

NATIONAL REPORT: GERMANY

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A. GENERAL

1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.

Until recently the term 'parental responsibility' (*elterliche Verantwortung*) was used only in some legal provisions (e.g. § 52 para. 1 German Act on Voluntary Jurisdiction¹), but was not used as basic concept in German law. However due to the use of this concept in the Brussels II and II A Regulations and other international and European instruments, this term is employed more and more in German legal literature.² The basic concept in German family law is still parental custody (*elterliche Sorge*), which includes the care of the child (*Personensorge*) and the care for the property of the child (*Vermögenssorge*), § 1626 para. 1 German CC. All other issues (legal representation, determination of residence, etc.) are either consequences of this parental custody or – as the right of contact – additional legal positions.

2. Explain whether your national concept or concepts encompass:

(a) Care and protection

As stated in the answer to Q 1, the German concept of parental custody specifically encompasses the care of the child; §§ 1626 para. 1, 1631 para 1 German CC. The statute mentions the care (*Sorge*) of the person, including education and supervision, but does not give details. Care means to take responsibility for the child in a very broad sense.³ Protection as such is not expressly mentioned as a part of parental care, but there is a general consensus that the person and the property of the child have to be protected.⁴

(b) Maintenance of personal relationships

Maintenance of personal relations – seeing, visiting, staying together or otherwise having contact – is called *Umgang* (personal contact) in German law. According to §

¹ Act on Voluntary Jurisdiction (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit; FGG) of 20.05.1898, *Imperial Gazette (Reichsgesetzblatt; RGBl.)* 1898 p. 771, as amended.

² See D. SCHWAB, *Familienrecht*, 12th Edition, Munich, 2003, No. 436 *et seq*, which also includes child maintenance as an issue of parental responsibility.

³ See J. GERNHUBER and D. COESTER-WALTJEN, in: *Lehrbuch des Familienrechts*, 4th Edition, Munich: Beck, 1994, § 57 I, p. 856 *et seq*.

⁴ See J. GERNHUBER and D. COESTER-WALTJEN, in: *Lehrbuch des Familienrechts*, 4th Edition, Munich: Beck, 1994, § 57 IX, p. 892 *et seq*; L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 56 *et seq*.

1626 para. 3 German CC, personal relations are in general in the best interests of a child with respect to both parents (sent. 1), and also with other persons (sent. 2). § 1684 German CC grants the child a right to contact. The corresponding parental right and duty to contact with the child is a separate legal position and is constitutionally protected by Art. 6 German Basic Law.⁵

(c) Provision of education

The provision of education is a part of personal care. A person having personal care over the child has the right and obligation to educate the child, § 1631 para. 1 German CC. Today, however, the public law of the respective state (*Land*) defines the extent to which regular attendance at school is compulsory.⁶ Failure to perform this duty will mean an administrative offence and can lead to educational measures.

(d) Legal representation

Legal representation of the child means that the holder of parental custody can act as a legal representative of the child, see Q 8f. This is a consequence of parental custody. Custody over personal or property matters bestows representation in these matters, § 1629 German CC.

(e) Determination of residence

The determination of the residence of the child is generally not a separate issue under German law; see Q 40. The right and duty to determine the child's place of abode (*Aufenthaltsbestimmungsrecht*) form part of the responsibility for the child. Therefore the determination of residence is generally a part of the custodian's care (§ 1631 para. 1 German CC.). This also applies for the domicile in the sense of § 11 German CC. There can be restrictions by the family court, however, and a custodian may lose the right to determine the residence of the child, see Q 51. The abduction of a child outside the Federal Republic without the consent of the holder of parental responsibility amounts to a crime under § 235 German Penal Code.

(f) Administration of property

The German concept of parental custody also encompasses the 'care for the property' of the child, which includes administration of property, § 1626 para. 1 sent. 2 German CC, see Q 10, 11. One consequence is that the holder of parental responsibility has possession of the property (*Besitz*), in the sense of the law of property.⁷

3. In what circumstances (e.g. child reaching majority or marrying) do parental responsibilities automatically come to an end?

Under some circumstances parental custody automatically comes to an end. One reason is the child attains majority, § 1626 para. 1 sent. 1 German CC. Another is adoption of the child by other persons, which extinguishes the parental

⁵ Federal Constitutional Court (Bundesverfassungsgericht; BVerfG), 31.05.1983, *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 64, 180, 188 = *Familienrechtszeitschrift (FamRZ)* 1983, 872.

⁶ E.g. ten years according to § 38 para. 1 School Law of Brandenburg of 02.08.2002.

⁷ D. SCHWAB, *Familienrecht*, 12th Edition, Munich, 2003, No. 606.

responsibility of the former holder (see § 1755 German CC).⁸ Marriage of the child does not terminate parental custody.⁹ However, care for an underage child who is or was married is restricted to representation in personal affairs, § 1633 German CC. A parent's care also expires with his or her death (see § 1680 para. 1 German CC).¹⁰ It is also automatically terminated when there is a declaration of death of the parent (§ 1677 German CC). Personal care cannot exist after the child dies.¹¹ The parents, however, shall attend to those affairs which cannot be delayed without jeopardy until the heir is able to attend to them; see § 1698b German CC. In other cases of a legal or actual obstacle for the custodian there is only a suspension of care, §§ 1673 et seq German CC. However, when persons other than the parents have only limited personal responsibility, these rights automatically end upon the cessation of living together, see Q 14.

4. What is the current source of law for parental responsibilities?

There are several important legal sources for parental responsibility. They are found in German constitutional law, European human rights law, German substantive civil law, the law of civil and non-contentious procedure and in social security law.

According to Art. 3 para. 2 of the Constitution (*Grundgesetz* or German Basic Law) there is equality of the sexes.¹² This provision, which came into force in 1953, made the former provisions of the Civil Code giving 'parental authority' to the father unconstitutional. Later the Constitutional Court also struck down a provision which gave the father the right to decide, if there was a conflict between the parents.¹³

Another important provision is Art. 6 para. 1 of the German Constitution, which states that marriage and family shall enjoy the special protection of the State. This means that in addition to the subjective rights embodied in Art. 6 of the German Basic Law this provision also contains a constitutional 'institutional guarantee' and a 'basic norm decisive as to value.'¹⁴ 'Family' includes the relationship between parents and their children, whether legitimate or illegitimate¹⁵.

⁸ L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 40.

⁹ L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 41.

¹⁰ L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 42.

¹¹ L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 38.

¹² Grundgesetz für die Bundesrepublik Deutschland of 23.05.1949, *Federal Gazette (Bundesgesetzblatt; BGBl)* 1949 I p. 1.

¹³ BVerfG, 29.07.1959, *BVerfGE* 10, 59 = *Neue Juristische Wochenschrift (NJW)* 1959, 1483 = *FamRZ* 1959, 416.

¹⁴ See BVerfG, 17.01.1957, *BVerfGE* 6, 55, 71 et seq; 29.07.1968, *BVerfGE* 24, 119, 135; 04.05.1971, *BVerfGE* 31, 58, 67 et seq; 18.07.1979, *BVerfGE* 51, 386, 396 et seq; 30.11.1982, *BVerfGE* 62, 323, 329.

¹⁵ See BVerfG, 29.07.1959, *BVerfGE* 10, 59, 66 = *FamRZ* 1959, 416.

According to Art. 6 para. 2 of the Constitution, the care and raising of children is the parents' natural right and foremost obligation. Therefore parents enjoy the fundamental right to determine the upbringing of their offspring as they think fit. Art. 6 para. 2 first sentence, guarantees the exercise of parental responsibility in the interests of welfare of the child.¹⁶ This is considered to be not only the constitutional basis for the principle that the best interests of the child are paramount, but also a barrier to State intervention. The State nevertheless has to fulfil its role as guardian of the child's own basic rights.¹⁷ Therefore the State is authorized to curtail parental rights in order to protect children where there is abuse or neglect. The State also has to guarantee that the child's position is represented in custody court proceedings.¹⁸

Art. 6 para. 5 of the German Constitution states that legislation shall provide illegitimate children with the same opportunities for their development and their place in society as are enjoyed by legitimate children. This constitutional mandate was the basis for the reform statutes of 1969 and 1997. A different treatment of illegitimate children is only acceptable if there are reasons that flow from the special situation of these children.¹⁹ In the field of parental responsibility, this provision and Art. 3 of the Constitution were the legal basis for several judgments of the Federal Constitutional Court, giving unmarried fathers a better legal position.²⁰ However, the Court recently upheld § 1626a German CC, according to which it is the mother who has parental responsibility if there is not a common declaration of joint parental responsibility,²¹ see Q 22b.

Another important legal source is the European Convention on Human Rights, especially Art. 8 on the respect of family life.²² The convention, however, has only the same status as a German federal statute. For this reason, German courts must observe and apply the Convention in interpreting national law. But on the level of German constitutional law, the text of the Convention and the case-law of the European Court of Human Rights (ECtHR) serve as interpretive aids when determining the scope and contents of the fundamental rights and constitutional principles of the German Basic Law, to the extent that this does not restrict or reduce the protection of the individual's fundamental rights under the German Basic Law.²³

However, in practice the implementation of the rules of the European Convention on Human Rights can be difficult, as the case of *Görgülü* shows. He is the Turkish father of a child born out of wedlock in 1999. The mother of the child gave the child up for adoption one day after the birth and declared her consent prior to adoption

¹⁶ See BVerfG, 18.07.1979, *BVerfGE* 51, 386, 398; 09.02.1982, *BVerfGE* 59, 360, 381 *et seq.*

¹⁷ See BVerfG, 15.06.1971, *BVerfGE* 31, 194, 208 = *FamRZ* 1971, 421.

¹⁸ BVerfG, 20.08.2003, *FamRZ* 2004, 86 = *NJW* 2003, 3544.

¹⁹ BVerfG, 07.05.1991, *BVerfGE* 84, 168, 185 = *FamRZ* 1991, 913; BVerfG, 06.05.1997, *BVerfGE* 96, 56, 65 = *FamRZ* 1997, 869.

²⁰ See BVerfG, 07.03.1995, *BVerfGE* 92, 158 = *FamRZ* 1995, 789 (adoption without consent of the father); 23.04.2003, *FamRZ* 2003, 1447 annotated by M. COESTER.

²¹ BVerfG, 29.01.2003, *BVerfGE* 107, 150 = *NJW* 2003, 955 = *FamRZ* 2004, 285.

²² See C. LENZ/J. BAUMANN, 'Umgangsrecht auf internationaler Ebene, insbesondere vor dem EGMR', *FPR* 2004, 303 *et seq.*

²³ See BVerfG, 14.10.2004, *NJW* 2004, 3407 = *FamRZ* 2004, 1857.

by the foster parents, with whom the child has been living since its birth. Since October 1999, the father has unsuccessfully endeavoured in a number of judicial proceedings to obtain custody and gain a right of contact. In a judgment of 26 February 2004, the ECtHR declared that the German decision on custody and the exclusion of the right of access violated Art. 8 of the European Convention.²⁴ The father was also successful in a constitutional complaint.²⁵ The Appellate Court of Naumburg nevertheless again denied contact to the child. Then, realising that the Appellate Court seemingly was not willing to follow the applicable legal norms, the German Constitutional Court itself issued a preliminary injunction in favour of the father.²⁶

The primary source of German family law is the Fourth Book of the Civil Code (§§ 1297-1921 German CC; Bürgerliches Gesetzbuch) with its three sections, 'Civil Marriage' (bürgerliche Ehe, §§ 1297 - 1588), 'Family Relationships' (Verwandtschaft, §§ 1589 - 1772) and 'Guardianship' (Vormundschaft, §§ 1773 - 1921). The statutory provisions on custody and contact are set out in section 2. The current source of law for parental responsibilities is mainly §§ 1626 - 1698b German CC. The provisions in this area of law were reformed in 1979²⁷ and again substantially amended by a reform statute of 16 December 1997 (Reform des Kindschaftsrechts),²⁸ which came into force on 1 July 1998. However, judge-made law still dominates the details of the allocation of custodial rights.

There are also provisions on the parental responsibility of the registered partner of a parent in § 9 of the Registered Partnership Act (LPartG; *Lebenspartnerschaftsgesetz*).

'Non-contentious' procedural issues are dealt with in the Act on Voluntary Jurisdiction (FGG; *Gesetz über die freiwillige Gerichtsbarkeit*).²⁹ Matters of parental responsibility are family matters in the framework of the Act on Voluntary Jurisdiction, see §§ 35b *et seq* German Act on Voluntary Jurisdiction.

The details of divorce proceedings and parental responsibility proceedings in this framework are regulated by the Code of Civil Procedure (§§ 606 *et seq* *Zivilprozessordnung*; German Code of Civil Procedure).³⁰ Especially in the context of divorce the relevant provisions are found in the Code of Civil Procedure. The subject matter jurisdiction of the family court and other courts is dealt with in the Court Organisation Act (*Gerichtsverfassungsgesetz*).³¹

²⁴ ECtHR (Third Section), *Görgülü v. Germany*, 26.02.2004, NJW 2004, 3397 = *FamRZ* 2004, 1456. A. ZEYCAN, *Der Fall Görgülü/BRD im Lichte der Menschenrechtskonvention*, *FuR* 2004, 443 *et seq*.

²⁵ See BVerfG, 14.10.2004, NJW 2004, 3407 = *FamRZ* 2004, 1857.

²⁶ BVerfG, 28.12.2004, *FamRZ* 2005, 173 annotated by G. RIXE.

²⁷ Gesetz zur Neuregelung des Rechts der elterlichen Sorge of 18.07.1979, *BGBI.* 1979 I p. 1061.

²⁸ *BGBI.* 1997, p. 2942.

²⁹ Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit of 20.05.1898, *Reichsgesetzblatt (RGBl.)*. 1898 p. 771, as amended.

³⁰ *Zivilprozessordnung* of 12.09.1950, *BGBI.* 1950 I p. 533, as amended.

³¹ *Gerichtsverfassungsgesetz* of 09.05.1975, *BGBI.* 1975 I p. 1077, as amended.

Of particular importance is the Children and Young Persons Assistance Act (KJHG; Kinder- und Jugendhilfegesetz) of 8 December 1998³² (as amended), which forms Book Eight of the Social Security Code (Sozialgesetzbuch; SGB VIII). According to this statute, the State Youth Welfare Office (Jugendamt) plays a central role.³³ The Youth Welfare Service (Jugendhilfe) gives, among other things, advice on partnership, separation and divorce (§ 17), on the exercise of contact rights (§ 18 para. 3), on education, adoption and guardianship (§§ 28, 51, 52a *et seq* of the Act), supervises foster parents (§ 44), commits children and young persons into custody (§ 34), participates in court proceedings (§§ 50 *et seq*), and acts as legal adviser, legal curator and guardian (§§ 55 *et seq*). Another task is the authentication of statements such as an acknowledgement of paternity or a commitment to pay maintenance (§ 59). The State youth welfare office can give advice and support (Beratung und Unterstützung). It also can be a legal adviser (Beistand, §§ 1712 *et seq* German CC) and in some cases the legal curator (Amtspfleger) for the child. Its task is mainly to promote the rights and interests of the child in relation to determination of paternity and maintenance (§§ 52 a *et seq* Social Security Code VIII).

5. Give a brief history of the main developments of the law concerning parental responsibilities.

The German CC of 1896 used the term ‘parental authority’ (Elterliche Gewalt). It was, however, the father of a legitimate child who had this authority. As a consequence of altered views on the role of spouses, the German Basic Law (*Grundgesetz*) of 1949 established equality between men and women (Art. 3 para. 2). A transitional provision made it clear that all statutes not in conformity with this principle would cease to be valid as of 31 March 1953 (Art. 117 para. 1 German Basic Law). From then on, the courts struck down an increasing number of family law provisions on the ground that they were unconstitutional (see Q 4). Later, many provisions of substantive family law were recodified by the Act on Equal Rights of Men and Women in the Field of Civil Law (Equal Rights Act; Gleichberechtigungsgesetz) of 18 June 1957.³⁴ These provisions lead to gender equality not only in marriage law, but also in child law as far as legitimate children were concerned. ‘Parental authority’ was replaced by ‘parental care’ in a reform law of 1979.³⁵

The old provisions on illegitimate children in §§ 1705 *et seq* German CC had also been declared unconstitutional, so a reform became necessary³⁶ (see Q 4). The Illegitimacy Act of 1969 for the most part called for the equal treatment of legitimate and illegitimate children.³⁷ Nevertheless there was still a certain amount of discrimination, especially the control of a non-married mother (so-called

³² German Social Security Code (Sozialgesetzbuch; SGB) Aches Buch (VIII) Kinder- und Jugendhilfe of 08.12.1998, *BGBl.* 1998 I, p. 3546.

³³ See U. LOHRENTZ, ‘Aufgaben des Jugendamtes bei Elterntrennung nach der Kindschaftsrechtsreform’, *Kind-Prax* 2001, 43 *et seq*.

³⁴ Gleichberechtigungsgesetz of 18.06.1957, *BGBl.* 1957 I p. 609.

³⁵ Gesetz zur Neuregelung der elterlichen Sorge (SorgeRG) of 18.07.1979, *BGBl.* 1979 I, p. 1061.

³⁶ BVerfG, 03.06.1969, *BVerfGE* 26, 44 = *FamRZ* 1969, 401.

³⁷ Gesetz über die rechtliche Stellung der nichtehelichen Kinder of 19.08.1969, *BGBl.* 1969 I, p. 1243.

Amtsvormundschaft, a certain kind of administrative curatorship), and there was no custody for the unmarried father.³⁸ The Civil Code also determined that the biological father of a child born out of wedlock could only exercise a right of access if the mother agreed or the Court of Guardianship so ordered.³⁹ For procedural reasons, in two cases a Chamber of the ECtHR found that this denial of the right of contact was discriminatory with respect to the application of the rights protected by Art. 8 of the Human Rights Convention.⁴⁰ The Grand Chamber, however, dismissed the claim.⁴¹

After Germany's reunification, the mother of an illegitimate child in East Germany retained full parental custody according to its former Family Code (*Familiengesetzbuch*; FamGB).⁴² The former restrictions of the German CC did not apply in East Germany (Art. 230 para. 1 Introductory Act to the German CC). The reform of legal curatorship – in the past often criticised, as unnecessary State interference – as well as the improvement of the legal position of a father of an illegitimate child were the main objectives of the reform of guardianship law in 1997.⁴³

Another fundamental reform also took place through a law of 16 December 1997, which came into force on 1 July 1998 (*Kindschaftsrechtsreformgesetz*; Child Law Reform Act).⁴⁴ The Child Law Reform Act mainly changed the rules on parental custody and contact in the event of divorce and for non-married fathers. It broke with the former concept that the father of a child born out of wedlock could not acquire custody and it also introduced the possibility for a non-married father to get parental care. Parental care, however, is still primarily with the mother (§ 1626a German CC), a solution that was recently confirmed by the Federal Constitutional Court.⁴⁵ See Q 22. The Child Law Reform Act also established the principle of co-parenting (joint parental responsibility) if married parents separate. Sole custody now represents the exception to the rule of joint custody, see § 1671 German CC. This concept of custody implies that, under the German CC, major decisions concerning the child must be made jointly by the parents. To a certain extent the Child Law Reform Act also recognized the stepfamily. The spouse of the parent (step-parent) got a right to contact (§ 1685 para. 2 German CC).⁴⁶

³⁸ The denial of joint custody was declared unconstitutional in a case of an illegitimate child that was later declared legitimate (§ 1738 old version German CC) by BVerfG, 07.05.1991, BVerfGE 84, 168 = FamRZ 1991,913.

³⁹ See the former §§ 1705, 1711 German CC.

⁴⁰ ECtHR (Fourth Section), *Sommerfeld v. Germany*, 11.10.2001, *Europäische Grundrechte-Zeitschrift* (EuGRZ) 2001, 588 = FamRZ 2002, 381; ECtHR (Fourth Section), *Sahin v. Germany*, 11.10.2001, EuGRZ 2002, 25.

⁴¹ ECtHR (Grand Chamber), *Sommerfeld v. Germany*, 08.07.2003, *ECtHR Reports* 2003-VIII No. 71 = FamRZ 2004, 337; ECtHR (Grand Chamber), *Sahin v. Germany*, 8.07.2003, *ECtHR Reports* 2003-VIII No. 71 = FamRZ 2004, 337. See C. Lenz/J. Baumann, FPR 2004, 303 *et seq.*

⁴² *Familiengesetzbuch, Gesetzblatt (GBl.)* 1966 I Nr. 1, p. 1, as amended.

⁴³ Gesetz zur Abschaffung der gesetzlichen Amtspflegschaft und Neuordnung des Rechts der Beistandschaft of 04.12.1997, *BGBl.* 1997 I, p. 2846.

