neuregelung des Abstammungsrechts durch das Kindschaftsrechtsreformgesetz' in (1997) *FamRZ* 1441, 1448, 1455.

[4] Cf. the critical comments of Gaul, note 3, p. 158 et seq.

Obviously as a consequence of such a state of affairs, the mother will regularly contest paternity in her own name and never in the name of the child.

The Federal Constitutional Court had criticized the fact that, according to the former law, a legitimate child could not, as a rule, contest his or her legitimacy as long as his or her mother still co-habited with her husband. It was argued that for such a restriction of the contesting authority no justification based on the Constitution existed 'if an imperilment of the marriage and of the family peace' caused by the contesting was not expected.[5] Thus, in the revised text of the contesting provisions, the child is allowed to contest paternity in his or her own right without any restriction after becoming an adult. There are some who deplore this fact,[6] though it is acceptable when one bears in mind that the child can only contest paternity in their own right as an adult. It is improbable that a marriage which has lasted at least 18 years, namely until the coming of age of the child, will break down for the only reason that the child is currently contesting paternity.

Finally, where the contesting authority of the father is concerned, the suggestion was to deny contesting authority to persons who have expressly given consent to heterologuous insemination (taking Swiss, Belgian, Dutch and English law as a model[7]). The legislator has not acted upon this suggestion because it would have led to a partial recognition of the heterologuous insemination without a simultaneous legal fixation of the limits of this method.[8] As a matter of fact, the Federal Supreme Court has found another convincing solution for this problematic situation: the agreement between the spouses to the effect that the husband consents to an heterologuous insemination is interpreted as a simultaneous conclusion of a contract in favour of the child which is the product of an artificial insemination, stipulating that the husband engages himself to provide for the maintenance of the child as much as if he were the father of the child himself. Should the husband later contest his paternity, the foundation for the maintenance obligation is gone; but the person who has brought about the change in situation cannot – according to the principle of good faith – use the frustration of contract to his own advantage. The obligation of maintenance is therefore preserved.[9] If, however, the child or the mother contests paternity, the plea of frustration of contract cannot be denied to the husband of the mother.[10]

II. Parental Custody

The crucial point of the reform is, without any doubt, the domain of parental custody. Until the coming into force of the KindRG the most noticeable differences

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5 (1989) *BVerfG FamRZ* 255, 259.
6 Gaul (1997) at p. 1458 et seq.
7 Cf. Art. 256 II ZGB, Art. 318 § 4 Belgian Civil Code, Art. 1-201 BW, s. 28(2)(3) Human Fertilisation and Embryology Act 1990.
8 BT-Drucks. 13/8511, p. 69.
9 (1995) *BGH FamRZ* at p. 861.
10 (1995) *BGH FamRZ* at p. 865; *see also* Henrich, *Inseminazione eterologa e disconoscimento della paternità* (Studium iuris 1997) at p. 349.

between legitimate and illegitimate children were to be found here. Illegitimate children were placed entirely under the parental custody of their mother. The father could not even share the parental custody if the mother wanted it. Visiting rights were not conceded to him without the consent of the mother. If the father had the intention to enforce visiting rights against the wish of the mother, the only means left to him was an appeal to the guardianship court. The court could, in such a case, grant visiting rights if it reached the finding that a personal relationship between father and child served the welfare of the child.

For a reform of this state of affairs, considered unjust by many fathers, the legislator was able to draw inspiration from various European models. In some legislation joint parental custody was and is still granted to the parents, provided they live together, irrespective of their marital status (this is, for example, the case in Belgian, French, Italian and Hungarian law).[11] Other national laws require an additional statement before a public authority, as for instance the French provisions, where the father recognizes the child only when the child has already completed his first year, and the Swedish provisions.[12] There are still other laws which make the attribution of joint parental custody dependent on a joint application of the parents, upon which a court or another public authority has to decide (as for example in Austrian law).[13] The German Juristentag[14] and the German Juristinnenbund[15] voted in favour of the attribution of joint parental care, if both parents apply for it. Without such a joint application the mother should remain in possession of the exclusive legal custody. The legislator followed these suggestions. § 1626 a BGB makes the following provisions:

1. If the parents are not married to each other at the time of birth they are entitled to the joint parental custody, if they
   (a) declare that they will assume jointly the parental custody (statement concerning the parental custody); or
   (b) get married to each other.
2. In other respects the mother is in possession of the parental custody.

