

HEADNOTE

to the Order of the First Senate of 14 April 1987
1 BvR 332/86

§ 1632(4) of the Civil Code must be interpreted in conformity with the Basic Law to the effect that a request by the parents or by one parent for the surrender of their child – not with the aim of reuniting the family but of achieving a change in foster parents – may only be granted if endangerment of the child's physical, mental or emotional well-being can be ruled out with reasonable certainty.

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 332/86 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

the child L..., represented by its supplementary curator,

– authorised representatives: ...

against a) the Order of the Supreme Court of Bavaria of 14 January 1986 -
BReg. 1 Z 99/85 -

b) the Order of the Aschaffenburg Regional Court of 13 November
1985 - T 180/85 -

c) the Order of the Obernburg Local Court - X 12/85 - issued on 30 July
1985

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

President Herzog,
Simon,
Hesse,
Niemeyer,
Henschel,
Seidel

held on 14 April 1987:

The Orders of the Obernburg Local Court - X 12/85 - issued on 30 July 1985, the
Aschaffenburg Regional Court of 13 November 1985 - T 180/85 - and the Supreme

Court of Bavaria of 14 January 1986 - BReg. 1 Z 99/85 - violate the complainant's fundamental right under Article 2(1) in conjunction with Article 1(1) of the Basic Law. The decisions are reversed. The matter is remanded to the Local Court.

[...]

REASONS:

A.

The constitutional complaint concerns court decisions ordering the complainant's foster parents to surrender the complainant to her father. 1

I.

The legal care responsibility for a minor includes the right to demand from anyone who unlawfully withholds a child from the parents or one parent that the child be surrendered (§ 1632(1) of the Civil Code). If the child has been in foster care for a longer period of time, the family court can, however, in accordance with § 1632(4) of the Civil Code, order *ex officio* or at the foster carer's request that the child remain with them if and as long as the requirements of § 1666(1) first sentence of the Civil Code are met, particularly regarding the reasons for or duration of foster care. According to the provision's wording, this is the case where, for example, the child's physical, mental or emotional well-being is endangered by the abusive exercise of parental custody, neglect of the child, or failure of the parents through no fault of their own. 2

II.

1. The complainant was born in wedlock on 22 November 1983 as the daughter of an inland skipper. She has two older sisters, one of whom raised by their grandmother. The other – born in 1980 – was removed from her mother's household at the age of three months in a neglected state and brought to her step-aunt, where she still lives today. The children's mother had been suffering from addiction for years and had repeatedly been treated in hospitals for that reason. Husband and wife have been living separately since May 1984. 3

In mid-December 1983, the district youth welfare office (*Kreisjugendamt*) informed the family court that the mother had abused the complainant and that the father hardly took care of the child. Thereupon, the court temporarily withdrew parental custody from the parents, ordered guardianship over the child and appointed the district youth welfare office as legal guardian. The authorities first placed the complainant in a children's hospital, and in January 1984 into the care of a married couple who had no children of their own. 4

Custody was initially withdrawn from both parents permanently, but the father regained custody following his successful complaint. Since January 1985, he has been demanding that the foster parents surrender the complainant in order to place her with his step-sister as well. 5

2. In January 1985, the foster parents attempted to obtain a judicial order from the family court for the child to remain with them (§ 1632(4) of the Civil Code). The father, 6

however, applied [to the Local Court] for an order obliging the foster parents to surrender the complainant. The court granted his request. [...]

[...] 7-8

3. a) The foster parents filed a complaint against the decision of the Local Court [at the Regional Court] [...]. 9

b) The complaint was unsuccessful. 10

[...] 11-14

4. The Supreme Court of Bavaria affirmed the Regional Court's decision, holding that it was free of legal error. 15

[...] 16-18

III.

With the constitutional complaint filed against these court decisions, the complainant claims that her fundamental rights under Art. 1(1) and Art. 2(1) of the Basic Law as well as Art. 103(1) of the Basic Law are violated. In addition, she claims that her constitutional right to remain in the foster family (Art. 6(3) of the Basic Law) was disregarded. 19

[...] 20-21

IV.

[...] 22-29

V.

[...] 30-38

B.

The constitutional complaint is, for the most part, admissible. [...] It is inadmissible only insofar as the complainant claims a violation of her right to be heard (Art. 103(1) of the Basic Law). 39

I.