⁴⁴ Gesetz zur Reform des Kindschaftsrechts (*Kindschaftsrechtsreformgesetz*; KindRG) of 16.12.1997, *BGBl.* 1997 I p. 2942. See R. FRANK, 'Parentage Law Reform,' in: *The International Survey of Family Law*, The Hague: M. Nijhoff Publ., 1999, p. 170 *et seq.*

⁴⁵ BVerfG, 29.01.2003, BVerfGE 107, 150 = FamRZ 2003, 285 = NJW 2003, 955.

⁴⁶ See K. MUSCHELER, 'Das Recht der Stieffamilie', *FamRZ* 2004, 913, 916.

Other amendments became necessary when registered life partnership for same-sex couples was introduced (2001).⁴⁷ The legislature gave the registered partner, and also a new spouse of the parent, ‘limited parental responsibilities’ (see § 9 para. 1(2) Registered Partnership Act; § 1687 b German CC).⁴⁸ By an amendment of 2004, adoption of stepchildren by a registered partner was allowed (see §9 para 4 Registered Partnership Act).⁴⁹ A minor amendment concerns the legal position of a biological father where parentage is not established legally.⁵⁰ Another amendment brought an extension of the persons who have a right to contact. Today there is no longer an enumeration of the persons having the right to contact but instead a general clause, see § 1685 para. 2 German CC (see Q 43c).⁵¹

6. Are there any recent proposals for reform in this area?

There are no major proposals for reform in the legislative process. However, the consequences and the implementation of the Child Law Reform of 1997, procedural innovations included, are still under debate.⁵² Also, after the reform German law primarily reflects biological and genetic parentage. This means that in general the biological parents also have parental responsibilities. However, even under the reformed legal provisions there are still many restrictions for unmarried father which are questionable under constitutional law and European human rights law. Therefore there is a constant debate on the legal position of the unmarried father and the remaining restrictions (see Q 22). Reforms in this respect could happen in the near future. On the other hand, German law has also started to recognise ‘social parenthood’ more and more, taking into account who the child is living with, and who is taking care of him or her, therefore there are also proposals for an improvement of the legal position of step-parents.⁵³ Another issue is the consequence of joint parental responsibility and the limits of contractual agreements of the parents, which is not defined clearly. The new procedural rules, especially in the field of contact, are also under review.

B. THE CONTENTS OF PARENTAL RESPONSIBILITIES

⁴⁷ Gesetz über die eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz – LPartG) of 16.02.2001, *BGBI.* 2001 I 266.

⁴⁸ K. MUSCHELER, ‘Das Recht der Stieffamilie’, *FamRZ* 2004, 913, 916.

⁴⁹ See Act to Amend the Law of Registered Partnership (Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts) of 15.12.2004, *BGBI.* 2004, I, p. 3396.

⁵⁰ Gesetz zur Umsetzung familienrechtlicher Entscheidungen des Bundesverfassungsgerichts of 13.12.2003, *BGBI.* 2003, I, p. 2547. See E. HÖFELMANN, ‘Das Gesetz zur Umsetzung familienrechtlicher Entscheidungen des Bundesverfassungsgerichts’, *FamRZ* 2004, 65 *et seq.*

⁵¹ Gesetz zur Änderung der Vorschriften über die Anfechtung der Vaterschaft und das Umgangsrecht von Bezugspersonen of 23.04.2004, *BGBI.* 2004, I, p. 598.

⁵² See Deutscher Bundestag Drucksache (BT-Drucks.) 15/2399 of 28.01.2004, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten M. NOLL, U. GRANOLD, M. EICHHORN, weiterer Abgeordneter und der Fraktion der CDU/CSU – Drucksache 15/2340 – Kindschaftsrechtsreform; <http://dip.bundestag.de/btd/15/023/1502399.pdf>

⁵³ See K. MUSCHELER, ‘Das Recht der Stieffamilie’, *FamRZ* 2004, 913, 919 *et seq.*

7. Describe what the contents of parental responsibilities are according to your national law including case law.

Since there has been no basic legal concept of parental responsibility until now, the contents of a general concept of parental responsibility cannot be defined. While the Civil Code of 1896 originally recognised and regulated ‘parental authority’ (*elterliche Gewalt*), today parents have ‘parental care’ (custody; *elterliche Sorge*). This change in terminology reflects the modern principle that the ‘best interests’ of the child should control and that the increasing ability of the child to act independently has to be taken in account. Although tort law protects the absolute right of parental custody from interference by third parties (§§ 823 par. 1, 1632 par. 1 German CC), the concept appears to be shaped just as much by the parents’ duty to the child.⁵⁴

In matters of parental custody, the law distinguishes mainly between the personal and the property interests of the child. ‘Personal care’ (*Personensorge*) includes the right and the duty to care for the child and to determine his or her education and residence. ‘Property care’ (*Vermögenssorge*) is the care for the child’s assets, § 1626 German CC. Another essential concept of German law is that in both of these kinds of care another distinction is made concerning whether the care relates to a more factual acting for the child or to legal representation.

8. What is the position taken in your national law with respect to:

(a) Care

Parental custody includes the care of the child, § 1626 para. 1 German CC. The statute does not go into details; however, it is generally accepted that this includes a general responsibility for the personal welfare of the child; this includes the child’s physical, mental and spiritual welfare (health, nourishment, clothing). A distinction has to be made between factual care (*tatsächliche Personensorge*) and representation in personal affairs (*Vertretung in persönlichen Angelegenheiten*).⁵⁵

A certain splitting of care has come from the fact that with joint parental responsibility there are several persons with care who do not necessarily live together. If the child has his or her ordinary residence with one parent, this parent can decide the ‘affairs of daily life’ (*Angelegenheiten des täglichen Lebens*) alone; § 1687 para. 1 sent. 2 German CC, see Q 36. Also the spouse or the registered partner of the parent with sole custody has a right to decide these daily affairs (see Q 14, 27a), e.g. on a one-day school excursion. Personal care includes choosing the child’s first name.⁵⁶

(b) Education

Care for the child specifically includes the right and the duty to educate the child, § 1631 para. 1 German CC. The parents shall give special consideration to the aptitude and inclination of the child with regard to matters of schooling and

⁵⁴ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1626 German CC No. 1.

⁵⁵ L. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2002, § 1626 No. 58 *et seq.*

⁵⁶ J. GERNHUBER and D. COESTER-WALTIJEN, in: *Lehrbuch des Familienrechts*, 4th Edition, Munich: Beck, 1994, § 54 I 6, p. 834.

vocation. If there is doubt, the advice of a teacher or of another suitable person should be obtained (§ 1631a German CC). *E.g.*, parents have to decide what school to send their child to;⁵⁷ however, routine issues of school attendance are simply ‘affairs of daily life’ in the sense of § 1687 para. 1 sent. 2 German CC;⁵⁸ see Q 8a.

(c) Religious upbringing

Religious upbringing of the child is a part of personal care.⁵⁹ The parent with the right of personal care can determine the religious upbringing of the child.⁶⁰ There has to be consent between the parents if they have joint parental responsibility. Generally, the religious belief that was common to the parents when they entered into marriage is decisive. If one parent wants a change and the other parent does not agree, the Guardianship Court can decide the dispute.

(d) Disciplinary measures and corporal punishment

Disciplinary measures can be taken, but their content and application is restricted.⁶¹ Whereas the former wording of the German CC was rather vague, stating that degrading disciplinary measures, in particular physical and mental mistreatment, were improper, now § 1631 para. 2 sent. 1 German CC states that children have a right to be educated without violence. Corporal punishment, mental injuries and other degrading measures are impermissible (§ 1631 para. 2 sent. 2 German CC). Also, ‘moderate’ corporal punishment is now banned.⁶²

(e) Medical treatment

Medical treatment is, as a rule, a question of parental care. The holder of parental care can consent or refuse consent to the child’s medical treatment.⁶³ If the holder, *e.g.*, as a Jehovah’s Witness refuses a necessary blood transfusion this can amount to a danger for the welfare of the child. Then the family court can take necessary steps according to § 1666 German CC and may substitute the parental consent to medical treatment;⁶⁴ see Q 51.

In cases of daily routine (especially day-to-day treatment) and also in cases of emergency, other persons who are not holders of parental care can take the necessary steps; see Q 27a. This is especially the case for the spouse of the parent, *i. e.* the step-parent (§ 1687b para. 1 and 2 German CC)⁶⁵ and the registered partner (§ 9 para. 2 Registered Partnership Act). Neither the parents nor the child can agree to

⁵⁷ P. HUBER, in: *Münchener Kommentar*, 4th Edition, München: Beck, 2002, § 1631 German CC No. 4.

⁵⁸ H. OELKERS, ‘Die Entwicklung des Sorgerechts bis Ende 2001’, *FuR* 2002, 107, 109.

⁵⁹ L. SALGO, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2002, § 1 RKEG No. 1.

⁶⁰ L. SALGO, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2002, § 1 RKEG No. 2.

⁶¹ H. OELKERS, ‘Die Entwicklung des Sorgerechts bis Ende 2001’, *FuR* 2002, 107, 110 *et seq.*

⁶² L. SALGO, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2002, § 1631 German CC No. 86.

⁶³ L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 22.

⁶⁴ See U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1666 German CC No. 16.

⁶⁵ See in more detail B. VEIT, ‘Kleines Sorgerecht für Stiefeltern (§ 1687 b BGB)’, *FPR* 2004, 67, 72 *et seq.*

a sterilisation (§ 1631c German CC) because the consequences for a minor child cannot be assessed correctly.

(f) and legal representation

Legal representation means that the parent acts in the name of the child but that the child bears the consequences. In general the parents represent the child jointly. However, in some instances one of the parents may represent the child individually (§ 1629 para. 1 German CC). The parent *e.g.* has the right to sign binding contracts in the name of the child, or the child may sue or be sued in his or her own name. Because the Civil Code distinguishes between care for the person and care for the property, there can be representation in both respects. Representation is generally a consequence of custody. Custody in respect with personal or property matters encompasses representation in these matters, § 1629 para. 1 German CC. However, according to § 1687 b para. 2 German CC, the spouse of a parent with sole parental responsibilities has a ‘right of representation in emergency situations’ (*Notvertretungsrecht*) in the event of imminent danger. The same applies to registered partners (§ 9 Registered Partnership Act), see Q 27a.

9. What is the position taken in respect of the child’s right to be heard with regard to the issues mentioned under Q 8 ((a)-(f)). What relevance is given to the age and maturity of the child?

(a) Care

As a general rule, in matters of care and education parents have to take into account the growing abilities and the need for the child to be independent and responsible acting, § 1626 para. 2 sent. 1 German CC. Parents must discuss issues of parental care with the child, as far as it is indicated, and endeavour to come to an understanding. For court proceedings see Q 59, 60.

(b) Education

As far as education is concerned the general rules apply. The parents shall give special consideration to the aptitude and inclination of the child with regard to matters of schooling and vocation, § 1631a German CC. They shall not press the child in a direction which does not conform with the child’s aptitude and inclination.⁶⁶ Disputes between the parents can be solved by court order, see Q 37.

(c) Religious upbringing

Generally, parents having parental custody decide whether the child should be given a religious upbringing. Under a special statute, a child of fourteen already has complete religious freedom (§ 5 sent. 1 German Act Concerning the Religious Upbringing of Children of 1921).⁶⁷ At the age of 12, a child cannot be educated under a different religion than before against his or her will (§ 5 sent. 2 German Law on Religious Upbringing). The child has to be heard when it is ten years old (§ 2 para. 3 sent. 5 German Law on Religious Upbringing).

⁶⁶ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 63rd Edition, München: Beck, 2004, § 1631a German CC No. 1.

⁶⁷ Gesetz über die religiöse Kindererziehung of 15.07.1921, *RGBl.* 1921, p. 939.

(d) Disciplinary measures and corporal punishment

Disciplinary measures can be taken. As stated in answer to Q 8 corporal punishment is inadmissible. However, insignificant acts are left out of consideration.

(e) Medical treatment

Medical treatment concerns an issue of parental responsibility and follows the general rules, see (a). One question is how far parents have to take the child's views into account. Another important question is how far the consent of the child is necessary or even sufficient for medical treatment. Generally the consent of the person with parental responsibility is necessary. However, there can also be cases where the consent of a minor child alone is sufficient. This is especially the case if the medical treatment is of minor importance.⁶⁸ The validity of consent to medical treatment will depend on the maturity and understanding of the child. The courts sometimes only require a 'natural understanding' (*natürliche Einsichtsfähigkeit*).⁶⁹ However, the conditions under which the consent of a child alone will suffice are a matter of controversy. A stricter view insists that consent of the parents is generally necessary.⁷⁰ See also Q 51.

If a pregnant minor chooses to have an abortion, under the conditions of § 218a German Penal Code it is argued that she can decide herself, as long as her maturity and understanding are guaranteed.⁷¹ This is, however, disputed. Other views demand that the consent of the holder of parental responsibility (parents) is always required⁷² or that a custodian must be appointed for the affair.⁷³ If a minor woman wants to have the child and her parents object, the family court can, if necessary, take measures according § 1666 German CC (jeopardy to the welfare of the minor child) and appoint a curator, thus protecting the pregnant woman.⁷⁴

(f) Legal representation

Legal representation is generally a consequence of parental care, therefore the restrictions of parental responsibility also set limits to legal representation. The

⁶⁸ L. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2002, § 1626 German CC No. 93.

⁶⁹ BGH 05.12.1958, *BGHZ* 29, 33 = *FamRZ* 1959, 200 annotated by BOSCH.

⁷⁰ M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin, 2000, § 1666 German CC No. 138.

⁷¹ Landgericht (LG) München I 24.07.1978, *FamRZ* 1979, 850 = *NJW* 1980, 646 (16 year old woman); Amtsgericht (AG) Schlüchtern 29.04.1997, *NJW* 1998, 832; L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 98.

⁷² Oberlandesgericht (OLG) Hamm 16.07.1998, *NJW* 1998, 3424; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 63rd Edition, München: Beck, 2004, § 1626 German CC No. 13.

⁷³ See L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 1626 No. 101.

⁷⁴ See AG Dorsten Der Amtsvormund 1978, 131 (16 years old woman); M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin, 2000, § 1666 German CC No. 102; L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No.102.

parent cannot agree to medical treatment against a child's will, as long as the child has the necessary understanding of the treatment's consequences.⁷⁵

10. Do(es) the holder(s) of parental responsibilities has(have) the right to administer the child's property?

The person holding parental custody (usually the parents) also has to administer the child's property (*Vermögenssorge*, § 1626 para. 1 German CC). Particularly important legal transactions concluded in the child's name, such as the sale of real property, require the approval of the family court (§ 1643 German CC), see Q 12.

11. If yes, explain the content of this right.

The content of the right to administer the child's property is a general obligation to conserve and to augment the child's assets. These assets include everything the child owns and acquires (immovables, movables, income *etc.*).⁷⁶ According to the principle of surrogation, the child's assets include anything purchased by the holder of parental care with the child's means, § 1646 German CC. The right to administer the child's property includes the legal representation of the child, § 1629 German CC, see Q 2d.

The Civil Code contains some basic rules on the administration of child's property. Money should be invested in accordance with the principles of 'profitable property management' (*wirtschaftliche Vermögensverwaltung*) in that it must not be used to cover expenses, § 1642 German CC. The Civil Code also gives some guidelines as to how the child's assets are to be used. Income is to be used primarily to cover the cost of administering the property and the cost of maintaining the child. Any remaining income shall not be kept by the parents but be reinvested.⁷⁷ If the income is insufficient, the income of the child's gainful employment or independent gainful occupation (*Erwerbstätigkeit*) can be used, § 1649 para. 1 German CC. The original capital may only be touched if the child's maintenance would otherwise be endangered.⁷⁸

If the income is not necessary for the administration of the child's assets and maintenance, it can also be used for two other purposes, i.e. the maintenance of the parents and the maintenance of any unmarried siblings. This possibility is based on the idea of family solidarity. The use of income is restricted, however, by the economic situation of the parties and 'equity'.

12. Are there restrictions with respect to:

⁷⁵ L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 8.

⁷⁶ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1626 German CC No. 19.

⁷⁷ H. ENGLER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2000, § 1642 German CC No. 7 *et seq.*

⁷⁸ See U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 63rd Edition, München: Beck, 2004, § 1642 German CC No. 4.

(a) Certain goods and/or values (inherited property, gift...)

There is a general restriction for the holder of parental responsibility with respect to the child's property. The parents may only use income from the child's property for their own support and for the support of siblings when it is not needed for the proper management of the property or for the child's maintenance, and if such a use is equitable in view of the assets and income of all the parties involved (§ 1649 para. 2 German CC).

There can also be restrictions to the administration of property concerning certain property, especially those that are inherited. The right and the duty to administer the child's property does not extend to property acquired by the child *mortis causa* or received by him as a gratuitous disposition *inter vivos* under § 1638 para. 1 German CC, if there were dispositions that the parents should not administer the property made by the testator by testamentary disposition or by the donor at the time the gift was given. Anything the child acquires by reason of a right belonging to such property or by way of compensation for the destruction, damage or deprivation of an item belonging to the property, or through a legal transaction involving the property, similarly may not be administered by the parents, § 1638 para. 2 German CC. If it is determined by testamentary disposition or upon making a gift that one of the parents is not to administer the property, it shall be administered by the other parent; to this extent the latter will represent the child (§ 1638 para. 3 German CC).

Another restriction concerns administration under instructions of third parties. Anything which the child acquires *mortis causa*, or which is given him as a gratuitous disposition *inter vivos*, shall be administered by the parents according to the instructions contained in the testamentary disposition or given at the time of making the gift, § 1639 para. 1 German CC. According to § 1639 para. 2 German CC the parents are permitted to deviate from the instructions to the same extent a guardian is permitted to do so under § 1803 para. 2, 3 German CC.

For all assets acquired by the child *mortis causa* the parents have to draw up an inventory of property, which is then submitted to the family court, § 1640 para. 1 German CC. However, this is not necessary if the value of property does not exceed 15.000 Euros or the testamentary disposition stated that no inventory has to be drawn up, § 1640 para. 2 German CC.

(b) Salary of the child

Where an under age child is employed with the authorisation of his or her parents, the child has the legal capacity to act in respect to the conclusion or dissolution of an employment contract, § 113 German CC. However, the general rules apply to the salary of the child. As far as there is no consent from the holder of the care for the property, the freedom of the child to dispose of his salary is not unlimited.⁷⁹ There can be, however, a general consent of the holder of parental responsibility which can also be given implicitly.⁸⁰

⁷⁹ See U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1626 German CC No. 19, 20.

⁸⁰ L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 66.

(c) Certain transactions

There are several restrictions concerning certain transactions. One category of restrictions are ‘subjective limits.’⁸¹ The representation of a child by his or her parents is excluded if the parents’ activities give rise to a conflict between their own interests and the interests of their child, §§ 1629 para. 2, 1795 German CC. This is especially the case if the parent represents the child in a transaction with his spouse or a relative in direct line, unless the transaction is only the performance of an existing obligation (§ 1795 No. 1 German CC).

There can also be no parental representation in the case of § 181 German CC, i. e. in a contract between the child and the parent (§ 1795 para. 2 German CC). These restrictions do not apply though, where the transaction can only be beneficial for the child.⁸²

§ 1643 German CC lists also finite types of cases where parents may only represent their child if the family court expressly agrees to the legal transactions to be performed in the child’s name. The approval of the family court is necessary for important or unusual transactions. The first category are legal transactions involving land or ships (§ 1821 German CC), transactions involving the full property of the child or an inheritance (§ 1822 No. 1 German CC), contracts involving the acceptance or refusal of a purchase or a business contract affecting this purchase (§ 1822 No. 3 German CC), lease contracts and other contracts involving obligations recurring over a year after the child comes of age (§ 1822 No. 5 German CC), credit (§ 1822 No. 8 German CC) and certain credit transactions, including the giving of a guarantee (§ 1822 No. 9 – 11 German CC).

There is also a general prohibition to making gifts. In representing a child the parents may not make gifts; such a contract is void.⁸³ Excepted are gifts which are deemed to be made under a moral obligation or out of common decency, § 1641 German CC.

13. Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?

There are general rules on the administration of the property of children (see Q 12). As a consequence of a decision by the Federal Constitutional Court,⁸⁴ special rules exist to protect children from indebtedness caused by the holders of parental custody. They were introduced by an Act Limiting the Liability of Minors (*Gesetz zur Beschränkung der Haftung Minderjähriger*), which came into force on 1 January 1999.⁸⁵ Today there is a restriction of a child’s liability, according to § 1629a German

⁸¹ H. ENGLER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2000, vor §§ 1638 - 1665 German CC No. 2.