Joint parental custody does not come automatically when the parents live together, but only if both parents have given a corresponding statement. This solution is supported by the fact that in case of doubt, there is no need to asses whether the parents live together or have ever lived together. Their statements

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[11] Cf. Art. 373 Belgian Civil Code; Art. 372 II French Civil Code; Gabrielli, 'Das italienische Kindschaftsrecht' in *Entwicklungen des Europäischen Kindschaftsrechts*, Schwab and Henrich (eds.) (2nd ed. 1996) at pp. 59, 76; § 72 Hungarian Family Law Code.
[12] Cf. Art. 372-1 French Civil Code; 6th chap. § 4 Swedish Parent Law.
[13] Cf. § 167, 1 ABGB.
[14] Decisions of the 59th Deutschen Juristentag (1992) *FamRZ* at p. 1275.
[15] Theses of the Deutschen Juristinnenbund to the reorganization of childrens' law, (1992) *FamRZ* at p. 912.

create an unequivocal situation. On the other hand, statements concerning parental custody result in joint parental custody, even if the parents do not live together. Thus, unmarried parents are on an equal standing with divorced parents. The legislative proceedings intended to make joint custody dependent on a previous examination as to whether such a state of affairs would serve the welfare of the child. The law, however, is satisfied with the mere declaration of the parents. The statement of the parents is therefore not an application upon which the court has to decide but a simple and formal manifestation of their will to take joint care of the child.

The requirement that the father only joins in parental custody if the mother makes a corresponding statement indicates that the mother still has the stronger position. There can be no objection to that if the father is not interested in the child. However, there are those problematic cases where the father takes as much care of the child as the mother and consequently has an authentic father-and-child relationship, and where the mother is nevertheless unwilling to make a statement concerning parental custody (to avoid a possible fight about the right of custody in case of separation). In this instance, the illegitimate child is at an obvious disadvantage in comparison with a legitimate child. If the parents of a legitimate child in case of separation or divorce do not wish for a continuance of joint custody, they are entitled to apply for parental custody or at least a part of it. The court has to decide on the basis of the optimal welfare of the child. If the mother of an illegitimate child has not given a statement concerning custody, she remains in exclusive possession of the right to custody, even if the father would be able to take better care of the child. Whether such a solution is compatible with Article 6 V GG, according to which illegitimate children are entitled to the same rights for their physical and psychical development and their position in society as legitimate children, is a question which has given rise to some debate.[16] A regulation such as the one embodied in the English Children Act 1989 would have been more convincing. According to this provision the (joint) parental responsibility for the child can be conceded by judicial order to the father, if no agreement with the mother has been reached (s. 4(1) Children Act). In Germany this is only possible if the welfare of the child is jeopardized by the conduct of the mother, that is, if it can be proved that the mother abuses her right of custody or neglects the child (§ 1666 BGB).

If, according to previous statements, the mother still has a certain preponderance where parental custody is concerned, this is no longer true with reference to the right of contact. Whether the father is allowed to see his child and have contact with him or her is no longer dependent on the will of the mother. If, in the spirit of the UN Convention concerning childrens' rights, one conceives the right of contact not as a right of the parents but as a right of the child, it can no longer be of importance whether the parents are married to each other or not.

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[16] Lipp, 'Das elterliche Sorgerecht für das eheliche Kind nach dem Kindschaftsrechtsreformgesetz' in (1998) *FamRZ* 65, 70, 72.

Accordingly, the reform of the right of contact by the KindRG (§ 1684 BGB) applies to all children alike.

III. Legitimation and Adoption

According to the old law the father of an illegitimate child had three possibilities to obtain parental custody. He could marry the mother and thus 'legitimize' the child, he could get a court decision legitimizing the child and finally he could adopt the child. With legitimation the child obtained the position of a legitimate child of his or her father. But at the same time the mother lost the right of custody even when she lived with the father of the child and where both of them wanted to have joint custody. The Federal Constitutional Court considered this regulation as an interference with the parental right and, with good reason, declared it unconstitutional in 1991.[17] With the abolition of all differences of status between legitimate and illegitimate children, legitimation is no longer required and the KindRG has therefore abolished legitimation. This applies to legitimation by subsequent marriage as well as to the declaration of legitimacy.