[...] 40-43

II.

[...] 44-50

C.

To the extent that the constitutional complaint is admissible, it is also well-founded. The challenged decisions violate the complainant's fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 51

I.

§ 1632(4) of the Civil Code must be interpreted in conformity with the Constitution to the effect that a request by the parents or by one parent for the surrender of their child – not with the aim of reuniting the family but of achieving a change in foster parents – may only be granted if endangerment of the child's physical, mental or emotional well-being can be ruled out with reasonable certainty. 52

1. The decisions challenged in the constitutional complaint are based on the application of § 1632(1) and (4) of the Civil Code. Pursuant to § 1632(1) of the Civil Code, parents with custody have the right to demand from anyone who unlawfully withholds their child that the child be surrendered. This follows from the right to determine the child's place of residence under § 1631(1) of the Civil Code [...]. This right to have the child surrendered is modified by § 1632(4) of the Civil Code in the sense that removing the child from a foster family at an unsuitable time should be avoided in order to not jeopardise their personal, and especially their emotional well-being (cf. BTDrucks 8/2788, pp. 40, 52). The provision does not contain any systematic restriction of parental rights, but rather makes the courts' decisions dependent upon the circumstances of the individual case. The provision is thus informed by the principle that individual measures to prevent the endangerment of children take precedence over general rules (cf. BVerfGE 24, 119 <145> with further references). 53

2. As the highest-ranking domestic law, the Basic Law is not only the standard against which the validity of domestic legal provisions is measured. All such legal provisions must also be interpreted in accordance with the Basic Law. [...] 54

Decisions under § 1632(4) of the Civil Code are taken in the case of a conflict between the interests of the parents, or of one parent with sole custody, in having the child surrendered to them, on the one hand, and the child's best interests, on the other hand, the Constitution requires that this provision be interpreted so that both the parental rights under Art. 6(2) first sentence of the Basic Law as well as the child's fundamental rights arising from Art. 2(1) in conjunction with Art. 1(1) of the Basic Law are taken into account. When interpreting provisions that fall within the scope of Art. 6(2) of the Basic Law, just like when interpreting legislative decisions, the required balancing of interests must take into account the fact that ultimately, the child's best interests must be decisive (cf. BVerfGE 68, 176 <188>). 55

a) The relationship between parental rights and the child's right of personality is shaped by the particular structure of the parental right. It is essentially a right in the child's interest, as already follows from the wording of Art. 6(2) first sentence of the Basic Law, which refers to the parental right to care for and raise the child and thus incorporates the child's interest into the parental right (cf. BVerfGE 59, 360 <382>). Generally, it is in the best interest of the child to be in its parents' care, given that the likeliest way to ensure that the child grows up to become a self-reliant person is if it is raised and cared 56

for by its mother and father in harmonious community (cf. BVerfGE 56, 363 <395>). However, it is not always possible to achieve this ideal state, for instance when children grow up in a foster family. A foster care relationship might arise from a voluntary decision by the parents or the parent with sole custody; more frequently, however, it is ordered by the authorities. Regardless of how it came about, and in accordance with Art. 6(2) first sentence of the Basic Law, the aim should be not to allow the foster care relationship to become so strong that the natural parents must in almost every case fear that the child will permanently remain in the foster family. This does not mean, however, that § 1632(4) of the Civil Code cannot allow for decisions that the parents find unacceptable because they feel that their parental rights have been impaired (cf. BVerfGE 68, 176 <189 and 190>).

b) It follows from the expert opinions by Fthenakis and Lempp that new research in the field of child psychology and child psychiatry challenges formerly established notions as to the effects of a separation of infants from their immediate caregivers. Nevertheless, it is still beyond dispute that such an event causes severe psychological stress for a child, and that how well the child deals with this challenge depends on its personality and the circumstances of the change. [...] When balancing parental rights and the best interests of the child in decisions pursuant to § 1632(4) of the Civil Code, it is [...] important to consider whether the surrendering of the child is meant to enable the child's return to its family or whether only a change of its foster family is intended. This distinction determines what degree of uncertainty regarding possible negative effects on the child is acceptable when taking into consideration the child's fundamental rights. In general, a greater risk may be acceptable if the natural parents themselves, or one parent, want to care for the child again. However, the situation is different where the child is not meant to return to its father's and mother's household, but is supposed, without any significant grounds related to the child's best interests, to move to a new foster family. In such a case, asserting the right of care for a minor pursuant to § 1631(1) of the Civil Code, in the form of the right to determine its place of residence, is only compatible with Art. 2(1) in conjunction with Art. 1(1) of the Basic Law if it can be ruled out with reasonable certainty that the child's separation from its foster parents will cause psychological or physical harm.