⁸² Federal Supreme Court (Bundesgerichtshof; BGH), 27.09.1972, *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)* 59, 236; BGH, 16.04.1975, *FamRZ* 1975, 480.

⁸³ H. ENGLER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2000, § 1641 German CC No. 15.

⁸⁴ BVerfG, 13.05.1986, *BVerfGE* 72, 155 = *FamRZ* 1986, 1859.

⁸⁵ Gesetz zur Beschränkung der Haftung Minderjähriger (Minderjährigenschaftsbeschränkungsgesetz – MiHbeG) of 25.08.1998, *BGBI.* 1998 I, p. 2487.

CC, up to the value of the child's property at the moment the child reaches the age of majority. This applies to acts of the parents in the framework of their legal representation.

The restrictions do not apply to obligations of the child arising from the carrying on of an independent gainful occupation permitted under § 112 German CC. The same is true for obligations solely for the satisfaction of his personal needs (§ 1629a para. 2 German CC).

14. Do the contents of parental responsibilities differ according to the holder(s) of parental responsibilities (e.g. married, unmarried, parents not living together, step-parents, foster parents or other persons). If so, describe in some detail how it differs.

The content of parental custody differs according to the holder(s) of parental responsibilities and to what extent it is acquired. Married parents have full parental custody for their children as long as it is not restricted or taken away, § 1626 para. 1 German CC.

An unmarried mother generally has full sole parental custody, § 1626a para. 2 German CC (see Q 20, 22). An unmarried father has only joint custody if there is a common declaration by the parents on custody (*Sorgeerklärung*), § 1626a para. 1 No. 2 German CC (see Q 22a). In this case he has full joint custody with the mother. Without such joint custody the father only has a contact right, § 1684 para. 1 German CC.

Parents living apart are generally in the same legal position as parents living together. Living together does not give the unmarried father a better legal position.

As stated in the answer to Q 8, a step-parent does not have full parental custody. However, he or she has a right to co-decide 'in agreement' (*im Einvernehmen*) with the custodian in daily affairs, § 1687b para. 1 German CC (see Q 27a). This attribution of 'limited parental responsibilities' is often called 'small custody' (*kleines Sorgerecht*).⁸⁶ This limited custody, however, presupposes that there is sole custody of only one of the parents. It is excluded if there is joint custody of the parents. In cases of imminent danger for the child the step-parent can undertake all necessary legal acts in the interests of the child (§ 1687b para. 2 German CC). The custodian has to be informed without delay.

The family court may restrict or exclude the 'limited parental responsibility' (limited custody) of the step-parent if this is necessary for the welfare of the child, § 1687b para. 3 German CC. Limited parental responsibility ends when the spouses no longer live permanently together (§ 1687b para. 4 German CC). The concept of 'limited parental responsibility' also applies to registered partners, § 9 *Lebenspartnerschaftsgesetz* (see Q 27b).

If parents are not willing or able to undertake the child's upbringing, foster care (*Familienpflege*) may be possible. Only sometimes is this possible without a

⁸⁶ See B. VEIT, 'Kleines Sorgerecht für Stiefeltern (§ 1687 b BGB)', *FPR* 2004, 67 *et seq.*

permission of the youth office (§ 44 Social Security Act VIII). The carer (*Pflegeperson*) takes on the factual role of a parent, while parental care remains vested in the parents. However, the caregiver has certain rights. He or she can decide in daily affairs and may represent the child in these affairs (§ 1688 para. 1 sent. 1 German CC), though not against the parents express wishes (§ 1688 para. 3 sent. 1 German CC). The carer also has the right to administer the earnings of the child's gainful employment and to claim for the child's maintenance, insurance and social security payments (§ 1688 para. 1 sent. 2 German CC). On application of the parents or with the parents consent the family court may transfer further rights to the foster caregivers, to the exclusion of the parents (§ 1630 para. 2 German CC).

C. ATTRIBUTION OF PARENTAL RESPONSIBILITIES

I. Married parents

15. Who has parental responsibilities when the parents are:

(a) Married at the time of the child's birth

When the parents are married at the time of the child's birth, they are *ipso iure* the joint holders of parental responsibilities. This situation is presumed to be self-evident in the German CC; although it is not expressly mentioned in the law, it results indirectly from the wording of § 1626 a para. 1 sent. 2 German CC, where it says that parents who are not married at the time of the child's birth are entitled to exercise parental responsibilities if they get married. Parents who are married at the time of the child's birth need not issue a declaration nor can they prevent the fact of joint parental responsibility; joint parental responsibility exists until this legal state is changed by operation of law, for example, by the death of one parent, § 1680 para. 1 German CC, or through a court decision.⁸⁷

(b) Not married at that time but marry later

When the parents are not married to each other at the time of the child's birth but subsequently marry, the mother's sole parental responsibility, which exists by operation of law, § 1626 a para.1 sent. 2 German CC, is automatically converted into joint parental responsibility in accordance with § 1626 a para. 1 sent. 2 German CC. If prior to the marriage the parents declared, with legally binding effect, in accordance with § 1626 a para. 1 sent. 1 German CC, their willingness to assume joint parental responsibility for the child, the joint responsibility which came into existence as a result of the declarations continues automatically.

16. How, if at all, is the attribution of parental responsibilities affected by:

(a) Divorce

Until the *Child Law Reform Act* of 1998, a court decision on parental responsibility was compulsory in the event of a divorce,⁸⁸ whereas according to the legislation currently in force, a court decision is no longer required. Back in 1982 the Federal Constitutional Court⁸⁹ declared the mandatory transfer of parental responsibility to

⁸⁷ D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 522.

⁸⁸ § 1671 German CC (old version), § 623 para. 1 German Code of Civil Procedure (old version).

⁸⁹ BVerfG 03.11.1982, *BVerfGE* 61, 358.

one parent on divorce⁹⁰ as null and void, due to the violation of parental rights this involved.⁹¹ Since the Reform Act, therefore, joint parental responsibility is generally maintained despite divorce. No court ruling is required. A parental divorce no longer means that family courts are obliged to deal with the future arrangements regarding parental responsibilities. A court decision on parental responsibility is now only made following an application by one parent. Such an application can always be made if the parents live apart, § 1671 German CC.

At the same time, the state of living apart that results from divorce does change the structure of joint parental responsibility, as the child will usually either live with the mother or the father on account of their spatial separation. The law takes account of this circumstance by means of the special provision in § 1687 German CC. Under the umbrella of the continuance of joint parental responsibility after divorce, which does not describe a reality but is a legal construct⁹², issues regarding contact with the child, § 1684 para. 3 German CC, maintenance and upbringing, § 1628 German CC, must be clarified between the parents, pursuant to § 1687 para. 1 German CC. If the child's permanent residence is with one of the parents, as opposed to any other possible arrangement for the sharing of responsibility, § 1687 para. 1 sent. 1 German CC stipulates that the parents' mutual consent is in general no longer required, as otherwise is the case when the parents hold joint responsibility. Mutual consent is only required in matters the regulation of which is of considerable importance for the child. In matters relating to everyday life, the decisions are made solely by the parent with whom the child habitually resides, the habitual residence resulting either from the consent of the other parent or from a court decision. The term 'matters relating to everyday life' refers to frequently occurring situations requiring a decision by the parents, but whose effects on the child's development can be modified without a great deal of difficulty (e.g. § 1687 para. 1 sent. 3 German CC).⁹³ By contrast, any decisions regarding matters which have an effect on the child's development that can either not be modified or be modified only with difficulty, are of 'considerable importance' for the child.⁹⁴

Above and beyond the provision of § 1687 German CC, both holders of parental responsibilities are authorised in accordance with § 1629 para. 1 sent. 4 German CC to act alone on behalf of the child in the event of imminent danger, § 1687 para. 1 sent. 5 German CC.

(b) Legal separation

German law does not have the legal institution of 'legal separation'.

(c) Annulment of the marriage

Since the annulment of marriage by court decision in accordance with § 1313 German CC has no retroactive effect, the same principles apply as for divorce. This

⁹⁰ § 1671 para. 4 sent. 1 German CC (old version).

⁹¹ Art. 6 para. 2 German Basic Law (*Grundgesetz*).

⁹² D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 667.

⁹³ BT-Drucks. 13/8511 p. 74 *et seq*; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1687 No. 11.

⁹⁴ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1687 No. 7.

means that joint parental responsibility continues after the annulment of a marriage by court decision.

(d) Factual separation

In the event of a factual separation, too, the previously existent joint parental responsibility continues. This means that there is no difference in comparison with the situation pertaining after a divorce. As shown by § 1671 para. 1 German CC, which refers to ‘living apart’ and not to ‘divorce’, it is not the divorce but the separation which forms the jurisdictional basis for the legal provisions.

17. To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage? If they are, are these agreements subject to scrutiny by a competent authority?

After a divorce, annulment of the marriage or factual separation of parents who were previously joint holders of parental responsibilities and who, as has been shown, remain so, each parent can, to the extent that § 1687 German CC applies, grant to the other parent, by means of the relevant authorisations, more scope for action than that which is in accordance with the legal situation governing representation.⁹⁵ Such authorisations can, however, always be revoked⁹⁶ and do not change the fundamental attribution of parental responsibilities.

In addition to these powers of control, each parent has the option to file an application with the family court, in accordance with § 1671 para. 1 German CC, for the transfer of sole parental responsibility, either in full or in part. The court must grant this application subject to the following preconditions:

Dissolution of joint parental responsibility in accordance with § 1671 German CC requires that the parents have lived apart from each other not just on a temporary basis at the time the decision concerning parental responsibility was taken, the reference point being the date of the last hearing.⁹⁷ The parents are considered to ‘live apart’ within the meaning of § 1671 German CC if the requirements set out in § 1567 para. 1 German CC have been met, i.e. if a common household no longer exists and there is no will to re-establish such, or if the parents are divorced.

Joint parental responsibility can only be dissolved on application; the arrangement of parental responsibility upon the court’s own motion cannot be based on § 1671 German CC.⁹⁸ Only the parents are entitled to file an application.⁹⁹

When deciding on the application, § 1671 para. 2 German CC distinguishes between those applications where parents are in agreement and those that are

⁹⁵ D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 672.

⁹⁶ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1629 No. 9.

⁹⁷ M. Coester, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2000, § 1671 No. 41.

⁹⁸ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 998.

⁹⁹ P. FINGER, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1671 No. 58.

disputed. In the case of an amicable solution, with which this question is concerned, § 1671 para. 2 No. 1 German CC applies:

If the respondent, i.e. the other parent, agrees, parental rights explicitly take precedence over control by the state. The family court does not have to examine the application to see whether it most nearly corresponds to the best interests of the child;¹⁰⁰ as a rule, the assessment of the child's best interest can be left to the parents who are in agreement regarding the same.¹⁰¹ This means that the court is bound by the parents' will, as expressed in the application and the consent. The only exception to this is when the child has completed its 14th year and objects to the sought-for attribution of sole parental responsibility, or if attribution of the said responsibility would endanger the welfare of the child (§ 1697 a German CC). Objection by the child does not mean that the court must in all cases be guided by the child's will; if the court arrives at the conviction that granting sole parental responsibility constitutes the best solution, resistance from the child notwithstanding, it will nevertheless grant the application.¹⁰²

In proceedings in accordance with § 1671 German CC, the court can, both when the parents agree and when the application is disputed, either transfer full sole parental responsibility to the proponent of the application or grant the proponent only partial sole responsibility while reaffirming joint responsibility in all other matters. Partial transfer of parental responsibility is an option, particularly if the parents have conflicting views regarding only one area. This is most often the case when it comes to the right to determine the residence of the child.¹⁰³

18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents/one of the parents? To what extent, if at all, should the competent authority take account of a parent's violent behaviour towards the other parent?

There are several ways in which the courts can become active with regard to the attribution of parental responsibilities against the will of one or both of the parents:

If the parents are living apart not just on temporary basis, the case falls under the scope of the provision contained in § 1671 para. 2 No. 2 German CC. If the parents are not in agreement about the attribution of sole parental responsibility to one parent, the court should grant the application only if it is to be expected that the dissolution of joint responsibility and moreover the transfer of sole responsibility on the proponent correspond most closely to the child's best interests. In this respect, it is still disputed whether the court should carry out its examination of the child's best interest in two stages¹⁰⁴ – i.e. whether it should initially decide whether

¹⁰⁰ OLG Hamm 31.08.1998, *NJW* 1999, 68.

¹⁰¹ M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2000, § 1671 No. 65.

¹⁰² D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 676.

¹⁰³ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1671 No. 5.

¹⁰⁴ OLG Hamm 25.08.1998, *FamRZ* 1999, 38, 39; OLG Nürnberg 17.11.1998, *FamRZ* 1999, 673, 674;

joint responsibility or sole responsibility most closely correspond to the child's best interests, followed by an examination as to whether the sole responsibility applied for by the proponent itself most closely corresponds to the child's best interests – or whether such a two-stage procedure is to be rejected.¹⁰⁵ According to the prevailing opinion in this regard, a two-stage examination is called for: The key criterion in the decision to dissolve joint responsibility is the parents' ability and willingness to cooperate.¹⁰⁶ This means that for joint responsibility to be dissolved, considerable impediments to communication must be present; in this context, disputes of a profound nature in matters of upbringing¹⁰⁷ are to be given greater weight than a dispute of a profound nature between the partners which has so far not involved the child. Serious conflict between partners, such as sustained violence¹⁰⁸ between parents or reports of a serious nature to the police, may give rise to dissolution of joint responsibility if these disputes prevent the parents from performing their joint parental responsibilities in accordance with the child's best interests.¹⁰⁹ It would seem that in German judicial practice, violence within a relationship still plays a fairly minor role with regard to court decisions on parental responsibility.¹¹⁰ However, the Federal Constitutional Court in a more recent decision¹¹¹ explicitly ruled that if the child's father has been sentenced with final and binding effect as a result of substantial acts of violence against the child's mother, resulting in substantial psychological problems for the mother, joint parental responsibility cannot be considered a possibility due to the lack of viable social relations between the parents. It is only when joint responsibility is not in the child's best interests that the question as to which parent is to be attributed sole responsibility arises. The valuation criteria used when deciding on the child's best interests are: the principle of the promotion of the child's development and that of continuity, the former having priority. The principle of the promotion of the child's development requires that priority of parental care be given to the parent with whom the child can be expected to receive the most support in the establishment of his or her personality.¹¹² By contrast, the principle of continuity is guided by the fact that a child's upbringing ought to seek to foster the establishment of behavioural constants¹¹³ and aim to keep the child in that environment where his or her strongest ties lie.

D. SCHWAB, 'Elterliche Sorge bei Trennung und Scheidung der Eltern, Die Neuregelung des Kindschaftsrechtsreformgesetzes', *FamRZ* 1998, 457, 462.

¹⁰⁵ M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2000, § 1671 No. 104 *et seq.*

¹⁰⁶ OLG Zweibrücken 02.03.2000, *FamRZ* 2000, 1042, 1043.

¹⁰⁷ KG 21.09.1999, *FamRZ* 2000, 502, 503; OLG Bamberg 10.03.1999, *FamRZ* 1999, 805, 806.

¹⁰⁸ OLG Hamm 13.08.1999, *FamRZ* 2000, 501, 502; M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2000, § 1671 No. 139.

¹⁰⁹ BVerfG 18.12.2003, *FamRZ* 2004, 354, 255; KG 18.10.1999, *FamRZ* 2000, 504, 505.

¹¹⁰ H. KINDLER and A. DRECHSEL, 'Partnerschaftsgewalt und Kindeswohl', *JAm* 2003, 217, 218 *et seq.*

¹¹¹ BVerfG 18.12.2003, *FamRZ* 2004, 354, 355.

¹¹² BVerfG 05.11.1980 *FamRZ* 1981, 124, 126; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1671 No. 21; P. FINGER, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1671 No. 28.

¹¹³ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1671 No. 22.

Regardless of whether the parents live apart or not, moreover, § 1628 German CC provides that the family court will, in the case of joint parental responsibility, make a decision if the parents are unable to agree on a specific issue or specific kind of issue relating to parental responsibility, the regulation of which is of considerable importance for the child. Again, the family court will only act upon application (see also the answer to Q 38).

Furthermore, there are cases where the court must intervene upon its own motion and regulate parental responsibility in order to avoid the child being placed in danger. The legal basis for this is found in § 1666 German CC: This provision authorises the family court to take all measures necessary to prevent the jeopardising of the physical, mental or moral welfare of the child as a result of the abusive exercise of parental responsibility, neglect of the child, parents' failure through no fault of their own, or of a third party's behaviour. Accordingly, changes to the arrangements of parental responsibility can be made to the extent that they seem suitable and necessary to avert danger. In this context, the court may withdraw responsibility from one parent, either in part or in full, as a result of which the other parent will then exercise sole responsibility in accordance with § 1680 para. 1 and 3 German CC. Furthermore, the court may withdraw parental responsibility from both parents in part¹¹⁴ and subsequently appoint a curator for the child.¹¹⁵ Finally, the court has the option to withdraw all parental responsibilities from both parents¹¹⁶ and to appoint a guardian for the child.¹¹⁷ It can be assumed that a child's best interests are in jeopardy if the child is exposed to a present danger to such an extent that it can be predicted with reasonable certainty that he or she will be considerably damaged in his or her further development.¹¹⁸ In this context, the court must also, under the aspect of jeopardy to the child's best interests by a third party's behaviour, take into account any violence between the partners within the family.¹¹⁹ Given the principle of proportionality, parental responsibility will only be withdrawn from a parent in extreme cases.

19. Provide statistical information on the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage.

(a) Divorce

A court decision on parental responsibility will only be made following an application by one of the parents, § 1671 para. 1 German CC (see answer to Q 17 for further details). If no application for the attribution of parental responsibilities is filed, joint responsibility continues after the divorce. In the year 2000, this was the case in 69.35 % (87,630 cases in absolute figures) of divorce proceedings involving

¹¹⁴ § 1666 a para. 2 German CC.

¹¹⁵ § 1909 para. 1 German CC.

¹¹⁶ § 1666 a para. 2 German CC.

¹¹⁷ § 1773 para. 1 German CC.

¹¹⁸ BGH 14.07.1956, *FamRZ* 1956, 350, 351; BayObLG 03.12.1976, *FamRZ* 1977, 473.

¹¹⁹ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1666 No. 33.

children.¹²⁰ In those cases where parental responsibility was attributed by the court, the breakdown was as follows: in 6.19 % (5,423) of divorce proceedings the courts attributed joint parental responsibility to mother and father; in 21.62 % (18,949) of proceedings, sole parental responsibility was attributed to the mother, while sole parental responsibility was attributed to the father in only 1.52 % (1,334) of proceedings.¹²¹ The latter two figures illustrate that mothers still take precedence when it comes to the attribution of sole parental responsibility. All in all, it can be said that joint parental responsibility predominates and is the usual model. To illustrate, altogether joint parental responsibility accounted for 75.54 % of cases in 2000.

(b) Legal separation

German law does not have the legal institution of ‘legal separation’.

(c) Annulment of the marriage

The annulment of a marriage, the consequences of which in accordance with § 1318 para. 1 German CC are largely informed by the provisions governing divorce, is in practice of very little importance. Consequently there is no statistical information on the attribution of parental responsibilities after annulment of the marriage.

II. Unmarried parents

20. Who has parental responsibilities when the parents are not married?

According to § 1626 a para. 2 German CC, when the parents are not married to each other at the time of the child’s birth, the mother as a rule has sole parental responsibility. The Federal Constitutional Court established on several occasions that the initial legal attribution of the child to the mother in accordance with § 1626 a para. 2 German CC and the general attribution to her of the right of care and custody of the child do not violate the parental rights of the father of a child born outside marriage resulting from Art. 6 para. 2 German Basic Law.¹²² The general attribution of parental responsibilities to the mother is justified on account of the great variety of life circumstances into which children born outside marriage enter; often the mother is the child’s only sure ‘reference person’, i.e. person able to provide a secure reference point for the child, after its birth. Moreover, the court holds that the mother has a natural connection to her child right from the start, unlike the father, who must begin building it up after birth.¹²³

The parents do, however, have the option to both issue a declaration of parental responsibility in accordance with § 1626 a para. 1 No. 1 German CC, which if effective results in the parents being attributed joint responsibility for the child. For such declarations of responsibility to be effective, specific preconditions set out in

¹²⁰ R. PROKSCH, *Begleitforschung zur Umsetzung der Neuregelungen zur Reform des Kindschaftsrechts*, 2. Zwischenbericht Teil II, Bonn, 2001, I.3.3.1 (S. 14), <http://www.bmj.bund.de/media/archive/202.pdf>.

¹²¹ R. PROKSCH, *Begleitforschung zur Umsetzung der Neuregelungen zur Reform des Kindschaftsrechts*, 2. Zwischenbericht Teil II, Bonn, 2001, I.3.3.1 (S. 14), <http://www.bmj.bund.de/media/archive/202.pdf>.