There were also differences between legitimate and illegitimate children with regard to adoption. The law allowed the father as well as the mother of an illegitimate child to adopt the child. With adoption by one parent the kinship to the other ceased to exist. If the father wanted to adopt the child he had to have the consent of the mother, whereas the mother could adopt the child even without the consent of the father. Morever, the mother as the sole parental custodian could give her agreement to an adoption by a third party without being obliged to inform the father. This regulation too has been declared unconstitutional by the Federal Constitutional Court. The Federal Constitutional Court did not only consider it a violation of the parental right of the father (Art. 6 II GG) but also a violation of the father's right to be heard (Art. 103 I GG).[18]

The KindRG has taken into account these constitutional objections. The possibility to adopt one's own child has ceased to exist. An adoption by a third party is now subjected to the consent of the father as well as to that of the mother (§ 1747 I, 1 BGB). A remnant of inequality still exists however. If the mother according to § 1626 II BGB (having refused to give a declaration concerning the parental custody) is the sole bearer of the parental custody, the consent of the father may be replaced by the guardianship court, 'if the refusal of the adoption would cause a disproportionate hardship to the child' (§ 1748 IV BGB). If the mother is the sole bearer of parental custody after a divorce and has consented to the adoption of the child, the consent of the father can only be replaced if he has failed grossly and continuously in his duty towards the child or shown by his attitude his indifference to the child (§ 1748 I, 1 BGB). It is surprising that the consent of a father who has lived

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[17] (1991) *BVerfG FamRZ* at p. 913.
[18] (1995) *BVerfG FamRZ* at p. 789.

for a duration of several years with the mother and the child can be more easily replaced than the consent of the former husband of the mother who may have deserted them before or soon after the birth of the child.[19]

IV. Name

Until a short time ago the legitimacy or illegitimacy of a child could be ascertained by his or her name. Legitimate children took – almost always – the name of their father, whereas illegitimate children took the name of their mother. With the removal of the distinction between legitimate and illegitimate children, the legal regime of the name has changed likewise. The only regulation which has remained in force concerns the child whose married parents choose a common family name; in this case the child gets this name (§ 1616 BGB). If the parents do not use a family name, the law distinguishes between those who have joint custody and those who do not. If both parents have joint custody due to marriage or due to a corresponding declaration concerning parental custody (§ 1626 a I, 1 BGB), they are free to decide whether they prefer to give the child the name of the father or that of the mother (§ 1617 BGB). Only double names consisting of the name of the father and the mother are excluded. If only one parent is in possession of parental custody, the child gets the name of this parent (§ 1617 a BGB).

V. Maintenance

Under the old law there were differences in the legal status of legitimate and illegitimate children with regard to the right of maintenance. With regard to the maintenance claim of illegitimate children, a series of special provisions were in force. A lump sum settlement could be agreed upon instead of regular maintenance payments. Above all, there were the so-called regular maintenance-payment rates. Regular maintenance-payment rates constituted the amount needed for the regular maintenance of a child who lived with the mother on a modest level. These regular maintenance-payment rates were the minimum allowances the father had to pay. The regular maintenance-payment rates could be set by the court rapidly and directly in a simplified procedure. The amount which could be claimed as regular maintenance-payment rates was to be gathered from the RegelunterhaltsVO (Regular Maintenance-Payment Rates Order). These rates were claimed in the vast majority of cases against fathers of illegitimate children.