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3. This interpretation of § 1632(4) of the Civil Code, which follows from Art. 2(1) in conjunction with Art. 1(1) of the Basic Law, does not contradict the legislative history of § 1632(4) of the Civil Code, which was incorporated in the Civil Code through Art. 1 no. 8 of the Act Revising Parental Care Law of 18 July 1979 (BGBl I, p. 1061). The aim of the revision of the law on parental custody was to take on board the demands of professional associations and experts in the field, and to grant the child a stronger legal position in the family [...]. Referring to the Federal Constitutional Court's case-law, it was stressed during the legislative process that, when assessing the scope of parental responsibilities, one had to consider that every child is a person with its own human dignity and its own right to develop its personality ([...]). This is in line with an interpretation of § 1632(4) of the Civil Code, pursuant to which, if the person who has custody of the child does not exercise the right to determine the child's place of residence in order to reunite it with its parent or parents, the child may only be separated from its foster parents if there is no reason to fear for its well-being.

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II.

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It is not ascertainable from the challenged decisions that the courts, in interpreting § 1632(4) of the Civil Code, sufficiently took into account the requirements resulting from Art. 2(1) in conjunction with Art. 1(1) of the Basic Law.

1. The Federal Constitutional Court does not review the interpretation and application of statutory law as such. The Court is only called upon to review whether the competent courts have properly assessed the scope and impact of fundamental rights in the area of private law. However, the limits of the Federal Constitutional Court's capacity to intervene when carrying out this task cannot be inflexible and rigid; the Court needs some degree of latitude in order to consider the specific situation of the individual case. The extent of the impairment of fundamental rights is of particular significance in this context (cf. BVerfGE 42, 163 <168> with further references).

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Surrendering the complainant to her father who has custody entails separating her from her foster parents, after which she is to be placed with other persons. This measure is of existential significance for the complainant's future. Thus, such an interference is only constitutional subject to strict requirements: Aside from the question of whether errors are discernible in the challenged decisions that are based on a fundamentally incorrect understanding of the significance of a fundamental right in general, and in particular its scope of protection, individual errors of interpretation must also be considered (BVerfGE 54, 129 <136> with further references).

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2. When interpreting and applying § 1632(4) of the Civil Code, none of the courts that dealt with the matter deemed it relevant to consider whether the complainant, after being surrendered by the foster parents, is meant to grow up with her father or in a family she does not know. In this context, the Supreme Court of Bavaria only stated that the frequent and long absences of the complainant's father, which mean that he would have to place the child into care elsewhere, did not raise any concerns about his suitability for being fully responsible for her care.

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It is true that negative conclusions concerning the exercise of parental custody cannot be drawn from the father's work-related absences. However, this does not answer the question about what constitutes a reasonable (*zumutbar*) future risk for the complainant if she is uprooted to live in a new foster family. To the extent that the courts considered that the disadvantages of this measure may be compensated by reuniting the complainant with her sister, this argument must be dismissed, in accordance with the Lempp expert opinion. This consideration must be accorded at least less significance than was done by the Regional Court and the Supreme Court of Bavaria when assessing its importance for the complainant's physical and psychological development upon her removal from the foster family. As a result, the experts' statements to the effect that no one can say with reasonable certainty whether the complainant's removal from the foster family would cause her permanent harm take on additional significance. Based on the expert opinion it had obtained, the Regional Court stated that it could not conclude that a change in the child's place of residence would result in non-negligible physical or emotional harm for the complainant. In addition to this, the Supreme Court of Bavaria points to case-law that has been recognised for decades (BGHZ 6, 342 <347 and 348>), according to which it cannot generally be assumed that living at a different place would permanently harm a child's psychological development. In doing so, the courts fail to appropriately interpret § 1632(4) of the Civil Code in conformity with the Constitution, as is warranted

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in cases such as the one at hand. In fact, such consequences for the complainant when changing the foster family must instead be ruled out with reasonable certainty.

Herzog
Niemeyer

Simon
Henschel

Hesse
Seidl