¹²² BVerfG 24.03.1981, BVerfGE 56, 363, 389; BVerfG 29.01.2003, NJW 2003, 955, 956.

¹²³ BVerfG 29.01.2003, NJW 2003, 955, 956.

§§ 1626 b to 1626 e German CC must be met. Declarations of responsibility are unconditional, § 1626 b para. 1 German CC, but can be issued before the birth of the child, § 1626 b para. 2 German CC. Furthermore, a declaration of responsibility is strictly personal, § 1626 c para. 1 German CC, and requires public registration, § 1626 d para. 1 German CC. To obtain joint responsibility, it is not necessary for the parents to live together. Nor are these declarations of responsibility examined with a view to establishing whether joint responsibility corresponds to the child's best interest.¹²⁴

In this regard, it may be worth mentioning a recent decision by the Federal Supreme Court:¹²⁵ According to this decision, the fact that the child's mother is still married does not stand in the way of the biological father issuing a declaration of responsibility in accordance with § 1626 a para. 1 No. 1 German CC, if the child is born after the application for divorce was lodged and the biological father has acknowledged paternity in accordance with § 1599 para. 2 German CC. In this case, the declaration of responsibility is invalid for the time being; once the court has granted the petition for divorce and issued a decree absolute the declaration becomes valid.

21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, pacte civil de solidarité...).

In German law, the only way mixed-sex couples may formalise their relationship is through marriage. The Registered Partnership Act of 16 February 2001, which offers the opportunity to formalise a relationship, applies only to same-sex partners. Since a major reform of the Registered Partnership Act, which took effect on 1 January 2005, a same-sex partner living in a registered partnership can adopt the child of his or her partner, § 9 para. 7 Registered Partnership Act. A bill providing for joint adoption¹²⁶ by registered partners was rejected (see answer to Q 28 for further details).

22. Under what condition, if at all, can

(a) the unmarried mother obtain parental responsibilities

In line with what was said in the answer to Q 20, German law generally provides that when the parents are not married to each other at the time of the child's birth, the mother of a child born outside marriage has sole parental responsibility, § 1626 a para. 2 German CC.

Where parental responsibilities have been withdrawn from the mother through court proceedings – for example, on the basis of § 1666 German CC (see Q 18) – the mother can reclaim them only in accordance with § 1696 German CC, i.e. through a court decision.

¹²⁴ BT-Drucks. 13/4899 p. 59.

¹²⁵ BGH 11.02.2004, NJW 2004, 1595, 1596.

¹²⁶ See Art. 2 para. 1 No. 2-9 of the draft legislation prepared by the FDP faction to amend the Registered Partnership Act, dated 11 February 2004, BT-Drucks. 15/2477 pp. 29, 31.

If the parents have made declarations of responsibility in accordance with § 1626 a para. 1 No. 1 German CC, either before or after the child's birth, and are thus jointly responsible for the child, their declarations are binding, which means that joint responsibility cannot subsequently be revoked.¹²⁷ Even if the father consents, therefore, the mother can obtain sole responsibility only in those cases where the couple has lived apart, following a court decision in accordance with § 1671 German CC.

(b) The unmarried father obtain parental responsibilities

First of all, the father of a child born out of wedlock can assume joint parental responsibility through the provisions of § 1626 a para. 1 No. 1 German CC, in agreement with the child's mother, by means of the relevant declarations of responsibility. The Child Law Reform Act through § 1626 a para. 1 No. 1 German CC has provided the parents of a child born outside marriage with the opportunity to take joint legal responsibility for the child. The Act is founded on a concept of organising parental responsibilities, the touchstone of which is the parents' consensual desire to assume joint responsibility, being guided by considerations of the child's best interests. The fact that the father is not able to obtain parental responsibility against the will of the mother does not, in the opinion of the Federal Constitutional Court – in contrast to a widely held view in legal literature¹²⁸ – violate the parental rights of the father as protected by Art. 6 para. 2 German Basic Law.¹²⁹ The joint exercise of parental responsibilities presupposes a functioning social relationship between the parents, requires at least a minimum of consensus between them and must be geared to the child's best interest. In contrast to the case of parents of children born in wedlock, who through marriage undertook to take responsibility for one another and for any common children, the legislature cannot generally assume even today, according to the court, that unmarried parents live in a common household, are able to care for their child, and wish to do so. The child's best interests, however, demand that the child from his or her birth onwards has a person who can take legally binding actions on his or her behalf. This could not be ensured if the question of who is to represent the child were to be, after the child's birth, a matter requiring the clarification of the court. The assignment of parental responsibilities to the mother on principle is, according to the court, also justified because the legislator has afforded unmarried couples who wish to take responsibility for their child together, the opportunity, by way of § 1626 a para. 1 No. 1 German CC, to do so through a joint declaration of responsibility. If such is made, it justifies the assumption that consensual cooperation between them will be possible.¹³⁰ The court considers that joint responsibility enforced against the will of one parent has proven to have more disadvantages than advantages for the child.¹³¹ The legislature was justified to assume that in instances where the necessary willingness to cooperate required for joint responsibility existed between parents,

¹²⁷ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1626 a No. 9.

¹²⁸ M. LIPP, 'Das elterliche Sorgerecht für das nichteheliche Kind nach dem Kindschaftsrechtsreformgesetz', *FamRZ* 1998, 65, 70.; P. HUBER, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1626 a No. 39-42.

¹²⁹ BVerfG 29.01.2003, *NJW* 2003, 955, 956.

¹³⁰ BVerfG 29.01.2003, *NJW* 2003, 955, 957.

¹³¹ BVerfG 29.01.2003, *NJW* 2003, 955, 958.

parents generally did in fact make use of the opportunity afforded them and legally safeguarded their factual joint responsibility through a legal declaration. Based on this assumption, according to the court, it is not a violation of Art. 6 para. 2 German Basic Law to rule out joint responsibility in the absence of a joint declaration. Still working under the assumption that the lawmakers' prognosis is correct, the Constitutional Court also denies a violation of Art. 6 para. 5 German Basic Law, which mandates that children born out of wedlock be given the same conditions for their development as children born within. In the court's opinion, neither does the provision of § 1626 a German CC violate the rule of equality under Art. 3 para. 1 German Basic Law.¹³² The mother's consent to joint responsibility is required in the case of a father of a child born outside marriage and of a father of a child born within marriage, the difference being that in the latter case, the declaration of consent is given in the consent to marry, while in the former it is given through a declaration of parental responsibility.

The Constitutional Court does, however, see the necessity of reviewing the validity of the lawmaker's prognosis. Should it turn out that in a substantial number of cases, even when the parents live with their children, joint responsibility is not legally secured and that this is not due to reasons connected with the child's welfare, then the denial of the father's right to participate in the child's upbringing does in fact violate his parental rights pursuant to Art. 6 para. 2 German Basic Law.¹³³

Furthermore, the family court is obliged to transfer parental responsibility to the father of the child born outside marriage following the death of the mother, who had sole parental responsibility in accordance with § 1626 a para. 2 German CC, provided that this serves the best interests of the child, § 1680 para. 2 sent. 2 German CC.

Finally, the family court can transfer parental responsibility to the father of the child born outside marriage within the scope, and subject to the preconditions, of § 1666 German CC (see Q 18).

Regarding the situation of unmarried couples living apart, see the answer to Q 23.

23. How, if at all, is the attribution of parental responsibilities affected by the ending of the unmarried parents' relationship?

If the mother had sole parental responsibility in accordance with § 1626 a para. 2 German CC before the separation, the situation remains unchanged by the separation. If the parents held joint parental responsibilities before the separation on the basis of § 1626 a para. 1 No. 1 German CC (declarations of responsibility), the joint responsibilities will continue after separation; with respect to the special arrangements regarding joint parental responsibilities in the event of the parents living apart, the provisions of § 1687 German CC must be taken into consideration (see Q 16a).

¹³² BVerfG 29.01.2003, NJW 2003, 955, 960.

¹³³ BVerfG 29.01.2003, NJW 2003, 955, 956, 959.

24. May the competent authority attribute joint parental responsibilities to the parents also against the wish of both parents/one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour towards the other parent?

In this case there are, once again, various possible courses of action open to the court when it comes to the attribution of parental responsibilities against the wishes of both parents or one of the parents:

If the parents were jointly responsible for the child before their separation, in accordance with § 1626 a para. 1 No. 1 German CC (declarations of responsibility), each parent can file an application requesting sole parental responsibility in accordance with § 1671 para. 2 No. 2 German CC. Concerning the prerequisites and consequences of a procedure in accordance with § 1671 para. 2 No. 2 German CC, that which has been said in response to Q 18 applies.

Moreover, the court may make a decision on the basis of § 1628 German CC if the parents are unable to agree on a specific issue or specific kind of issue relating to parental responsibility (see Q 18).

Finally, the court has the authority, in fulfilment of its official mandate as guardian in accordance with § 1666 German CC, to take any measures required to avert a danger to the child and to reattribute parental responsibilities within this context (see Q 18).

25. To what extent, if at all, are unmarried parents free to agree upon the attribution of parental responsibilities after the ending of their relationship?

If the parents were jointly responsible for the child before their separation through declarations of responsibility in accordance with § 1626 a para. 1 No. 1 German CC, this joint responsibility on principle continues after separation (see Q 23).

By contrast, if the mother had sole parental responsibility in accordance with § 1626 a para. 2 German CC before the separation, the parents are still able to file declarations of responsibility in accordance with § 1626 a para. 1 No. 1 German CC after separation, as living together is not a prerequisite for the obtaining of joint responsibility (see Q 20). The father can obtain sole responsibility only if he files an application for transfer of responsibility in accordance with § 1672 German CC. Through this provision, the legislature of the German Child Law Reform Act replaced the method of attribution of parental responsibility to the father, which in earlier legislation could be achieved only through a declaration of legitimacy¹³⁴ or through adoption¹³⁵, by a parental responsibility arrangement that is not concerned with personal status or descent.¹³⁶ This change in the attribution of parental responsibilities presupposes the filing of an application by the father and the mother's consent; failure by the mother to give her consent results in the

¹³⁴ § 1723 German CC (old version).

¹³⁵ § 1741 German CC.

¹³⁶ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 1011.

application being rejected as inadmissible out of hand.¹³⁷ Unlike § 1671 para. 2 No. 1 German CC, § 1672 German CC does not follow the parents' joint assessment, making rather changes in the attribution of parental responsibilities dependent on an additional positive examination of the child's best interests, through a decision of the family court; the application will be granted if the transfer of responsibility serves the child's best interests, § 1672 para. 1 sent. 2 German CC. Once a reattribution of parental responsibilities has taken place, joint parental responsibility can no longer be established by means of a declaration of responsibility, but only through the decision of the family court, § 1696 German CC.

The compulsory requirement of the mother's consent for the transfer of sole responsibility to the father is regarded by many as open to objection from a constitutional law point of view,¹³⁸ given that a child who has lived with both parents is likely to have developed emotional ties with his or her father. Failing to raise any objections on principle against the norm of § 1626 a German CC from a constitutional law point of view, the Constitutional Court also declared § 1672 German CC to be constitutional.¹³⁹ According to the Constitutional Court, an incompatibility of § 1626 a German CC – and hence as a logical consequence, of § 1672 German CC – with German Basic Law exists only to the extent that there is a lack of transitional arrangements for those parents who have lived with their child born outside marriage and have jointly cared for their child, but who separated before the Child Law Reform Act came into force on 1 July 1998:¹⁴⁰ Such parents, particularly the fathers, must be given the opportunity to have their case examined by the court to decide whether joint parental responsibility can be established in consideration of the child's best interests, the other parent's will to the contrary notwithstanding. The legislator has since created such a transitional provision regarding the German Child Law Reform Act for parents who are not married to each other.¹⁴¹ Under this arrangement, the family court can, on application, substitute the declaration of responsibility of the parent holding parental responsibilities, subject to certain conditions.

26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.

If the parents are not married to each other at the time of their child's birth, the mother has sole responsibility (§ 1626 a para. 2 German CC) unless both parents have filed a declaration of responsibility in accordance with § 1626 a para. 1 No. 1 German CC (see Q 15b for further details). As far as the frequency of these declarations is concerned, no statistical data are available. In 2004 the statistical recording of the number of declarations became a legal requirement, § 58 a para. 2 SGB XIII, which means that this number will be included in the Youth Welfare Statistics (*Jugendhilfestatistik*) from 2005 onwards. Then it will be easier to assess whether the legislator's prognosis was accurate, i.e. that parents living together

¹³⁷ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 1012.

¹³⁸ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1672 No. 3.

¹³⁹ BVerfG 23.4.2003, *FamRZ* 2003, 1447.

¹⁴⁰ BVerfG 29.01.2003, *NJW* 2003, 955, 956.

¹⁴¹ BGBl 2003/1 p. 2547 *et seq.*

legally secure their factual joint responsibility through the filing of declarations of responsibility (see Q 22b).

III. Other persons

27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when, he/she is:

(a) Married to that parent

The spouse of the parent holding parental responsibilities can participate in or obtain parental responsibilities in the following ways:

First of all, the spouse of the parent holding parental responsibilities has the option of obtaining parental responsibilities for the child of his or her spouse through adoption. In accordance with § 1741 para. 2 sent. 3 German CC, a spouse can, on their own, adopt the child of his or her spouse. Subsequently the child will acquire the legal position of a joint child of the spouses, § 1754 para. 1 German CC. This situation also leads to the spouses obtaining joint responsibility for the child, § 1754 para. 3 German CC. For an adoption to be effective, a number of declarations of consent must be obtained, namely that of the child who is to be adopted, that of his or her parents and, if applicable, that of the spouse; these declarations of consent must be recorded by a notary, they are absolute and valid indefinitely and must, with a few exceptions, be made in person and are irrevocable (§ 1750 para. 1 – 3 German CC); furthermore, they become ineffective if the application for adoption is withdrawn or refused (§ 1750 para. 4 sent. 1 German CC).¹⁴² According to § 1741 para. 1 sent. 1 German CC, adoption must always serve the child's best interests. In most cases, however, so-called 'stepchild adoption' does not serve the child's best interests as long as the other parent is alive. Stepchild adoption must not destroy the child's relationship with the other parent, who as former partner of the parent caring for the child might seem to that parent worth displacing.¹⁴³ Only in cases where a personal relationship with the other parent has never existed, or no longer does so, or where it has at least become considerably less close, can stepchild adoption serve the child's best interests.¹⁴⁴ In accordance with § 1752 para. 1 German CC, the declaration of adoption of the child is made by the guardianship court on application by the adopting parent.

In all other cases, that is, without recourse to adoption, there is no change to the original attribution of parental responsibilities; this means that the spouse of the parent holding parental responsibilities does not, for example, obtain (joint) parental responsibility for the latter's child as a result of marriage. However, by virtue of the *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften* (Law to end discrimination against same-sex partnerships: registered partnerships), which came into force on 8 August 2001, the legislature has created a provision for the specific arrangements of parental responsibility both in the cases under discussion here, i.e. marriage by one parent

¹⁴² D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 702.

¹⁴³ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 1153.

¹⁴⁴ H.-U. Maurer, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1741 No. 32.

(§ 1687 b German CC) and, in § 9 Registered Partnership Act, the cases where a parent enters into a registered partnership with a same-sex partner.

According to § 1687 b para. 1 German CC, the spouse of a parent with sole parental responsibilities is entitled to participate in decision-making on matters relating to the child's everyday life, – the so-called 'limited parental responsibilities' (*kleines Sorgerecht*), – and, in accordance with § 1687 b para. 2 German CC, a 'right of representation in emergency situations' (*Notvertretungsrecht*) in the event of imminent danger. According to § 9 German Registered Partnership Act, the same applies to registered partners.

§ 1687 b para. 1 sent. 1 German CC and/or § 9 para. 1 German Registered Partnership Act refers to 'the spouse of the parent holding sole parental responsibility, who is not a parent of the child' being entitled to 'participate in decision-making' on 'matters relating to the child's everyday life' in 'agreement' with the parent holding parental responsibility. According to § 1687 b para. 3 German CC and/or § 9 para. 3 Registered Partnership Act, the family court can limit or rule out the rights provided for in § 1687 b para. 1 German CC (§ 9 para. 1 German Registered Partnership Act), if this is necessary in the interests of the child's best interests.

The provisions of § 1687 b para. 1 German CC and/or § 9 para. 1 German Registered Partnership Act are not uncontroversial as far as their interpretation and importance in terms of legal policy is concerned. For instance, the legal literature has often criticised the lack of clarity concerning the exact nature of the acts constituting 'limited parental responsibilities'.¹⁴⁵

One of the difficulties is the interpretation of the term 'consent' from the point of view of the binding effect of the 'consent' once it has been granted. Some have cited the way legislative procedure¹⁴⁶ was used to create the legal provision in question as proof that the intention of the legislature was that, once granted, the consent becomes binding. By virtue of the provision added in § 1687 b para. 3 German CC (§ 9 para. 3 German Registered Partnership Act), (only) the family court can restrict the rights provided for in § 1687 b para. 1 (§ 9 para. 1 German Registered Partnership Act) if this is necessary in the best interests of the child; continuous disputes between partners can harm the child's best interests.¹⁴⁷ According to predominant opinion, however, the requirement of 'consent' is not meant to be qualified by any restriction on the parental responsibilities of the parent who holds responsibility; for this reason, the opinion of the parent with sole responsibility is decisive in the event of a dispute.¹⁴⁸

The legal scope of the term 'participation in decision-making' also raises problems. A right to participate in decision-making must mean more than merely the right to a hearing. This right to a hearing, in fact, already results from § 1353 para. 1

¹⁴⁵ D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 604; Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 1134.

¹⁴⁶ See BT-Drucks. 14/3751, p. 39.

¹⁴⁷ D. SCHWAB, 'Eingetragene Lebenspartnerschaft – ein Überblick', *FamRZ* 2001, 385, 394.

¹⁴⁸ G. Brudermüller, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 9 LPartG No. 1.

German CC (§ 2 German Registered Partnership Act) - duty to conjugal community, bearing of mutual responsibility - to the extent that the arrangements of the step-parent's marriage to the parent holding responsibility or the arrangements of the registered partnership are affected.¹⁴⁹ From this results the question whether the parent holding responsibility must come to an agreement with the step-parent, especially, regarding whether the former will cease to be the sole external representative of the child.¹⁵⁰

Furthermore, the phrase 'matters relating to everyday life' requires interpretation. This terminology refers back to the legal definition of § 1687 para. 1 sent. 3 German CC (see Q 16 a). However, the situation outlined in § 1687 b German CC (§ 9 Registered Partnership Act) is different from that of § 1687 German CC, in that in § 1687 German CC the parents' right to decide becomes concentrated in one person due to their separation, in spite of their continuing to hold joint responsibility, whereas the provision of § 1687 b German CC (§ 9 German Registered Partnership Act) is based on the partners cohabiting, with only one partner holding sole responsibility.¹⁵¹

Finally, it is disputed under which conditions a parent can be deemed to hold sole parental responsibilities, which is necessary for the so-called limited parental responsibilities to come into play. Some, in an extensive interpretation, understand a parent to hold *sole* parental responsibility even in cases of joint responsibility where one parent had sole right to decide in matters relating to everyday life until they married or entered a registered partnership, either as a result of parental consent or of a court decision.¹⁵² Although the requirement of sole parental responsibility does not appear meaningful due to the limited scope of the authorisation,¹⁵³ given the unambiguous wording and legislator's intention it indeed appears to be a requirement that the parents do not hold joint responsibilities.

Despite the objections against the 'limited parental responsibilities'¹⁵⁴ raised in legal literature from a constitutional law point of view, the Constitutional Court has ruled the provision of § 9 para. 1 German Registered Partnership Act, which corresponds to § 1687 b para. 1 German CC, to be compatible with the constitution.¹⁵⁵ It ruled that in entrusting 'limited parental responsibilities' to the spouse or registered partner, the legislature does not interfere with the parental rights resulting from Art. 6 para. 2 German Basic Law, which belong to the parent who does not hold parental responsibilities. It was not the 'limited parental

¹⁴⁹ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 1134.

¹⁵⁰ D. SCHWAB, 'Eingetragene Lebenspartnerschaft - Ein Überblick', *FamRZ* 2001, 385, 395; Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 1134.

¹⁵¹ G. BRUDERMÜLLER, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 9 LPartG No. 1.

¹⁵² See St. MOTZER, 'Die neueste Entwicklung von Gesetzgebung und Rechtsprechung auf dem Gebiet von Sorgerecht und Umgangsrecht', *FamRZ* 2001, 1034, 1040; G. Brudermüller, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 9 LPartG No. 1.