According to the KindUG there is no longer difference between legitimate and illegitimate children. For the maintenance claims of all minors the same provisions apply. The claim to regular maintenance-payment rates has been replaced for all children by an individual maintenance claim. Still, regular maintenance allowances will remain in existence in the future. But their significance is different from that of the regular maintenance requirements according to the RegelunterhaltsVO. The

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[19] *See also* Frank, 'Die Neuregelung des Adoptionsrechts' in (1998) *FamRZ* at pp. 393, 394 et seq.

actual regular maintenance-payment rates are no longer sums presumed to cover the requirements of the child but mere apportioned quantities with the aid of which a maintenance title can be established in a dynamic fashion.[20] A child claiming maintenance from the father need not specify their claim. Instead, he or she can demand payment of (for instance) 120, 130 or 150 per cent of the regular maintenance-payment rates (§ 1612 a BGB). The regular maintenance-payment rates are assessed in the RegelbetragsVO and adapted to the current, modified conditions at an interval of two years. A division is made into three age groups. For children belonging to the first age group (0 to 5 years) the regular maintenance-payment rates are actually DM 349, for those belonging to the second age group (6 to 11 years) DM 424 and for those of the third age group (12 to 17 years) DM 502. How much the child is entitled to, depends on the income of the person liable to provide maintenance. According to the maintenance index used in Germany, in particular the Düsseldorfer Tabelle, for instance a child of the second age group can demand DM 636 from his father who receives a monthly net salary of DM 5,000.[21] DM 636 are 150 per cent of the regular maintenance-payment rates for this age group (DM 424). If the child does not demand DM 636 but 150 per cent of the regular maintenance-payment rates, he or she need not sue for a modification of the maintenance title when he or she reaches the next age group or when the RegelbetragsVO is amended, but can immediately demand 150 per cent of the augmented regular maintenance-payment rates. The maintenance title is a dynamic title.

In this context a second innovation is still important. If the child does not demand more than 150 per cent of the regular maintenance-payment rates the decision is made by a simplified procedure. The child need not prove that the person liable to provide maintenance is able to pay this sum. If the person liable to provide maintenance feels that the amount demanded by the child is too high they have to prove (by disclosing their financial situation) that they cannot be expected to pay the sum required.

VI. Law of Succession

Even before the 1998 reform illegitimate children in Germany were entitled to an inheritance not only vis-à-vis their mother and her relatives, but also vis-à-vis their father and his relatives. There were only two special stipulations. If the father of the illegitimate child was married and had legitimate children of his own, the illegitimate child should not become a fully entitled heir, but was entitled to a sum of money of equal value. This was the so-called substituted inheritance right. A corresponding settlement applied in the case of the death of a relative on the side of the father. On

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[20] Rühl and Greßmann, *Kindesunterhaltsgesetz* (1998) give an introduction to the children's law of maintenance; *see* in addition Schumacher and Grün, 'Das neue Unterhaltsrecht minderjähriger Kinder' in (1998) *FamRZ* at p. 778.

[21] Düsseldorfer Tabelle, stage 1 July 1998, (1998) *FamRZ* at p. 534.

these occasions the illegitimate child did not become a member of the community of heirs but was instead granted a monetary claim towards the community of heirs. The child could, between his 21st and 27th year of age, demand a so-called premature share of inheritance from his father. He could, so to speak, advance himself his part of the inheritance prematurely and thereafter be excluded from the inheritance. These two stipulations were cancelled without substitution by the According of Equal Status to Illegitimate Children in Matters of Inheritance Act of 16 December 1997. Thus there is no longer any difference between legitimate and illegitimate children. Their position in matters of inheritance is absolutely the same.

B. The Strengthening of Rights of Children

Under the influence of the UN Convention on childrens' rights, the German legislator has strengthened the legal position of the children in several respects. In particular, the principle that the responsibility for the education and development of the child should lie in the hands of both parents (Art. 18 I of the UN Convention) has been recognized. Article 9 III of the UN Convention has been put into practice, which declares:

> States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Finally, the position of children in legal proceedings has been strengthened.

I. Joint Custody

The German legislator was formerly of the opinion that it was in the best interests of the child of divorced or unmarried parents to create a clearly defined situation by appointing custody to *one* of the parents. In the case of illegitimate children, the father was excluded from the parental custody from the start. Where legitimate children were concerned, the law provided that in the case of divorce, 'The parental custody is to be assigned to one of the parents exclusively' (§ 1671 IV, 1 BGB former version). With the decision of 3 November 1982 the Federal Constitutional Court declared this law unconstitutional and void. If the parents of a legitimate child were willing and able to continue joint parental responsibility, a prohibition by the legislator concerning the exercise of joint parental custody would represent a violation of the constitutionally protected parental right (Art. 6 II GG).[22]

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[22] (1982) *BVerfG, FamRZ* at p. 1179.

Divorced parents could therefore apply for joint custody even before the coming into force of the KindRG. However, at the beginning this was very rarely put into practice. Between 1983–1985 in only 1–2 per cent of all cases was parental custody assigned jointly to both parents. The percentage increased from year to year. In the years 1994–1995 parental custody was assigned to both parents in 17.7 per cent of the cases. In some of the Bundesländer the figures lay above this percentage: Saarland 23.99 per cent, Baden-Württemberg 23.03 per cent, Hamburg 22.07 per cent.[23]

In France a similar tendency has led to the law of 8 January 1993 which introduced the joint exercise of the *autorité parentale* after divorce as a general rule. The judge is only allowed to assign the exercise of parental custody to one of the parents, if the welfare of the child so requires. Otherwise, in cases of a dispute between the parents for the right of custody, the judge can only decide which parent the child will live with.

Since the coming into force of the Children Act 1989, this problem is similarly dealt with in England. There too, a separation or divorce of the parents leaves parental responsibility on the whole untouched. Only if one of the parents makes a corresponding application or if the welfare of the child requires it, the court can interfere with parental responsibility, for example by a so-called residence order which establishes which person the child shall live with, or by a contact order which settles visiting rights.

The German legislator has now taken these regulations as a model for the KindRG.

Parents who, after their divorce, wish to continue with joint parental custody no longer need to make a corresponding application. The law presumes that joint parental care continues after divorce. It was only when parents do not desire the continuance of joint custody that they have to make an application.

§ 1671 BGB now states as follows:

1. If parents who exercise the parental custody jointly are not only temporarily separated, each parent can make the application that the family court conveys to him the parental custody or part of the parental custody.
2. The application has to be granted provided that:
   (a) the other parent gives his consent, excepting the case when the child has reached his 14th year of age and objects to the conveyance, or
   (b) it is to be expected that the removal of the joint parental custody and the conveyance to the applicant best meets the welfare of the child.
3. The application is not to be granted insofar as the parental custody has to be regulated in a different manner due to other prescriptions.

This regulation has several remarkable aspects. One innovation is that the family

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[23] *See* the evidence presented by Greßmann, Neues Kindschaftsrecht (1998), p. 8 et seq.

court not only has the power to assign the parental custody as a whole, but can also assign part of the parental custody. This could be, for instance, the right to decide upon the residence (*Aufenthaltsbestimmungsrecht*) if the parents cannot reach an agreement, or the statutory duty of care for a minor's property or the care for the child's professional training if for example the child shall later manage the business of a parent. In such cases it is also conceivable that the right to decide upon the residence of the child is only temporarily assigned to one parent, if for instance the professional training demands a change of residence.

It is, likewise, remarkable that when an application for the removal of joint parental custody is made, this application need not necessarily be granted for the sole reason that it is an indication of troubled relations between the parents, but only if the conveyance of parental custody to the applicant corresponds with the welfare of the child.

However, the most significant aspect is that if there is no application the child has no chance to be heard. According to the wording of the ministerial bill, a dissolution of marriage could have been carried through, even if the judge did not know whether any children had issued from the marriage. Without an application the judge would have had no occasion to inform himself about the existence of children. This blunder (there is no other way to put it) has been at least partly corrected in the law committee. § 622 II ZPO now says: The written application, subject to § 630, must give an indication if

1. there are common minor children ...

If there are minor children the court has to give notice to the youth welfare office that divorce proceedings are pending, so that the latter can give information to the parents about the tenders of the youth help (§ 17 III KJHG/SGB VIII). However, if neither parent makes an application for the right of custody, and if the wording of the law is to be followed to the letter, the child cannot make him or herself heard in the divorce proceedings. This is an unmistakable deterioration as compared with the situation which existed to date; for the divorce was obligatorily linked to the regulation of the right of custody and § 50 b FGG required the hearing of the child. According to the new law such an obligation no longer exists, the regulation of parental custody being no longer a matter arising obligatorily in the divorce proceedings.