¹⁵³ N. DETHLOFF, 'Die Eingetragene Lebenspartnerschaft - Ein neues familienrechtliches Institut', *NJW* 2001, 2598, 2602.

¹⁵⁴ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 1134.

¹⁵⁵ BVerfG 29.01.2003, *NJW* 2002, 2245, 2250.

responsibilities' derived from the sole parental responsibility of a parent that deprive the parent who does not hold parental responsibility of his or her responsibilities, but the decisions by the family court which transferred sole responsibility to one parent rather than another. The rights of a parent who does not have parental responsibility cannot be affected if a third person living with the child were to exercise joint parental responsibilities in part, in agreement with the parent holding sole parental responsibility.

The right of representation in emergency situations stipulated in § 1687 b para. 2 German CC (§ 9 para. 2 German Registered Partnership Act) corresponds to an actual need, that is, to the enabling of the step-parent to act in the best interests of the child in the event of imminent danger; because the parent holding parental responsibility must be notified immediately, this does not produce conflict with the parental rights.¹⁵⁶ This competence in emergency situations has an effect on the outside world and includes legal representation, for example in the case of medical treatment after an accident.¹⁵⁷

(b) Living with that parent in a formalised relationship (registered partnership, civil union, *pacte civil de solidarité*...)

Since mixed-sex couples under German law do not have the opportunity to legally formalise their relationship other than by marriage, this question is not applicable. Regarding the situation of same-sex partners, see the answer to Q 28.

(c) Living with that parent in a non formalised relationship

'Non-marital step-parenthood' does not offer the partners of parents holding sole parental responsibility the option to obtain joint parental responsibility. Declarations of responsibility in accordance with § 1626 a para. 1 No. 1 German CC (see Q 20), stating the assumption of joint responsibility for a child, can only be made by the biological parents. Furthermore, partners in non-formalised relationships cannot adopt the biological child of a partner with sole parental responsibility; § 1741 para. 2 sent. 3 German CC applies only to spouses. Finally, the parent holding sole parental responsibility is not allowed to transfer part of his or her parental responsibility to the other partner or to grant him or her the authority to care jointly for the child in the context of an agreement; parental responsibility is a highly personal duty.¹⁵⁸ The parent with sole responsibility does, however, have the option to involve his or her partner in the fulfilment of his or her duties on a revocable basis; the essence from a legal point of view in this respect is the consent of the parent with parental responsibilities. The matter of the consent is the permission to fulfil parental care functions; it constitutes a legally recognised justification for the involvement of third parties, that is otherwise not permitted.¹⁵⁹

28. Does it make any difference if the partner of the parent holding parental responsibilities is of the same sex?

Since a major reform of the Registered Partnership Act, which took effect on 1 January 2005, a same-sex partner living in a registered partnership can adopt the

¹⁵⁶ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 1134.

¹⁵⁷ BT-Drucks. 14/3751 p. 39.

¹⁵⁸ D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 593.

¹⁵⁹ D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 593.

child of his or her partner, § 9 para. 7 Registered Partnership Act. The child thus obtains the legal position of a joint child of the same-sex partners in accordance with § 1754 para. 1 German CC.

Moreover, the registered partner of a parent with sole parental responsibilities is entitled to participate in decision-making on matters relating to the child's everyday life, § 9 para. 1 Registered Partnership Act. Please refer to the comments on limited parental responsibilities in answer to Q 27a.

If the same-sex partner does not cohabit with the parent holding sole parental responsibilities on a formalised basis, i.e. without having established a registered partnership, he or she may only be granted the exercise of individual duties of parental responsibility within the context of the revocable consent granted by the parent holding sole parental responsibilities. In such cases, no limited parental responsibilities exist. In addition, that which has been said in answer to Q 27c applies.

29. How, if at all, is the attribution of parental responsibilities in the partner affected by the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

Relationship of the type in Q 27a (spouse of the parent):

Here a distinction must be made according to the various permutations possible:

- If an adoption has already been completed, on divorce or annulment of the marriage the adopting spouse and the biological parent they were married to continue, on principle, to exercise joint parental responsibilities. Consequently, § 1687 German CC applies. In this context, please refer to the comments made in the answer to Q 16a.
- If there has been no adoption and if the spouse of the parent holding sole parental responsibility enjoyed only 'limited parental responsibilities', the following applies: The 'limited parental responsibilities' of the step-parent must always 'protect and secure' the care for and raising of the child;¹⁶⁰ therefore in accordance with § 1687 b para. 4 German CC they end once the spouses live apart on a permanent basis.

Relationship of the type in Q 27b:

This question is not applicable (see Q 27b above).

Relationship of the type in 27c (unmarried partner of the parent):

In the case of 'non-marital step-parenthood' the partner cohabiting with the parent holding parental responsibility without being married to him or her can only – as shown in answer to Q 27c – be assigned the exercise of individual areas of parental responsibility, as shown in answer to Q 27c, and that by way of consent, i.e. a revocable authorisation. The termination of the relationship, i.e. the separation of the unmarried cohabiting partners, is generally accompanied by an – implied, at least – revocation of any authorisations previously granted with regard to the exercise of specific aspects of parental responsibility.

¹⁶⁰ BT-Drucks. 14/3751 p. 39.

Relationship of the type in Q 28:

Here the following distinction must be made:

If a same-sex partner cohabits with a parent holding sole parental responsibility in a registered partnership in accordance with the Registered Partnership Act, then § 9 para. 1 Registered Partnership Act applies, as shown in the answer to Q 28, and provides the registered partner with 'limited parental responsibilities'. If the registered partners live apart on a permanent basis, the 'limited parental responsibilities' end in accordance with § 9 para. 4 Registered Partnership Act, as the purpose associated with them, i.e. to secure and protect the care for and upbringing of the child by this step-parent, has ceased to exist.

With cohabitation that has not been formalised through a registered partnership, the termination of the relationship does not affect the attribution of parental responsibilities. Just as in the case of termination of a relationship between unmarried cohabiting mixed-sex partners, however, the termination of the relationship generally includes an implied revocation of any authorisations previously granted with regard to the exercise of specific aspects of parental responsibility.

30. To what extent, if at all, is the parent holding parental responsibilities and his/her partner free to agree upon the attribution of parental responsibilities after the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

Relationship of the type in Q 27a:

After a divorce, annulment of the marriage or factual separation both the adopting spouse and the biological parent generally remain jointly responsible. Moreover they may, within the scope of § 1687 German CC as outlined in the answer to Q 16a, grant to the other parent by means of the relevant authorisations more scope for action than that which is in accordance with the legal provisions governing representation, but subject to the premise of revocability. In addition to these powers of control, each parent has the option to file an application with the family court, in accordance with § 1671 para. 1 German CC, requesting the transfer of sole parental responsibility, either in full or in part. With regard to the prerequisites and consequences of a procedure on the basis of § 1671 para. 1 German CC, please refer to the appropriate comments found in the answer to Q 17.

If the stepchild was not adopted, § 1671 para. 1 German CC does not apply; there is no way for the (former) spouse of the biological parent to obtain the transfer of the parental responsibilities or joint parental responsibilities. This applies even if he or she has in fact cared or jointly cared for the child over a prolonged period of time, even as far back as the child's birth, and has close emotional ties with the child. The parent holding sole parental responsibility only has the option to transfer to the other parent, as to any other third party, the exercise of aspects of parental responsibility by way of consent, while the attribution of parental responsibilities remains otherwise unchanged.

Relationship of the type in Q 27b:

In the absence of possibilities other than marriage which might be used to legally formalise a relationship between mixed-sex partners, this question is not applicable (see Q 27b).

Relationship of the type in Q 27c:

In the event of the termination of extramarital cohabitation between a parent and his or her partner, the general attribution of parental responsibilities remains unaffected, just as it was while the relationship was intact. If the parent holding sole parental responsibility has transferred to the partner the exercise of certain areas of parental responsibility by granting the relevant authorisations, the separation will generally be viewed as including at least an implied revocation of such authorisations. The parent holding sole parental responsibility is, however, free on termination of the relationship with his or her partner to include the ex-partner, as they could any other third party, in the exercise of aspects of parental responsibility by means of consent.

Relationship of the type in Q 28:

With regard to the powers of control on termination of a registered partnership or the *de facto* separation of registered partners, the only option available to the parent holding sole parental responsibility is, once again, to grant the authorisation mentioned above.

31. Under what conditions, if at all, can other persons not being a parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parent...)? Specify, where such other persons may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

Once again, the parents holding parental responsibilities may involve third parties, on a revocable basis, in the exercise of the tasks associated with parental responsibility. The essence of the permitted involvement of third parties from a legal point of view lies in the consent granted by the parents holding parental responsibility. The parental responsibility as such does, however, remain with the parent(s) holding parental responsibility.

Where parents are not able, or perhaps not even willing, to bring up their child themselves, they have the option to give their child up for adoption. Moreover, they may entrust the child to a foster family for a shorter or longer period, or possibly even on a long-term basis.

The adopting third party will, in accordance with § 1754 para. 3 German CC, be granted parental responsibility for the minor he or she has adopted. In return, the biological parents who have given their child up for adoption will lose their parental responsibilities.

By contrast, when the child is received into a foster family the foster parent is not attributed any direct parental responsibilities for this child. The parental responsibilities of the biological parents remain undiminished by any contractual

foster care arrangements and any mediated by the youth welfare office.¹⁶¹ If the child is in foster care over a prolonged period, the foster parent is, however, authorised, in accordance with § 1688 para. 1 sent. 1 German CC, to decide on matters relating to everyday life and to act for the holder of parental responsibility to this extent. Moreover, the foster parent is entitled, in accordance with § 1688 para. 1 sent. 2 German CC, to administer any remuneration for work the child may receive and to claim and administer any maintenance, insurance, public support and other social benefits on behalf of the child. The holder of parental responsibility may, however, in accordance with § 1688 para. 3 sent. 1 German CC, preclude such authorisations by ‘declaring otherwise’; furthermore, the family court, in accordance with § 1688 para. 3 sent. 2 German CC, may limit or preclude the foster parent’s said authorisations. Subject to the consent of the parents holding parental responsibility, the foster parent may be granted a legal position which exceeds § 1688 German CC: for instance, the family court has the option, in accordance with § 1630 para. 3 sent. 1 German CC and upon application by the parents, to transfer matters of parental responsibility to the foster parent if the child is in foster care over a prolonged period. The transfer may concern matters having to do with responsibility for the child’s person and for the child’s property; the phrase ‘matters of parental responsibility’ does not limit the scope, which means that a full transfer of parental responsibility, especially of responsibility for the child, can take place in individual cases.¹⁶²

In addition to the options outlined so far, there are two further ways in which third parties can obtain parental responsibility: guardianship and curatorship.

Guardianship (*Vormundschaft*) usually refers to the legally regulated, comprehensive care for a person unable to safeguard his or her interests. Today guardianship only exists for minors. A prerequisite of guardianship is that the parents do not act as legal representatives. According to § 1773 German CC, the minor is entrusted to a guardian if he or she is not subject to parental responsibility or if the parents are not entitled to represent the minor legally, either in the area of responsibility for the child’s person or for the child’s property. This is the case, for example, if both parents die, if parental responsibility has been suspended or if it has been withdrawn from the parents in accordance with § 1666 German CC. The guardianship court must furthermore place the child under the care of a guardian if the personal status of the minor cannot be established, i.e. if the child is a foundling.

Guardianship replaces parental responsibility; as a result, in accordance with § 1793 para. 1 sent. 1 German CC it generally includes full responsibility for the child’s person and the child’s property and the authorisation to represent the child legally. In exceptional cases the guardian may not be granted full parental responsibility, for example, if in accordance with § 1673 para. 2 sent. 2 German CC the under-age mother is entitled *de facto* to care for the child alongside the guardian. In general, guardianship is ordered and the guardian chosen by the guardianship court; if the family court has withdrawn parental responsibility from

¹⁶¹ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 1129.

¹⁶² U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1630 No. 19.

the parents, then this task falls to the family court. The guardian is chosen primarily on the basis of the person named by the parent in accordance with §§ 1776, 1777 German CC (see answer to Q 34), and secondly, i.e. in the absence of such, by the court, using criteria of suitability. An examination of suitability takes into account the personal life situation as well as the assets and other circumstances of the person in question; for instance, the court will deem unsuitable any person who forced the court to intervene in matters to do with the care for and upbringing of his or her own children, or any person who might have been sentenced for child abuse.¹⁶³ Although the law assumes guardianship by a single guardian to be the norm, the youth welfare office or even an association can be, and often is, appointed as guardian.

Curatorship (*Pflegschaft*) means the holding of parental responsibility for a limited number of matters; structurally it is modelled on guardianship, and the rules of guardianship law are largely applicable to it, in accordance with § 1915 para. 1 German CC.

In this context, it is particularly the 'supplementary curatorship' (*Ergänzungspflegschaft*), in accordance with § 1909 para. 1 German CC, that is of importance: It supplements parental responsibility or guardianship if and to the extent that the parents or guardian are either factually (*e.g.*, due to geographical distance) or legally (*e.g.*, due to self-dealing in accordance with § 181 German CC) prevented from looking after specific matters on behalf of the child. In the case of § 1909 German CC, the curator is not chosen according to the provisions governing the appointment of a guardian. As a result, the court can make its choice without being bound by parental wishes, once again guided by criteria of suitability. In comparison with parental responsibility and the responsibility of a guardian, the remit of a curator's scope for action is limited.¹⁶⁴ Insofar as the inability of parents and guardian to assume their responsibilities results directly from the law, no further measures by the court are required for the appointment of a curator in accordance with § 1909 para. 1 sent. 1 and 2 German CC. If, however, the law provides for parental responsibility to be restricted by a court decision, *e.g.* in the case of § 1666 German CC (see Q 18), a partial withdrawal of parental responsibility or of the guardian's power of representation is necessary if a curator is to be appointed. Since parents and curators or guardians and curators must per force work alongside each other with regard to parental responsibility in questions which affect both their respective areas, differences of opinion which cannot be decided by a clear allocation of competence may arise. In these situations, § 1630 para. 2 German CC stipulates that in such cases the family court will be appointed to settle the dispute. The court cannot make this decision upon its own motion, but only following an application by a parent, the guardian or the curator.

32. Under what conditions, if at all, can a public body obtain parental responsibilities? Specify, where it is so obtained, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

¹⁶³ Th. WAGENITZ, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1779 No. 5.

¹⁶⁴ D. SCHWAB, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1909, No. 41.

It is possible to appoint the youth welfare office, being a public body, as guardian or curator of the child, subject to the general conditions governing the appointment of guardians or curators mentioned in the answer to Q 31.

According to § 1791 b para. 1 German CC, in cases where there is no suitable candidate to be individual guardian, the youth welfare office can be appointed guardian. However, the youth welfare office is the last resort, utilised if no suitable individual guardian can be found despite intensive efforts.¹⁶⁵ The guardianship court alone has the power to appoint the youth welfare office as guardian; the parents cannot appoint it guardian with legal effect, § 1791 b para. 1 sent. 2 German CC. The appointment procedure is an abridged one, which is why a written order by the guardianship court suffices.¹⁶⁶ Guardianship is to be transferred to the youth welfare office with local jurisdiction. According to § 87 c para. 3 sent. 1 German Social Security Code (*Sozialgesetzbuch*) VIII, it is the youth welfare office in whose area the child or teenager has his or her habitual residence that has local jurisdiction. The youth welfare office will in turn transfer the exercise of the duties of guardian to one or more of its civil servants or employees, § 55 para. 2 sent. 3 German Social Security Code (*Sozialgesetzbuch*) VIII.

Furthermore, in accordance with § 1791 c para. 1 German CC, the youth welfare office becomes guardian at the birth of a child whose parents are not married to each other and who requires a guardian, if the child's habitual residence is within the territory of application of the German CC. This legal provision regulates the guardianship of the youth welfare office; the guardianship comes into effect immediately by operation of law, the so-called 'legal *ex officio* guardianship'. This type of guardianship is used exclusively for children born outside marriage who are not subject to parental responsibilities at their birth. No letter of appointment is issued; all the guardianship court must do is confirm in writing, by way of a declaration, that the guardianship has come into force, § 1791 c para. 3 German CC.

If no suitable candidate for individual curatorship is available, the youth welfare office can be appointed curator.¹⁶⁷

33. To whom are the parental responsibilities attributed in the case of:

(a) The death of a parent holding parental responsibilities

Here the following distinction ought to be made:

- If the parents held joint parental responsibility and one parent dies, parental responsibilities will in future be attributable to the surviving spouse, § 1680 para. 1 German CC. Application is irrespective of whether joint parental responsibility existed by virtue of the parents' marriage or as a result of declarations of parental responsibility (§ 1626 a para. 1 No. 1 German CC).
- If a parent who was entitled to sole parental responsibility in accordance with § 1671 or § 1672 para. 1 German CC (see also answers to Q 17, 18 and 25) dies, the family court must attribute parental responsibility to the

¹⁶⁵ LG Flensburg 18.02.2000, *FamRZ* 2001, 445.

¹⁶⁶ Th. WAGENITZ, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1791 b No. 6.

¹⁶⁷ D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 811.

surviving parent, unless this is contrary to the child's best interests, § 1680 para. 2 sent. 1 German CC.

- If the mother was entitled to sole parental responsibility in accordance with § 1626 a para. 2 German CC (see Q 20), the family court must attribute parental responsibility to the father if this serves the child's best interests, § 1680 para. 2 sent. 2 German CC. The procedures in accordance with § 1680 German CC are initiated upon the court's own motion, which means that even in the case of para. 2 sent. 1 and 2 they do not require an application to be made by the surviving parent who claims his or her sole parental responsibility or demands the assignment of parental responsibilities.¹⁶⁸

(b) The death of both parents of whom at least one was holding parental responsibilities at the time of the death

If both parents die, at least one of whom held parental responsibility for the child, parental responsibility for the child ends at the parents' death.¹⁶⁹ At this, there is an absence of parental responsibility, which means that a guardian must be appointed for the child in accordance with § 1773 para. 1 German CC. Concerning the conditions for and consequences of the guardian's appointment, see Q 31.

34. To what extent, if at all, may the holder(s) of parental responsibilities appoint a new holder(s) upon his/her/their death? If such an appointment is permitted, must it take place in a special form, e.g. will?

The relevant provisions are contained in §§ 1776, 1777 German CC:

§ 1776 para. 1 German CC attributes to the parents holding parental responsibilities the right to designate the person who is to be appointed guardian of their underage child, this includes the case of the parents' death. This right to designate a guardian is an expression of parental responsibilities both in terms of responsibility for the child's person and for the child's property.¹⁷⁰ In accordance with § 1777 para. 1 German CC, parents can designate a guardian for their child only if they hold parental responsibility for the child's person and the child's property at the time of their death. The contents of the designation must ensure that the identity of the person being designated is safely concluded; alternatively, the parents could merely limit the group of people from among whom the guardian is to be chosen.¹⁷¹

In accordance with § 1777 para. 3 German CC, designation is by means of a will, § 1937 German CC, or by means of a contract of inheritance (*Erbvertrag*), § 1941 German CC; such a designation is unilaterally obligating only – i.e. it is not interdependently or contractually binding even if it is made in a joint will or in a contract of inheritance. A will can, in accordance with § 2221 German CC, be drafted as a holographical will (§ 2247 German CC) or in the form of a public will

¹⁶⁸ P. FINGER, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1680 No. 23.

¹⁶⁹ Th. WAGENITZ, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1773 No. 7.

¹⁷⁰ BayObLG 04.05.1992, *FamRZ* 1992, 1346, 1348.

¹⁷¹ Th. WAGENITZ, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1776 No. 9.

(*öffentliches Testament*) (§ 2232 German CC). According to § 2276 para. 1 sent. 1 German CC, a contract of inheritance must be recorded in writing by a notary in the presence of both parties.

The designation may be revoked at any time with legally binding effect; for this reason, a parent, may after a joint designation, unilaterally designate another person by making a new disposition.¹⁷² In the event of diverging designations by the parents holding parental responsibility the special provision of § 1776 para. 2 German CC applies, whereby each parent's designation is valid even if the father and the mother designate different persons, subject to the proviso that the designation by the parent who died last applies; this means that any dispute between parents during their lifetime is irrelevant.

As a consequence of the valid designation as guardian in accordance with § 1776 German CC, the guardianship court must appoint the designated person guardian, provided that he or she is willing and that there is no impediment or reason to pass over this person. In accordance with § 1778 para. 1 German CC, the person appointed guardian pursuant to § 1776 German CC can be passed over without his or her consent only if that person in their very person presents a hindrance, if he or she is factually prevented from assuming guardianship not only on a temporary basis, if the assumption of guardianship is delayed, if his or her appointment would threaten the best interests of the ward or if the ward has completed his or her 14th year and objects to the appointment, unless the ward has no legal capacity to contract.

D. THE EXERCISE OF PARENTAL RESPONSIBILITIES

I. *Interests of the child*

35. In exercising parental responsibilities, how are the interests of the child defined in your national legal system?

The best interests of the child constitute the guiding principle of parental responsibility, § 1697 a German CC. It is the highest guiding principle for the exercise of parental responsibility by the parents; at the same time, it also constitutes the yardstick and legal basis for any court decisions.

This undefined concept of law is assumed in many norms of the German CC: For instance, § 1671 para. 2 sent. 2 German CC names the best interests of the child as a criterion to be taken into account by the family court in deciding whether sole parental responsibility can be attributed to one parent when the parents live apart. Furthermore, in accordance with § 1680 para. 2 German CC the best interests of the child are to be taken into account in deciding whether parental responsibility is to be attributed to the surviving parent should the parent holding sole parental responsibility die. Furthermore, a threat to the best interests of the child can constitute the reason for the child's being ordered to reside in the joint household

¹⁷² W. ZIMMERMANN, in: SOERGEL, *Großkommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Stuttgart: Kohlhammer, 2000, § 1776 No. 4.

of the parent not holding parental responsibilities and another reference person, § 1682 German CC.

What constitutes the best interests of the child is, however, only specified by law in individual instances. § 1666 para. 1 sent. 1 German CC makes a distinction between the physical, mental and moral welfare of the child to achieve a protection of the child that is as comprehensive as possible, but specifies only certain types of behaviour, such as neglect of the child, as being a threat to the child's best interests. Any closer definition of the term is generally guided by the question as to whether certain objective developmental standards which have absolute application, for example, as set out in the German Social Security Code (*Sozialgesetzbuch*), have been assured for the child. It is further guided by objective educational principles, which include: the promotion of the child's development, the raising of the child to become a person who is able to take responsibility for himself or herself and live in community,¹⁷³ the continuity and stability of the circumstances in which the child is cared for, and the respect for the child's internal ties.¹⁷⁴ Furthermore, the circumstances of the individual in question must be taken into account, such as his or her social milieu and age.¹⁷⁵

In view of parental autonomy with regard to education, as enshrined in Art. 6 German Basic Law, the best interests of each child are to be determined primarily by the parents themselves, using the criteria set out above, taking into particular account the child's personal rights pursuant to Art. 2 para. 1 German Basic Law.¹⁷⁶ An objective external assessment is required only where a court decision is necessary.

Moreover, § 1626 para. 3 German CC includes a positive approach to filling in the definition, which stipulates that a constituent part of the child's welfare is contact with both parents and, provided that it promotes the child's development, with other persons to whom the child is close. Finally, the definition is and will be shaped by the findings of child and family psychology, which are continually in development.¹⁷⁷

II. Joint parental responsibilities

36. If parental responsibilities are held jointly by two or more persons, are they held equally?

If the parents hold joint parental responsibilities, the mother and father are entitled and obliged to exercise their parental responsibilities equally; on principle, each parent is entitled to care for the child's person and for the child's property in all

¹⁷³ § 1 German Social Security Code VIII.

¹⁷⁴ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 958.

¹⁷⁵ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1666 No. 15.

¹⁷⁶ L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1627 No. 20; Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 958.

¹⁷⁷ Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 958.

their constituent elements.¹⁷⁸ This also includes representation of the child, which in accordance with § 1629 para. 1 sent. 2 clause 1 German CC is also effected jointly.

In exceptional cases, a parent may, subject to the conditions laid out in § 1678 para. 1 clause 1 German CC, exercise sole parental responsibility despite the parents holding joint parental responsibility if the other parent is factually prevented or if that parent's parental responsibility has been suspended. Such a suspension can, for example, be caused by legal or actual incapacity and results in the parent concerned being prevented from exercising their parental responsibilities on a temporary basis, §§ 1673-1675 German CC.

If the parents live apart, the parent with whom the child has its legitimate habitual residence is moreover authorised, in accordance with § 1687 para. 1 sent. 2 German CC, to decide alone on matters relating to everyday life. According to § 1687 para. 1 sent. 4 German CC, such decisions are those that recur frequently and whose effect on the development of the child can easily be modified (see also the answer to Q 16). The other parent then only has the authority to make decisions alone during the period in which the child is temporarily and legally with him or her. This authority is limited to matters of actual care, § 1687 para. 1 sent. 4 German CC. Matters of actual care concern, for example, questions of diet, of rest and of TV consumption and thus also constitute matters relating to everyday life.¹⁷⁹ In the area of actual care there is no comprehensive right to sole representation. Instead, in accordance with § 1687 para. 1 sent. 5 German CC the right of representation in emergency situations stipulated in § 1629 para. 1 sent. 4 German CC applies accordingly.

37. If parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of parental responsibilities have the authority to act alone? In this respect is a distinction made between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the parental responsibilities?

In principle, the parents ought to come to an agreement in questions concerning the care for and upbringing of the child, § 1627 German CC. In accordance with § 1687 para. 1 sent. 1 German CC, this applies to matters of considerable importance, even if the parents live apart. Such an agreement might also take the form of a mutual authorisation to permit one of the holders of parental responsibility to make decisions alone – both those of a daily nature and those concerning important matters.¹⁸⁰

Without such an agreement a parent has the right to make decisions on his or her own authority only in the event of imminent danger, as provided for with regard to

¹⁷⁸ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1626 No. 7; W. SCHLÜTER, *Familienrecht*, 10th Edition, Heidelberg: C.F. Müller, 2003, No. 353.

¹⁷⁹ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1687 No. 13.

¹⁸⁰ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1687 No. 8.

representation in § 1629 para. 1 sent. 4 German CC. With regard to this right to make decisions in the event of imminent danger, it is immaterial whether the parents are or were married to each other and whether they cohabit or live apart.¹⁸¹ Imminent danger can be said to exist if the participation, particularly the consent, of the other parent cannot be obtained without frustrating the purpose of the intervention.¹⁸² For this to be the case the mere possibility of the child's best interests being threatened is insufficient; rather, the child must be threatened with health or economic disadvantages of a considerable extent requiring immediate intervention.¹⁸³

If the parents live apart, § 1629 para. 2 sent. 2 German CC, furthermore, enables the parent with whom the child lives to be the sole representative of the child when asserting maintenance claims against the other parent. Further rights of a parent to make his or her own decisions in matters of a daily nature or of actual care for the child can result from § 1687 para. 1 German CC if the parents live apart (see Qs 16 and 36).

38. If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g. residence or contact.

If the parents are unable to agree on a specific issue or specific kind of issue relating to parental responsibility, the family court may, in accordance with § 1628 sent. 1 German CC, assign the decision to one parent, following an application by the father or the mother. To avoid the parents offloading their responsibility onto the family court,¹⁸⁴ however, this only applies to matters that are of considerable importance for the child. Whether a matter is of considerable or merely minor importance depends on its effect on the child. Furthermore, its field of application with regard to the subject matter is limited to matters of parental responsibility with a specific reference to the given situation.¹⁸⁵ Parent/child conflicts are not covered by § 1628 German CC, nor are disputes between the parents concerning the carrying of the child to term, i.e. decisions for or against birth.¹⁸⁶

¹⁸¹ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1629 No. 17.

¹⁸² BGH 12.02.1962, JZ 1962, 609, 610; L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2002, § 1629 No. 53.

¹⁸³ P. Huber, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1629 No. 27.

¹⁸⁴ BT-Drucks. 8/2788 p. 46; BVerfG 29.07.1959, FamRZ 1959, 416, 421; L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2002, § 1628 No. 26.

¹⁸⁵ P. HUBER, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1628 No. 8, 10.

¹⁸⁶ P. HUBER, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1628 No. 8-9; L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1628 No. 20; Th. RAUSCHER, *Familienrecht*, Heidelberg: C.F. Müller, 2001, No. 964.

It is doubtful whether the rule applies to questions relating to the child's residence. The application of the rule has been rejected by some¹⁸⁷ to avoid the circumvention of more specific provisions. The prevailing opinion¹⁸⁸ does, however, assume that § 1628 German CC also applies in matters relating to residence. It is true that this results in a certain amount of overlap with the field of application of § 1671 German CC, according to which the family court can, following an application by the father or the mother, decide which parent should be attributed parental responsibilities following a separation. But just because the same or a similar result can be achieved through § 1628 German CC and § 1671 German CC, this does not mean that an application in accordance with § 1628 German CC in the same matter – relating to the child's residence – is inadmissible; it must, however, be remembered that they differ with regard to their prerequisites and provisions.¹⁸⁹

If a parent has been assigned the decision in accordance with § 1628 German CC, this parent will alone represent the child, in accordance with § 1629 para. 1 sent. 3 alt. 2 German CC.

39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of parental responsibilities?

Regarding the question as to when a holder of parental responsibilities may act alone, please see the answer to Q 37.

In the event of imminent danger, the parent entitled to represent the child in emergency situations may, in accordance with § 1629 para. 1 sent. 4 German CC, perform all acts necessary in the interests of the child. Subsequently, however, the other parent must be informed immediately, *i.e.*, without culpable delay, § 1629 para. 1 sent. 4 clause 2 German CC. In the absence of specific provisions in § 1629 German CC, the reimbursement of expenses incurred and any other compensation claims are governed by the general provisions.¹⁹⁰

Where the assertion of maintenance claims in accordance with § 1629 para. 2 sent. 2 German CC is concerned, the scope of the authorisation to act alone is wide: The parent in whose care the child is can assert the child's maintenance claims in and out of court.¹⁹¹ Assertion in court includes both active and passive representation in all disputes concerning the child's maintenance claims against the other parent, *i.e.* including an application for the variation of an order for periodical payments,

¹⁸⁷ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1628 No. 2.

¹⁸⁸ P. HUBER, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1628 No. 11-12; D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 679; *idem*, 'Elterliche Sorge bei Trennung und Scheidung der Eltern', *FamRZ* 1998, 457, 467 *et seq.*, 471 *et seq.*

¹⁸⁹ D. SCHWAB, *Familienrecht*, 12th Edition, Munich: Beck, 2003, No. 679.

¹⁹⁰ P. HUBER, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1629 No. 31; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1629 No. 18.

¹⁹¹ OLG Hamburg 13.02.1981, *FamRZ* 1981, 490; L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1629 No. 341; P. Huber, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1629 No. 91.

action for temporary judicial relief or action for a negative declaration by the other parent.¹⁹²

§ 1687 German CC generally grants authorisation not only for legal actions but also for all actual arrangements concerning the matters of parental responsibility in question.¹⁹³ The power of the parent who merely exercises his or her right to contact to act alone resulting from § 1629 para. 1 sent. 4 German CC, is extended in scope with regard to prolonged visits by the child corresponding to the requirements of the length of the visit.¹⁹⁴ § 1687 para. 1 sent. 5 German CC refers for both parents to § 1629 para. 1 sent. 4 German CC, which means that in these cases, too, subsequent mutual notification is required. Furthermore, reference is made to § 1684 para. 2 German CC, which says that the parents must refrain from anything that might adversely affect the child's relationship with the other parent and/or with the person in whose care the child is, or which might render the raising of the child more difficult. This means that the father and mother are obliged to mutual loyalty and must not refuse to participate in the decisions required of them.¹⁹⁵

40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so called relocation) without the consent of one of the holders of parental responsibilities?

According to § 1631 para. 1 German CC, the obligation and right to determine the child's place of residence form part of the responsibility for the child and thus of parental responsibility, in accordance with § 1626 para. 1 sent. 2 German CC. If the father and mother hold joint parental responsibility, it is generally not possible for a court to make a decision regarding a change in the child's place of residence against the will of one of the persons holding parental responsibility. A unilateral decision by one parent regarding the child's place of residence is generally only possible if this parent has been attributed, by the court, sole responsibility for the child or the sole right to determine the child's place of residence.¹⁹⁶

If a parent changes the child's place of residence against the will of the other parent, who is entitled to determine the same, the latter is, in the case of wrongful retention of the child, entitled to claim the child's return as a result of § 1632 para. 1 German CC. The decision as to whether or not such an illegal act has been committed is guided, in relations where parents hold joint parental responsibility, exclusively by the best interests of the child.¹⁹⁷ If the best interests of the child

¹⁹² H.-W. STRÄTZ, in: SOERGEL, *Großkommentar zum Bürgerlichen Gesetzbuch*, 12th Edition, Stuttgart: Kohlhammer, 1987, § 1629 No. 42; L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2002, § 1629 No. 340.

¹⁹³ BT-Drucks. 13/4899 p. 107; Jaeger, in: *Kommentar zum Eherecht*, 4th Edition, Munich: Beck, 2003, § 1687 No. 2.

¹⁹⁴ Jaeger, in: *Kommentar zum Eherecht*, 4th Edition, Munich: Beck, 2003, § 1687 No. 8.

¹⁹⁵ Jaeger, in: *Kommentar zum Eherecht*, 4th Edition, Munich: Beck, 2003, § 1687 No. 10; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1687 No. 15.

¹⁹⁶ BGH 27.05.1992, NJW-RR 1992, 1154.

¹⁹⁷ OLG Düsseldorf 06.09.1973, FamRZ 1974, 99; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1632 No. 6.

demands it, the family court may, in exceptional cases, even where the parents hold joint parental responsibility, refuse the parent filing the application his or her claim for return of the child. Although the right to return of the child serves the enforcement of responsibility for the child, it cannot automatically be derived, of its own and without the need for a factual examination, from the attribution of parental responsibility.¹⁹⁸

41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with both holders of parental responsibilities (e.g. every other month with mother/father)?

Parents who live apart and hold joint parental responsibilities have a choice of various different models for caring for the child. The law assumes the so-called residence model, but it may, subject to the parents' consent, allow a dual-residence, alternating or nest model.¹⁹⁹

However, the court cannot order the alternating residence model for the child against the will of the parents; it may, at most, beyond the scope of § 1666 German CC, order partial sole parental responsibilities on an alternating basis with regard to the right to determine the child's residence.²⁰⁰

In case of conflict it is, moreover, conceivable that the family court may decide on the scope of the right to contact, § 1684 para. 3 sent. 1 German CC. In this context, according to § 1697 a German CC the best interest of the child is the sole yardstick for its decision. Provided that it corresponds to the child's best interest, the court may, instead of periodical contact of short duration with the parent living apart, order contact over prolonged blocks of time.²⁰¹ However, due to the fact that § 1684 German CC has been drafted without reference to parental responsibility, no particular provisions apply in the case of joint parental responsibility, for example, in the direction of a more generous provision of contact, for the period of the contact provision.²⁰² As a result, it is not possible for the court to order an alternating residence model using this avenue of approach.

III. Sole parental responsibilities

42. Does a parent with sole parental responsibilities have full authority to act alone, or does he/she have a duty to consult:

¹⁹⁸ BayObLG 01.07.1976, *FamRZ* 1977, 137, 139; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1632 No. 6.

¹⁹⁹ See AG Hannover 13.10.2000, *FamRZ* 2001, 846; B. VEIT, in: Bamberger and Roth, *Kommentar zum Bürgerlichen Gesetzbuch*, 1st Edition, Munich: Beck, 2003, § 1687 No. 3; H. Oelkers, 'Das gemeinsame Sorgerecht nach Scheidung in der Praxis des Amtsgerichts Hamburg – Familiengericht', *FamRZ* 1994, 1080, 1082.

²⁰⁰ See AG Hannover 13.10.2000, *FamRZ* 2001, 846.

²⁰¹ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, Munich: Beck, 2005, § 1684 No. 15.

²⁰² Th. RAUSCHER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2000, § 1684 No. 200.

(a) The other parent

§ 1627 German CC provides that the parents must exercise their parental responsibilities in mutual agreement and that they must attempt to reach an agreement in the event of a dispute. This norm, however, applies only when the parents hold joint parental responsibility.²⁰³ By contrast, in the case of sole parental responsibility, just as in the case of factual or legal inability by one of the two joint holders of parental responsibilities,²⁰⁴ there is no such duty to consult.

The concentration of parental responsibility in one parent by necessity results in the disenfranchisement of the other parent, who does not hold parental responsibility, although the latter retains his or her position as parent, which is protected by the constitution, Art. 6 para. 2 German Basic Law.²⁰⁵ Family law does, however, take account of these parental rights through the institution of the right to contact and through the option to have one's parental responsibilities reinstated at a later date if, for example, sound reasons of the child's best interests argue in favour of such a change in parental responsibility, § 1696 German CC. Furthermore, each parent is entitled to be informed by the other parent of the child's personal circumstances, § 1686 sent. 1 German CC.

Moreover, in the case of sole parental responsibility the parent who does not hold parental responsibility can of course participate in the care for the child, provided that the parents wish it; the parent holding sole parental responsibility does, however, remain solely responsible from a legal aspect.²⁰⁶

(b) Other persons, bodies or competent authorities

Parental responsibility is generally, irrespective of whether it is exercised by one parent alone or jointly by both parents, subject to certain limits (see Q 12). One particular feature for the married parent holding sole parental responsibility results from § 1687 b German CC, which stipulates that the spouse of this parent has the right to participate in decision-making on matters relating to everyday life, the so-called 'limited parental responsibilities' (see Q 27a).

E. CONTACT

43. Having regard to the definition by the Council of Europe (see above), explain the concepts of contact used in your national legal system.

Contact (*Umgang*) means access to the child. This kind of contact is factual. It can be realised through different means, especially personal contacts, visits and stays

²⁰³ H.-W. STRÄTZ, in: SOERGEL, *Großkommentar zum Bürgerlichen Gesetzbuch*, 12th Edition, Stuttgart: Kohlhammer, 1987, § 1627 No. 3; P. Huber, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck, 2002, § 1627 No. 3.

²⁰⁴ J. GERNHUBER and D. COESTER-WALTJEN, in: *Lehrbuch des Familienrechts*, 4th Edition, Munich: Beck, 1994, § 64 II, III, pp. 1024-1026.

²⁰⁵ J. GERNHUBER and D. COESTER-WALTJEN, in: *Lehrbuch des Familienrechts*, 4th Edition, Munich: Beck, 1994, § 65 III 3, p. 1039.

²⁰⁶ J. GERNHUBER and D. COESTER-WALTJEN, in: *Lehrbuch des Familienrechts*, 4th Edition, Munich: Beck, 1994, § 65 III 3, p. 1040.

(weekend-visits, holidays, day-visits *etc.*).²⁰⁷ It can also be effected via telephone, letters, e-mail *etc.*²⁰⁸ Contact is often limited in time (see Q 47). The right to contact is a separate legal position based on the natural right of parents and protected by Art. 6 para. 2 German Basic Law.²⁰⁹ Today it is accepted that there exists not only a right of the parent, but also a duty of the parent to contact, § 1684 para. 1 German CC. Contact is also a right of the child. The statute, however, does not mention that the child has a duty to contact, see § 1684 para. 1 German CC. As a rule the rights and duties to contact exist irrespective of who actually holds parental care. A parent who is not entitled to personal custody nevertheless retains the right to personal contact (*persönlicher Umgang*) with his or her child (§ 1684 para. 1 German CC). He or she may also demand information about the personal condition of the child, in so far as this is compatible with the child's welfare (§ 1686 German CC). This right to information also exists independently of the right of parental care and the right of contact.²¹⁰

44. To what extent, if at all, does the child have a right of contact with:

(a) A parent holding parental responsibilities but not living with the child

According to the general provision that it is in the interests of the child to have contact with both parents (§ 1626 para. 3 sent. 1 German CC), the child has a right of contact with a parent holding parental responsibilities but not living with the child. A non-resident parent retains the right and duty to contact in addition to his or her continuing duties of parental responsibility. The parent with parental custody also has the right to contact, *e.g.*, when the child stays for a longer period of time with the other parent.²¹¹

(b) A parent not holding parental responsibilities

The child has a right of contact with a parent not holding parental responsibilities; § 1684 para. 1 German CC. The right of contact exists especially in cases where there is no parental care. This is also true for the unmarried father.

(c) Persons other than parents (e.g. grandparents, step-parents, siblings etc...)

Since the 1998 child law reform, additional persons have been vested with a legal right of contact with the child. Grandparents and siblings have this right to contact. There is a pre-condition for the exercise of a contact right, however, that it is in the interests of the child (§ 1685 para. 1 German CC). According to § 1685 para. 2 sent. 1 German CC, a person with a close relationship with the child (*enge Bezugsperson*) also has a right to contact with the child if this person bears or bore factual responsibility for the child. Under these circumstances a socio-familial relationship (*sozial-familiäre Beziehung*) exists. A bearing of factual responsibility generally exists

²⁰⁷ P. FINGER, in: *Münchener Kommentar*, 4th Edition, München: Beck, 2002, § 1684 German CC No. 21.

²⁰⁸ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1684 German CC No. 2.