It is difficult to understand why a law which aims at a strengthening of the child's rights should renounce the claim to hear the child. This can also be considered a violation of the UN Convention on the rights of children. Article 12 of this Convention concedes to the child who is able to form their own opinion the right to pronounce this opinion freely in all matters affecting them. Article 12 II of the Convention states:

> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

One can certainly assert with good reason that even in a case where parental custody

is not a matter arising in divorce proceedings, the child is 'affected' by the proceedings. The future will tell us if the courts will infer from this fact a procedural obligation to hear the child.[24]

If the parents make no application concerning parental custody, they remain jointly in possession of custody. As a consequence, the question arises what the term 'joint parental custody' signifies. It might, for instance, mean that the child goes in periodical intervals from one parent to the other (this is called the pendulum model or the alternative exercise of parental custody), or it can mean that the child lives permanently in one household and that the parents take care of the child alternatively (nest model), or it can mean that the child lives mostly with one parent who is principally exercising the parental custody, whereas the other parent is in frequent contact with the child and participates in important decisions (residence model).

The German legislator obviously proceeds from the last-mentioned model (without excluding the others). § 1687 BGB contains the following provision:

I. If parents who have joint parental custody live separately on a not only temporary basis, their mutual consent is necessary in decisions concerning matters the regulation of which is of considerable importance to the child. The parent with whom the child with the consent of the other parent or by a court decision resides habitually has the power to decide exclusively in matters of daily life. Decisions in matters of daily life are, as a rule, decisions which arise frequently and which do not have such consequences on the development of the child that it would afterwards be difficult to alter them. As long as the child, with the consent of a parent or by a court decision, lives with the other parent the latter has the power to decide exclusively in matters of actual care. § 1629 I, 4 and § 1684 II, 1 apply accordingly.

II. The family court can restrict or exclude the powers subject to I, 2 and 4, if such a procedure is required by the welfare of the child.

Accordingly, the parents have to come to an agreement as to where the child shall take his habitual residence. If they are not able to come to an agreement, the court may convey to one of them the right to decide where the child's residence should be. The parent with whom the child resides habitually has the power to decide exclusively in all matters concerning daily life. The other parent only has a right of co-determination in fundamental decisions.

Fundamental decisions in this sense are decisions which are important for the development of the child in the domains of actual care, decision as to the child's residence, schooling and religious education as well as medical care. Therefore, the parents have to decide in common whether, for instance, the child shall receive a higher school training. The consent to an operation of the child – urgent matters excepted – has likewise to be given jointly by both parents.[25] Objections against joint

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[24] Cf. here Johannsen, Henrich and Jaeger, *Eherecht* (3rd ed. 1998) § 1671, marginal note 7.
[25] BT-Drucks. 13/4899, p. 107.

custody as a rule were caused by the parents' apprehensions that they would then be forced to continually co-operate. However, the reform does not have much in common with such a notion. It resembles those legal systems which – as for instance the Italian – leave parental custody on essential points to both parents and only entitle the judge to convey to one of the parents the exercise of parental custody. In such a case the other parent still has the right of co-determination and certain powers of control. In this form, joint custody is – at least abroad – considered practicable.

II. The Right of Contact

The legislator has also strengthened the position of the child with regard to the right of contact. The ministerial bill originally stated: 'Each parent has the right of contact with the child.' In the legislative deliberations it was argued that 'right of contact' did not mean the right of the parent, but the right of the child. The UN Convention on the Rights of Children was called upon where it states:

> States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

In some legal systems this claim has already been taken into account earlier. Thus the English Children Act 1989 provides that the court can oblige a parent by a so-called contact order to grant to the child visits to the other parent or contacts with other persons.

If one considered the right of contact exclusively as a right of the child, new problematic aspects would arise. How can one tell when the moment for the child has come to assert this right in his own name? Who decides upon the contacts with a baby? A right of the child would call for a corresponding obligation of the parent. What happens if the father for instance does not call upon his child regularly although the child (or his mother as his legal representative) desires it? Some courts in the United States have granted the child a claim for compensation of an amount corresponding to the costs of a babysitter.

Article 9 III of the UN Childrens' Convention is guided by the just consideration that the right of contact is not only a right of the parent but also a right of the child. The right of contact does not only lie in the interest of the parent who has the care and custody, it also serves the welfare of the child.