²⁰⁹ T. RAUSCHER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2000, § 1684 German CC No. 62.

²¹⁰ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1686 German CC No. 1.

²¹¹ P. FINGER, in: *Münchener Kommentar*, 4th Edition, München: Beck, 2002, § 1684 German CC No. 5.

if the person lived with the child in the same household over some length of time (§ 1685 para. 2 sent. 2 German CC). This provision is the result of Federal Constitutional Court case law, which gave biological but non-legal fathers a right to contact.²¹² However, a precondition is that the biological father must have, for a certain amount of time, actually bore responsibility for the child and that a social relationship between him and the child developed.²¹³

Under the new version of § 1685 para. 2 German CC there is no longer an exclusive enumeration of the different persons with a right to contact.²¹⁴ It is agreed however that also the spouse of the parent (step-parent) has a right of personal contact. The same is true for the former spouse and the former partner of a non-marital relationship. The registered partner or former registered partner has also such a right of contact. Other persons can have such a right when they acted as foster carers over some length of time.²¹⁵

45. Is the right to have contact referred to in Q 43 also a right and/or a duty of the parent or the other persons concerned?

According to § 1684 para. 1 German CC, the child has a right of contact with each parent and each parent has a right of contact and is obliged to contact with the child. Therefore for parents contact is not only a right but also a duty (*Pflichtrecht*)²¹⁶. For the other persons mentioned in § 1685 para. 1, 2 German CC (grandparents, siblings and persons with a close relationship) who have a right of contact, no corresponding duty exists.

46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?

Generally co-operation of the parents is needed and they are encouraged to reach contact arrangements.²¹⁷ However, a total renunciation of contact is against good morals (§ 138 German CC)²¹⁸ and prohibited (§ 134 German CC). It is argued that an agreement is invalid unless the non-exercise of contact is in the best interests of the child.²¹⁹ In general these arrangements are not necessarily subject to scrutiny by

²¹² BVerfG, 09.04.2003, BVerfGE 108, 82 = FamRZ 2004, 1705 annotated C. Huber = NJW 2003, 2151.

²¹³ BVerfG, 31.08.2004, FamRZ 2004, 1705.

²¹⁴ For the former version of § 1685 para. 2 German CC see I. RAKETE-DOMBEK, 'Das Umgangsrecht des Stiefelternteils zu seinem Stiefkind gem. § 1685 II BGB', FPR 2004, 73 *et seq.*

²¹⁵ H. HOLZHAUER, 'Familienrecht', in: R. HAUSMANN/G. HOHLOCH (ed.), *Das Recht der nichtehelichen Lebensgemeinschaft*, 2nd Edition, Berlin: E. Schmidt, 2004, No. 6-95, 98.

²¹⁶ S. MOTZER, 'Elterliche Sorge', in: D. SCHWAB, *Handbuch des Scheidungsrechts*, 5th Edition, München: Vahlen, 2004, Part. III No. 232.

²¹⁷ See S. HAMMER, *Elternvereinbarungen im Sorge- und Umgangsrecht*, Bielefeld: Gieseking, 2004

²¹⁸ S. HAMMER, *Elternvereinbarungen im Sorge- und Umgangsrecht*, Bielefeld: Gieseking, 2004, p. 63.

²¹⁹ See OLG Frankfurt a.M., 12.03.1986, FamRZ 1986, 596 (no contact of father against child support arrangement in favour of father); U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1684 German CC No. 3.

the family court,²²⁰ however, the parents can submit their agreement to the court, which will then make a ruling on the agreement under § 1684 para. 3 German CC.²²¹ Under these circumstances there is also the possibility of the scrutiny of the court. There can also be arrangements in the framework of court proceedings. Where there is a dispute between parents a special mediation procedure in the family court can take place; see Q 57. In the framework of this procedure arrangements by the parents can be made which have to be included in the proceedings, § 52a para. 4 German Act on Voluntary Jurisdiction.

With a divorce based on the consent of the parties there has to be a declaration of the parents that there will be no application on custody and contact (§ 630 para. 1 No. 2 alt. 1 German Code of Civil Procedure) or, if there will be an application on custody and contact, that the other spouse agrees (§ 630 para. 1 No. 2 alt. 2 German Code of Civil Procedure). One parent can get parental custody if the other spouse agrees and the child is not over 14 years, if the child objects (§ 1671 para. 2 No. 1 German CC). An application to end joint parental custody will be successful if it is in the best interest of the child (§ 1671 para. 2 No. 2 German CC). As a consequence of such an order an order on contact will also be issued (§ 1684 para. 3, 4 German CC).

47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?

The family court can decide on the existence and the extent of a right of contact. This includes the exercise of this right; also vis-à-vis third parties, § 1684 para. 3 German CC. The court can give injunctions to urge persons to fulfil their obligations under § 1684 para. 2 (§ 1684 para. 3 German CC); see Q 45. The family court can also restrict the right of contact or the execution of a former contact decision, insofar as this is in accordance with the welfare of the child, § 1684 para. 2 sent. 1 German CC. The circumstances of the individual case are decisive.

The court can determine how often and in what intervals contact shall take place.²²² Orders often give a contact right one or two weekends in a month. Visits during school holidays and holidays are also common. The appropriate place is generally the home of the parent (or person) with the contact right.²²³ Often even the details of taking and returning the child have to be regulated.²²⁴ The court can also try to prevent a jeopardy to the welfare of the child (§ 16666 German CC) by appointing a special curator (*Ergänzungspfleger*) for the regulation of the details of contact.

²²⁰ S. MOTZER, 'Elterliche Sorge', in: D. SCHWAB, *Handbuch des Scheidungsrechts*, 5th Edition, München: Vahlen, 2004, Part. III No. 236.

²²¹ OLG Düsseldorf, 27.09.1982, *FamRZ* 1983, 90, 91; S. MOTZER, 'Elterliche Sorge', in: D. SCHWAB, *Handbuch des Scheidungsrechts*, 5th Edition, München: Vahlen, 2004, Part. III No. 236.

²²² U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1684 German CC No. 15.

²²³ BGH 13.12.1968, *BGHZ* 51, 219, 224 = *NJW* 1969, 422; OLG Brandenburg, 08.08.2001, *FamRZ* 2002, 414 (two year old girl).

²²⁴ OLG Zweibrücken, 28.07.1998, *FamRZ* 1998, 1465.

Among other things, the family court may determine that contact shall only occur when a third person prepared to collaborate is present, § 1684 para. 4 sent. 3 German CC (*betreuter or begleiteter Umgang*). This third party can be a natural person, but may also be a youth welfare institution or an association. The association then determines which single person fulfils the task, § 1684 para. 4 sent. 4 German CC. Supervised contact generally means that the non-custodial parent may visit the child at a particular time and in a particular place. This is one method of preventing the other parent from taking the children away without consent of the custodian.²²⁵ It is also used in cases where there was previous domestic violence.

The governing principle for contact orders is the welfare of the child. The custodian's interest in a family life with a new spouse (partner) without the disturbance of having contact with the other parent is left out of account.²²⁶ The child's wishes have some influence. Although the overriding question will always be what is in child's welfare, the court has to take into account that contact with a parent is the general rule. The court has to strike a balance between the right of the child's self-determination and the right of the parent seeking contact.²²⁷ Therefore, the factual reasons for a refusal are decisive. The child does not have the final say and it will be the court's decision just how much consideration is to be given to the child's wishes. This depends on the child's age, maturity, and the quality of the reasons.²²⁸ The will of the child can be disregarded if it is obviously only the result of a parent's power of suggestion.²²⁹

The family court can also totally exclude the right of contact. *E.g.* a parent's violent behaviour towards the other parent can lead to a restriction or exclusion of the right to contact.²³⁰ However, a decision which restricts the right of contact or its execution for a longer period, or permanently, may only be rendered if the welfare of the child would otherwise be endangered, § 1684 para. 4 sent. 2 German CC. Therefore the family court will ask why it is in the child's interests for some form of contact not to be maintained or granted.

In practice, the person caring for an illegitimate child, *e.g.*, the mother, decides under what circumstances the father will have contact. If the parents cannot agree on the terms of contact, the father may apply to the family court to determine whether personal contact would endanger the child's welfare (§ 1684 German CC).

²²⁵ OLG Brandenburg, 23.06.1999, *FamRZ* 2000, 1106; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1684 German CC No. 28.

²²⁶ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1684 German CC No. 21.

²²⁷ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1684 German CC No. 23.

²²⁸ OLG Bamberg, 24.03.1999, *FamRZ* 2000, 46 (contact order despite resistance of the child).

²²⁹ BVerfG, 02.04.2001, *FamRZ* 2001, 1057 (six year old girl).

²³⁰ R. PROKSCH, *Rechtstatsächliche Untersuchung zur Reform des Kindesrechts*, Köln: Bundesanzeiger Verlag, 2002, p. 233 *et seq*; A. Will, 'Gewaltschutz in Paarbeziehungen mit gemeinsamen Kindern', *FPR* 2004, 233, 235 *et seq*.

48. What if any, are the consequences on parental responsibilities, if a holder of parental responsibilities with whom the child is living, disregards the child's right to contact with:

(a) A parent

According to § 1684 para. 2 German CC, each parent shall refrain from impairing the child's relationship with the other parent (*Wohlverhaltensgebot*). If the holder of parental responsibilities with whom the child is living disregards the child's right of contact with a parent, the consequences on parental responsibilities depend on the situation. The other parent can make an application to the family court; then the court has to look for an understanding or to the use of counselling (§ 52 German Act on Voluntary Jurisdiction), see Q 57. Where a court order already exists, a special court conciliation procedure can take place (§ 52a German Act on Voluntary Jurisdiction), see Q 57. If this procedure remains unsuccessful the court can make various orders (§ 52a para. 5 German Act on Voluntary Jurisdiction). It can use coercion, and there can be modifications of the contact regulation or the regulation of parental care, see Q 58.

(b) Other persons

The child has a right of contact with his or her grandparents and siblings, if it is in the interests of the child, § 1685 para. 1 German CC. However, if the parents disregard this right or prevent the grandparents from seeing their grandchild German courts do not enforce the grandparents' right. Quite to the contrary, they generally argue that a serious conflict between parents and grandparents is not in the interests of the child.²³¹ Therefore, care of the parents is given priority and the grandparents cannot make use of their right of contact, which can be completely excluded (see § 1685 para. 1, 3, § 1684 para. 4 German CC).

The child has also a right of contact with the spouse or the former spouse, and the registered partner or former partner of a parent, § 1685 para. 2 German CC. There can also be conflicts in these situations, and the best interests of the child prevail.

F. DELEGATION OF PARENTAL RESPONSIBILITIES

49. To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?

As a rule parental care is strictly personal. It cannot be transferred, as a whole, to a third party.²³² However, parents can vest others with certain rights in relation to the child, as e. g. in the case of relatives, kindergarten, schools, boarding schools, holiday camps or neighbours caring for the children.²³³ In this sense, the holders of

²³¹ See OLG Koblenz, 29.09.1999, *FamRZ* 2000, 1111; OLG Hamm, 23.06.2000, *FamRZ* 2000, 1601 annotated by Liermann *FamRZ* 2001, 704.

²³² L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1626 German CC No. 24 *et seq.*

²³³ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1626 German CC No. 3.

parental responsibilities may only partially delegate its exercise.²³⁴ This also applies to the administration of assets.²³⁵

50. To what extent, if at all, may a person not holding parental responsibilities apply to a competent authority for a delegation of parental responsibilities?

An application for a delegation of personal responsibility as such is not possible. However, a person not holding parental responsibilities may apply to the family court for a decision on parental responsibilities. Nevertheless, an application to get personal care can only be successful if the person holding parental care will lose (or has to share) it. Third parties can obtain total parental care when they become guardian to a child (*Vormund*, §§ 1773 *et seq* German CC). A third party can also become a custodian (*Pfleger*, § 1630 para. 1, 2 German CC) who is responsible for certain affairs. It is also possible that a third party can be a foster parent (see § 1632 para. 4 German CC) or act as a special curator (*Beistand*; §§ 1712 *et seq* German CC).²³⁶

G. DISCHARGE OF PARENTAL RESPONSIBILITIES

51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his/her/their parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of parental responsibilities, etc.? To what extent, if at all, should the competent authority take into account a parent's violent behaviour towards the other parent?

If the physical, mental or spiritual welfare or the property interests of a child are in jeopardy, the family court is obliged to take the necessary protective steps (§§ 1666 *et seq* German CC), see also Q 18. The family court also has jurisdiction if the issues relating to children are raised in the context of divorce proceedings. As a basis for a court order the danger can result from various causes. The main cases are abuse of parental care (mistreatment,²³⁷ serious educational deficits,²³⁸ sexual abuse *etc.*)²³⁹ negligence of the child (malnutrition, no medical treatment)²⁴⁰ and inadvertent behaviour of the holder of parental care, § 1666 para. 1 German CC.

²³⁴ L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, § 1631 German CC No. 15.

²³⁵ H. ENGLER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2000, vor §§ 1631 *et seq* German CC No. 7.

²³⁶ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1626 German CC No. 6.

²³⁷ E.g. BayObLG, 21.11.1996, *FamRZ* 1997, 572; M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin, 2000, § 1666 German CC No. 92 *et seq*.

²³⁸ E.g. OLG Köln, 18.02.2002, *JAm* 2003, 548.

²³⁹ For more details see U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1666 German CC No. 21 *et seq*.

²⁴⁰ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1666 German CC No. 30; M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin, 2000, § 1666 German CC No.98 *et seq*.- But see OLG Hamm, 22.06.2001, *FamRZ* 2002, 691 (a child's repeated head lice infestation was not sufficient for court measures).

Mental illness of the holder of parental responsibilities as such is not enough. However, if the state of health endangers the welfare of the child, mental disorder, paranoia, alcoholism, *etc.* are sufficient reasons for intervention.²⁴¹ There was, however, a case where German courts deprived parents of parental custody for their daughters because the parents had learning disabilities. German authorities not only argued that the parents' intellectual capacities were insufficiently developed to permit them to raise their children but also took the children away. However, the parents were successful in a proceeding at the ECtHR. The European Court ruled that the total revocation of the parents' legal custody, and the circumstances of the execution of this measure, constituted a deprivation of parental care that did not satisfy the condition of proportionality. As a result, the Court held that Art. 8 of the Human Rights Convention had been violated.²⁴²

Though fault is not necessary for a court order, the parents must be either unwilling or unable to avert the danger themselves.²⁴³ The family court can take into account a parent's violent behaviour towards the other parent; this can lead – at least when it occurs repeatedly and in an aggravated form – to restrictions or a total discharge.²⁴⁴ Also, the conduct of third parties can be relevant (§ 1666 para. 1 German CC). Court orders have to follow the principle of reasonableness and must be proportionate to the impending danger (see § 1666a para. 1, 2 German CC).

The family court may substitute declarations of the holder of parental care (§ 1666 para. 3 German CC, see Q 8). As far as a consent of the holder of parental responsibility is deemed necessary, it is accepted that the court may substitute the consent if the parent unreasonably refuses to give it.²⁴⁵ The Civil Code does not specify which other 'measures' the court may take according to § 1666 para. 1 German CC. It is generally accepted that the family court enjoys a broad discretion to make the appropriate orders. These may range from orders on specific issues, modification of custody, placing the child under institutional or foster care, to other orders.

The court also possesses powers in financial affairs. The family court may make an order if the child's assets are put into jeopardy by abuse of parental care, neglect,

²⁴¹ OLG Karlsruhe, 14.03.2000, *JAmt* 2001, 192; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1666 German CC No. 32.

²⁴² ECtHR, 26.02.2002, *Kutzner v. Germany*, Request No. 46544/99, *FamRZ* 2002, 1393. - See C. BRÜCKNER, 'Die Überprüfung von Sorgerechtsentziehungen durch den Europäischen Gerichtshof für Menschenrechte', *Familie und Recht (FuR)* 2002, 385 *et seq.*; C. HOSS, 'Family Matters: European Court of Human Rights Finds German Parenting Rights Decisions to be in Violation of Art. 8 of the Convention', *German Law Journal* Vol. 3 No. 4 - 01.04.2002. <http://www.germanlawjournal.com/print.php?id=146>

²⁴³ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1666 German CC No. 31 *et seq.*

²⁴⁴ KINDLER/DRECHSEL, 'Partnerschaftsgewalt und Kindeswohl', *JAmt* 2003, 217 *et seq.* A. WILL, 'Gewaltschutz in Paarbeziehungen mit gemeinsamen Kindern', *FPR* 2004, 233 *et seq.*

²⁴⁵ OLG Hamm 16.07.1998, *NJW* 1998, 3424; U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 63rd Edition, München: Beck, 2004, §1666 German CC No. 13. See also M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin, 2000, § 1666 German CC No. 103.

inadvertent behaviour of the parents or the conduct of third parties. Care for the child and care for the child's property are different issues which must be examined separately.²⁴⁶ The child's economic interests are endangered if the parents act blatantly contrary to economic principles or from motives of self-interest. Where there is a risk of diminishing or losing the child's fortune or a danger of indebtedness the court may take appropriate actions. § 1666 para. 2 German CC expressly mentions three cases: (1) the parent has violated the right of the child to receive support, (2) the parent has violated his or her duties in the administration of the child's property or (3) the parent did not follow a court order in respect with the administration of the child's property. In this area the court also enjoys broad discretion.²⁴⁷ An appropriate measure is often at least a partial deprivation of parental custody in financial affairs.

As a matter of last resort, the parents may be deprived, either totally or in part, of their parental custody. As far as possible other measures, including those under public law, must be used (§ 1666a para. 2 German CC). Those measures which involve the separation of a child from his or her paternal family are permissible only if the jeopardy for the child may not be countered in another manner (§ 1666a para. 1 German CC). A detailed catalogue of additional powers of the youth welfare authorities is contained in the Children and Young Persons Assistance Act of 1998. However, intervention must always be limited to what is really necessary (§ 1666a German CC). In a recent case, parents successfully complained to the ECtHR that their parental rights were withdrawn when their children were taken into foster care without giving the parents a fair hearing.²⁴⁸

In cases of emergency or where the child or young person asks for it, the youth office can take children or young persons into provisional custody. The holder of parental responsibility has to be informed. If he or she objects, the child or young person must be returned or the youth office has to apply to the family court (§ 42 German Children and Young Persons Assistance Act).

52. Who, in the circumstances referred to in Q 51, has the right or the duty to request the discharge of parental responsibilities?

The proceedings under § 1666 German CC may be initiated *ex officio*.²⁴⁹ Therefore no formal application is necessary and any person with relevant facts can apply.²⁵⁰ However, a parent or other relatives can make a request. The youth office is a very important institution, having the right and duty to investigate and to give notice (§ 50 para. 3 German Children and Youth Protection Act). The youth office may also request the discharge of parental responsibilities.

²⁴⁶ BayObLG, 09.05.1996, *FamRZ* 1996, 1352.

²⁴⁷ See U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1667 German CC No. 3.

²⁴⁸ ECtHR, *Haase v. Germany*, 08.04.2004, *NJW* 2004, 3401 (Taking seven children into care on an emergency basis, including a seven day old baby, without providing parents an opportunity to contest the court order).

²⁴⁹ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1684 German CC No. 56.

²⁵⁰ M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin, 2000, § 1666 German CC No. 206.

53. To what extent, if at all, are rights of contact permitted between the child and the previous holder of parental responsibilities after the latter has been discharged of his/her parental responsibilities?

Since contact and parental care concern different rights, rights of contact may, as a rule, be exercised between a child and the previous holder of parental responsibilities after the previous holder has been discharged of his or her parental care.²⁵¹ However, the holder of the right of contact can also be discharged of this right in the interests of the child (§ 1684 para. 4 sent. 1 German CC). A decision restricting or excluding the right to contact for a longer period, or which excludes it totally, can only be ordered if the welfare of the child would otherwise be endangered (§ 1684 para. 4 sent. 2 German CC). Therefore it is important whether the ground for the discharge of parental custody still persists and would also influence contact with the child and the child's welfare. Existence of a contagious disease or violent behaviour, *e.g.*, may well lead also to an exclusion of contact.²⁵² In other cases different kinds of restrictions and measures of control are possible.²⁵³ *E.g.*, the family court can order that a third person is present when there is contact (*begleiteter Umgang*; § 1684 para. 4 sent. 3 German CC). Such a third person can be a youth welfare institution or an association. The association then determines which single person fulfils the task of being present (§ 1684 para. 4 sent. 4 German CC).