The recognition of this fact has finally carried weight in the course of the legislative procedure. The corresponding provision (§ 1684 I BGB) reads as follows: 'The child has the right of contact with each parent; each parent has a right and an obligation of contact with the child.'

It is an innovation that persons other than the parents have a right of contact, such as the grandparents, the brothers and sisters of the child, a step-parent if the child has been living for a longer period in their household, or a person who has taken care of the child for an extensive period (§ 1685 BGB). In comparison to § 1684

BGB it is remarkable, in this context, that a right of contact is only conceded to the aforementioned persons and not also to the child.

III. Position of the Child in the Procedure

The law of procedure also takes into account that the law aims at strengthening the child's legal position. The most important innovation in this context is the introduction of a curator for procedural matters for the child. The existing law (§ 50 b FGG) already provided that the child had to be heard personally in a procedure concerning their personal custody and the administration of their property. Henceforth a curator can be appointed to the child as far as this is necessary for the observation of their interests in legal proceedings concerning their person (§ 50 FGG). This regulation is meant to guarantee that the autonomous interests of the child are included in the procedure and that the child is not reduced to being a simple object of procedure.

This provision could become important especially in cases where it has to be decided if measures are to be taken against a parent who by their conduct threatens the welfare of the child, for instance if it is alleged that the father abuses his right of custody or that the mother neglects the child (§ 1666 BGB). In such procedures the parents are frequently represented by lawyers. The child was up until now reduced to putting forward his notions and wishes before the judge in person. The new provision allows the court to designate a person to assist the child in the representation of his interests. This person can be a lawyer, a social pedagogue, a psychologist for children etc. Other persons, for instance relatives of the child, can likewise be taken into consideration.

§ 33 II FGG includes another important clarification of legal procedure. If one parent alone is the bearer of parental custody whereas the other parent only has a right of contact, the child often refuses contact with the parent who has a right of contact, who, in turn, tries to assert their right with violent means e.g. with the assistance of the bailiff. In such an instance the law rules as follows: 'The employment of violence against a child is not to be permitted for the purpose of surrendering the child in order to enforce the right of contact.'

C. Strengthening of the Legal Status of Parents

With the KindRG the legislator intended to strengthen the legal status of parents and to protect them from unnecessary public interference. This intention of the legislator has reduced the powers of the youth welfare office as well as the control of the guardianship court. Until the coming into force of the KindRG, an official curatorship was activated at the moment of birth of an illegitimate child. The youth welfare office was appointed curator. By the offical curatorship the parental custody of the mother was restricted in three domains. The youth welfare office was

empowered (a) to ascertain the paternity; (b) to claim maintenance; and (c) to settle the right of succession as well as the child's entitlement to a compulsory portion from his father and the father's relatives. This official curatorship has now been changed into a standby arrangement which, in contrast to the official curatorship, does not come into existence by virtue of the law but only if a parent makes a corresponding application (§ 1712 BGB). Thus, official assistance is no longer forced on the mother but only offered as an available service.

The recognition of paternity by the father of a child no longer requires the additional consent of the child or of the youth welfare office which represented it. From now on, it is the mother who has the right of consent. If the father is not willing to recognize the child, he is no longer sued by the youth welfare office in the name of the child for determination of paternity. It is now the mother who is entitled to sue (§ 1600 e BGB).

If the mother of a legitimate child, having left her husband and having obtained the custody of the child, wanted to contest the legitimacy of the child in the child's name (not being entitled to a right of contest in her own name), she needed the consent of the guardianship court. Now the mother can also contest paternity in her own name; consent of the guardianship court is no longer necessary (§§ 1600, 1600a BGB).

Finally, attention must once again be drawn to the procedure in divorce proceedings. If no parent makes an application for parental custody it is no longer the judge – as up to now – who decides *ex officio* according to the best interests of the child. The autonomous decision of the parents is no longer revised by the court.

As these examples point out, the strengthening of the parents' position and the elimination of public 'patronage' has a reverse side. The child is robbed of the protection of a neutral preserver of their interests. And there might indeed be cases where the child's interest collides with the interests of both or one parent. It remains an open question how, in such colliding cases, the child's interests are to be upheld in future. Under certain circumstances it might be necessary to lower the scale of interference of § 1666, i.e. the provision which permits legal steps if the welfare of the child requires it.