54. To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his/her parental responsibilities, regain them?

In these cases the general rules of non-contentious proceedings apply.²⁵⁴ The family court has to modify its orders any time it holds that doing so serves the interests of the child. However, serious reasons must exist which affect the interests of the child (§ 1696 para. 1 German CC). Measures under § 1666 German CC and § 1667 German CC must be revoked if a danger to the interests of the child no longer exists (§ 1696 para. 2 German CC). Long-lasting measures under § 1666 German CC and § 1667 German CC must be examined at reasonable intervals *ex officio* (§ 1696 para. 3 German CC). Where the measure discharging the parent of parental care is revoked, the parent regains parental care according to the legal provisions of §§ 1626 *et seq* German CC. Paramount consideration is always the interests of the child. The specific facts and circumstances of each individual case are decisive. Serious reasons for a modification can be an alteration of the underlying facts for the previous court order. There can also be a change in legal provisions or case law.²⁵⁵

²⁵¹ See U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1684 German CC No. 4.

²⁵² See in more detail L.M. PESCHEL-GUTZEIT, 'Die Regelung des Umgangs nach der Herausnahme des Kindes aus dem Elternhaus, §§ 1666, 1666a BGB', *FPR* 2003, 290 *et seq.*

²⁵³ See U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1684 German CC No. 26 *et seq.*

²⁵⁴ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1666 German CC No. 60.

²⁵⁵ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, § 1696 German CC No. 18 *et seq.*

H. PROCEDURAL ISSUES

55. Who is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact? Who is the competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?

The competent authority in matters of parental responsibility is the family court. This is a department of the local court (*Amtsgericht*), see § 23b Court Organisation Act (*Gerichtsverfassungsgesetz*). The family court has to decide disputes concerning parental responsibilities (§ 1628 sent. 1 German CC). This court also decides questions of the child's residence, which generally are framed as an issue of parental care (§ 1671 German CC). The family court is also competent for questions of contact (§§ 1684, 1685 German CC).

There can be an injunction of the family court in the context of a divorce proceeding. The court can make an injunction on the application of one of the parties for the parental custody of a common child (§ 620 No. 1 German Code of Civil Procedure), contact of a parent with the child (§ 620 No. 2 German Code of Civil Procedure) or the surrender of a child to the other parent (§ 620 No. 3 German Code of Civil Procedure). Such an injunction on parental custody, contact or the surrender of a child is also possible in an isolated proceeding on these questions (§ 621g German Code of Civil Procedure in conjunction with § 621 para. 1 No. 1 – 3 German Code of Civil Procedure). In a contact proceeding, an order to surrender the child to the other parent for the purpose of enforceable contact is also possible.²⁵⁶

As far as necessary the family court has to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact. The legal basis is § 12 German Act on Voluntary Jurisdiction. According to this provision the court can undertake an *ex officio* investigation.

The court can use a variety of possibilities to investigate the facts. Often reports of the youth office are used. In most matters concerning children the youth office has to be heard, especially in relation to tasks of foster parents (§ 49a para. 1 No. 3 German Act on Voluntary Jurisdiction), support of parents for personal care (§ 49a para. 1 No. 4 German Act on Voluntary Jurisdiction), contact with the child (§ 49a para. 1 No. 7 German Act on Voluntary Jurisdiction), jeopardizing the welfare of the child (§ 49a para. 1 No. 8 German Act on Voluntary Jurisdiction), parental care after separation of the parents (§ 49a para. 1 No. 9 German Act on Voluntary Jurisdiction) and parental custody after deprivation of custody (§ 49a para. 1 No. 12 German Act on Voluntary Jurisdiction). The court can also use expert evidence (psychologists, medical practitioners).²⁵⁷ Especially in the case of contact disputes

²⁵⁶ OLG Karlsruhe, 16.10.2001, *FamRZ* 2002, 1125; OLG Frankfurt 03.09.2002, *FamRZ* 2002, 1585.

²⁵⁷ U. DIEDERICHSEN, in: PALANDT, *Bürgerliches Gesetzbuch*, 64th Edition, München: Beck, 2005, Einf. § 1626 German CC No. 7.

with children under ten years of age a psychological opinion may be necessary.²⁵⁸ However, a parent cannot be forced to have contact with his or her child under the supervision of an expert who has to prepare a report for the court.²⁵⁹

56. Under what conditions, if any, may a legally effective decision or agreement on parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, e.g., required that the circumstances have changed after the decision or agreement was made and/or that a certain period of time has time has passed since the decision or agreement?

A legally effective decision or agreement on parental responsibilities, the child's residence or contact may always be reviewed by a family court.

The family court has to modify its orders at anytime if this it is necessary because of reasons seriously affecting the welfare of the child (§ 1696 para. 1 German CC). The court is also under an obligation to do so whenever the danger to the child's welfare ceases to be imminent (see § 1696 para. 2, 3 German CC). Also, according to the general rules of non-contentious proceedings, a court decision can be modified if there is a change of circumstances (§ 18 German Act on Voluntary Jurisdiction). That a certain period has elapsed since the decision or agreement is irrelevant.

57. What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?

It is widely accepted that arbitration proceedings are not admissible for matters of parental responsibility.²⁶⁰ Alternative dispute solving mechanisms are as such not generally recognised in German law; however, there have been some pilot projects where, with the consent of the parties, family judges act as mediators and the court procedure as such is suspended.²⁶¹ Most efforts to use mediation in disputes on custody and on contact are supported not only by associations of mediators, but also by attorneys. These more or less private efforts are also beginning to influence traditional dispute mechanisms.²⁶² They are also available at the enforcement stage of a decision or agreement concerning parental responsibilities, the child's residence or contact. Their effect differs according to the stage of proceedings and the co-operation of the parties. Counselling on issues of partnership, separation and divorce, and also other issues is given not only by the youth office²⁶³ but also by other institutions and associations.

²⁵⁸ See LENZ/J. BAUMANN, *FPR* 2004, 303 *et seq*; F. FINKE, 'Die rechtlichen Grundlagen der Sachverständigentätigkeit in der Familiengerichtsbarkeit nach der Kindschaftsrechtsreform vom 1. 7. 1998', *FPR* 2003, 503,505 *et seq*.

²⁵⁹ BVerfG, 20.05.2003, *FamRZ* 2004, 523.

²⁶⁰ See K. SCHUMACHER, 'Schiedsgerichtsbarkeit und Familienrecht', *FamRZ* 2004, 1677, 1780.

²⁶¹ See for courts in Lower Saxony F. ENTRINGER, 'Projekt Gerichtsnahe Mediation in Niedersachsen - Praktische Erfahrungen mit Familienmediation', *FPR* 2004, 196 *et seq*.

²⁶² W. GOTTWALD, 'Alternative Streitbeilegung (Alternative Dispute Resolution, ADR) in Deutschland', *FPR* 2004, 163 *et seq*.

²⁶³ See § 17 Children and Young Persons Assistance Act (Social Security Code VIII).

According to § 52 para. 1 sent. 1 German Act on Voluntary Jurisdiction, the family court has to make efforts to come to an understanding in matters concerning the child. This *Vermittlung* has to occur at the earliest possible moment and at every stage of the proceedings. The court has to hear the parties at the earliest possible moment and has to draw attention to the possibility of counselling by the youth welfare institutions, with the goal to develop an agreed concept for custody and parental responsibility (§ 52 para. 1 sent. 2 German Act on Voluntary Jurisdiction). As far as there is no delay detrimental to the welfare of the child, the court can also order a stay of the proceedings if the parties are prepared for counselling or if there are prospects for an understanding between the parties.

Where there is a dispute between the parents a special mediation procedure (*Vermittlungsverfahren*) in the family court can take place. Where one parent claims that the other parent prevents the implementation of a court order on contact, the family court conciliates on the application of one of the parents, § 52a para. 1 German Act on Voluntary Jurisdiction. Despite the fact that these proceedings are often time consuming and not always successful they are used in practice.²⁶⁴ In such proceedings the personal appearance of the parents can be ordered and in appropriate cases the youth office can also take part (§ 52a para. 3 German Act on Voluntary Jurisdiction). The court will discuss the consequences of an omission of contact for the child and also the legal consequences for the parents (§ 52 a para. 4 German Act on Voluntary Jurisdiction). In the framework of this procedure, arrangements of the parents can be made which have to be included in the procedure, § 52a para. 4 German Act on Voluntary Jurisdiction. Where there is no understanding on contact or on the use of counselling, or where at least one parent does not appear in the proceedings, the court will make an order stating that the conciliation procedure was unsuccessful (§ 52a para. 5 German Act on Voluntary Jurisdiction).

A conciliation is still possible at the stage of enforcement. However, according to § 52a para. 5 German Act on Voluntary Jurisdiction, the conciliation procedure of the court takes place before coercion is used. On the other hand, the use of coercion granted by § 33 German Act on Voluntary Jurisdiction is not dependent on a previous attempt of conciliation according to § 52a German Act on Voluntary Jurisdiction.²⁶⁵

58. To what extent, if at all, is an order or an agreement on parental responsibilities, the child's residence or contact enforceable and in practice enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?

An order on parental responsibilities is enforceable under § 33 German Act on Voluntary Jurisdiction. The system of enforcement of such a court order is one of

²⁶⁴ R. PROKSCH, *Rechtstatsächliche Untersuchung zur Reform des Kindesrechts*, Köln: Bundesanzeiger Verlag, 2002, p. 242 *et seq.*- See also D. MORAWE, 'Die Vermittlung nach § 52a FGG und die Güteverhandlung nach § 278 ZPO', *FPR* 2004, 193 *et seq.*

²⁶⁵ OLG Bamberg, 29.06.2000, *NJWE-FER* 2001, 24; OLG Rostock, 29.10.2001, *FamRZ* 2002, 967.

non-contentious proceedings. § 33 German Act on Voluntary Jurisdiction deals with cases where the act or the omission of an act depends solely on the will of a person. According to this provision the court can determine a payment by way of a penalty (*Zwangsgeld*; § 33 para. 1 German Act on Voluntary Jurisdiction). There can also be an arrest order (*Zwangshaft*; § 33 para. 1 sent. 2 German Act on Voluntary Jurisdiction), and as an *ultima ratio* the use of force is admissible (*Gewalt*; § 33 para. 2 German Act on Voluntary Jurisdiction).

Before the penalty is determined there has to be a warning by the court. The statutory maximum penalty amount is 25,000 Euros (§ 33 para. 3 German Act on Voluntary Jurisdiction). However, in practice there is often only a threat of a penalty of 5,000 Euros. For the determination of the amount, the circumstances of the individual case, the financial abilities of the party, the degree of disregard of former court orders and the amount of fault have to be taken into account.²⁶⁶ In the case of a contravention the court fixes the final sum; sometimes a penalty with an amount of 5.000 Euros, but often only 250 – 500 Euros is determined.²⁶⁷ According to empirical data courts often hesitate to fix a penalty; arrest orders seem not to be used.²⁶⁸ The use of force is a measure of last resort. It can only be ordered in the surrender of a child where other means of coercion have been unsuccessful.²⁶⁹ For the execution by force the court can use the help of the bailiff (*Gerichtsvollzieher*). He can, without an additional order, use the police to help (§ 33 para. 2 sent. 3 German Act on Voluntary Jurisdiction).²⁷⁰

The use of force against a child who opposes the exercise of contact has been excluded since the reform of parent and child law in 1998 (§ 33 para. 2 German Act on Voluntary Jurisdiction). In a proceeding for the surrender of a child, the use of force is, in principle, admitted. The family court, however, has to take the will of the child into account.

If the parent having parental custody consistently and without reason denies the other parent contact with the child, a partial²⁷¹ or even a total termination of parental custody can be ordered.²⁷² In such a situation, it is argued, the behaviour of the parent is against the best interests of the child. However, if the holder of parental custody has used all reasonable efforts to persuade the child to grant

²⁶⁶ W. ZIMMERMANN, in: K. KEIDEL, T. KUNTZE and J. WINKLER, *Freiwillige Gerichtsbarkeit*, 15th Edition, München: Beck, § 33 FGG No. 20a.

²⁶⁷ BayObLG, 12.01.1996, *FamRZ* 1996, 878 (10.000 German Marks); BayObLG, 10.02.1998, *NJWE-FER* 1998, 184 (1.000 German Marks); OLG Karlsruhe, 16.10.2001, *FamRZ* 2002, 1125 (400 German Marks).

²⁶⁸ R. PROKSCH, *Rechtstatsächliche Untersuchung zur Reform des Kindesrechts*, Köln: Bundesanzeiger Verlag, 2002, p.237 *et seq.*

²⁶⁹ OLG Brandenburg, 11.10.2000, *NJW-RR* 2001, 1089.

²⁷⁰ For more details see W. ZIMMERMANN, in: K. KEIDEL, T. KUNTZE and J. WINKLER, *Freiwillige Gerichtsbarkeit*, 15th Edition, München: Beck, § 33 FGG No. 40.

²⁷¹ OLG Brandenburg, 25.10.2001, *FamRZ* 2002, 1273 (deprivation of the right to determine the residence of the child); OLG Dresden, 25.04.2002, *JAmt* 2002, 310 (Sorgerechtspfleger); OLG Frankfurt a.M., 03.09.2002, *FamRZ* 2002, 317.

²⁷² AG Besigheim, 16.01.2002, *JAmt* 2002, 137; AG Frankfurt a.M., 18.02.2003, *FamRZ* 2004, 1595.- For a more restrictive view however M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin, 2000, § 1666 German CC No. 131.

contact, it is no longer reasonable for the parent to follow the contact order.²⁷³ It cannot be expected for the parent to use force against the child.²⁷⁴

For the court order to be enforceable, it must contain an exact order for the type of behaviour the parent or the third party is asked. A simple agreement of the parents alone, even when it is made in the framework of court proceedings, is not sufficient. Only when the content of the agreement is confirmed and transformed into a court order is there an enforceable order.²⁷⁵ The court order must be detailed enough that it can actually be enforced. Especially in contact cases the exact kind of contact, the location, the period and the frequency of contact must be fixed.

There is no express statutory provision dealing with cases where a contact order against the parent with the obligation to contact his or her child is not followed. However, in court practice some situations are recognised.²⁷⁶ Where the person having the right and the obligation to contact, usually the father, does not perform this duty it is contested whether a penalty can be determined. Some courts use the possibility of a penalty.²⁷⁷ Their main argument for this position is that the child is entitled to contact and the parent having the contact duty can be influenced by the penalty. Other courts and the majority in legal literature are against the use of penalty orders.²⁷⁸ An amelioration of the relationship between the child and an unwilling parent cannot be expected by such an enforcement.

59. To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child's residence or contact, e.g., upon a dispute, when scrutinizing an agreement, when appointing or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?

As regards the hearing of children in custody proceedings, § 50b Act on Voluntary Jurisdiction stipulates that the court shall hear a child personally in proceedings concerning the child's care or the administration of the child's assets if the inclination, ties or will of the child are of importance for the decision, or if it is indicated that the court have a direct impression of the child in order to determine the facts, § 50b para. 1 German Act on Voluntary Jurisdiction.

If the child is over fourteen the court must always hear the child personally in a proceeding on the child's care (§ 50b para. 2 sent. 1 German Act on Voluntary Jurisdiction). However, in court practice younger children are also heard

²⁷³ OLG Karlsruhe, 05.02.2001, *FamRZ* 2002, 624.

²⁷⁴ OLG Zweibrücken, 23.10.1986, *FamRZ* 1987, 90; OLG Köln, 17.02.1998, *NJWE-FER* 1998, 163.

²⁷⁵ OLG Köln, 17.02.1998, *FamRZ* 1998, 961; OLG München, 02.09.1998, *FamRZ* 1999, 522; OLG Brandenburg, 11.10.2000, *FamRZ* 2001, 1315 (surrender of a child); W. ZIMMERMANN, in: K. KEIDEL, T. KUNTZE and J. WINKLER, *Freiwillige Gerichtsbarkeit*, 15th Edition, München: Beck, § 33 FGG No. 10.

²⁷⁶ OLG Nürnberg, 11.06.2001, *FamRZ* 2002, 413 already refuses a contact order because this would not be in the interest of the child.

²⁷⁷ See OLG Celle, 21.11.2000, *Monatsschrift für Deutsches Recht (MDR)* 2001, 395; OLG Köln, 15.01.2001, *FamRZ* 2001, 1023.

²⁷⁸ C. KRAEFT, *Vollstreckungsprobleme nach § 33 FGG*, *FPR* 2002, 611, 612; D. SCHWAB, *Familienrecht*, 12th Edition, Munich, 2003, No.691.

regularly,²⁷⁹ see Q 62. The residence of the child is an issue of the child's care. According to empirical data, in 88% of the cases the children were not heard where there was no application for sole custody. Where there was an agreed application for sole custody in nearly 70% of the cases the children were heard and in contested cases the children were regularly heard.²⁸⁰ In proceedings concerning the child's assets the child must be personally heard, as far as this is indicated according to the nature of the affair (§ 50b para. 2 sent. 2 German Act on Voluntary Jurisdiction).

As far as no detriments for his or her development or education have to be feared, the child has to be informed on the subject of the proceedings and the possible outcome of the proceedings; the child has to be given an opportunity for expression, § 50b para. 2 sent. 3 German Act on Voluntary Jurisdiction. The court may refrain from a hearing only for serious reasons. This is indicated where the hearing itself could already harm the psychological balance of the child.²⁸¹ Where there is no hearing due to an imminent danger, there has to be a hearing at a later time, § 50b para. 3 German Act on Voluntary Jurisdiction. Since there is no precise enumeration of cases where children are heard this should occur in almost all cases relevant for their personal welfare.

60. How will the child be heard (e.g. directly by the competent authority, a specially appointed expert or social worker)?

Where the child in the situations of § 50b para. 1, 2 sent. 1 and 2 German Act on Voluntary Jurisdiction must be personally heard, this means that the court itself shall, as a rule, hear the child personally. Generally, the family judge will talk with the child.²⁸² The child has a constitutional right to be heard personally, generally orally.²⁸³ As far as it is possible the child has to be informed in an appropriate manner about the subject and the possible results of the proceedings (§ 50b para. 2 sent. 2 German Act on Voluntary Jurisdiction).

61. How, if at all, is the child legally represented in disputes concerning:

(a) Parental responsibilities

The child himself or herself is not a party in custody proceedings.²⁸⁴ The child can, however, lodge an appeal without the help of a legal representative (§ 59 para. 1, 3 German Act on Voluntary Jurisdiction; see Q 62). In order to prevent a child from

²⁷⁹ See R. PROKSCH, *Rechtstatsächliche Untersuchung zur Reform des Kindesrechts*, Köln: Bundesanzeiger Verlag, 2002, p.269.

²⁸⁰ See R. PROKSCH, *Rechtstatsächliche Untersuchung zur Reform des Kindesrechts*, Köln: Bundesanzeiger Verlag, 2002, p 270 *et seq.* See also K. KOSTKA, 'Die Begleitforschung zur Kindschaftsrechtsreform - eine kritische Betrachtung', *FamRZ* 2004, 1924, 1932 *et seq.* - Former research showed that less than half of the children in child protection proceedings were heard personally. A quarter of those aged 14 to 17 were not heard. J. MÜNDER, B. MUTKE and R. SCHONE, *Kindeswohl zwischen Jugendhilfe und Justiz - Professionelles Handeln in Kindeswohlverfahren*, Münster: Votum 2000, p. 130 *et seq.*

²⁸¹ H.-U. MAURER, 'Das Verfahren der Familiengerichte', in: D. SCHWAB, *Handbuch des Scheidungsrechts*, 5th Edition, München: Vahlen, 2004, Part. I No. 458 *et seq.*

²⁸² See H.-U. MAURER, 'Das Verfahren der Familiengerichte', in: D. SCHWAB, *Handbuch des Scheidungsrechts*, 5th Edition, München: Vahlen, 2004, Part. I No. 452 *et seq.*

²⁸³ BVerfG, 14.08.2001, *FamRZ* 2002, 229.

²⁸⁴ BVerfG, 20.08.2004, *FamRZ* 2004, 86 = *NJW* 2003, 3544.

being simply the object of other persons' proceedings, the Child Law Reform Act of 1997 introduced the institution of a curator (*Verfahrenspfleger*) who shall act as an 'attorney of the child' (*Anwalt des Kindes*). The child can be legally represented in proceedings concerning parental responsibilities by appointment of such a curator, § 50 para. 1 German Act on Voluntary Jurisdiction. The court has to appoint a curator in proceedings concerning the 'person' of the child if it is necessary to safeguard the interests of the child. Proceedings concerning the 'person' are interpreted very broadly so that basically only proceedings concerning the assets of the child are not covered.²⁸⁵

The statute lists three different situations in a nonexclusive manner. The first situation, formulated as a general clause, is if there is a conflict of interests between the legal representative and the child (No. 1). The second is if there are measures necessary which can lead to a child's separation from his or her family, or to a total deprivation of parental care (No. 2). This can be a proceeding under § 1666 German CC (jeopardy to the welfare of the child).²⁸⁶ The third situation concerns the removal of the child from a foster caregiver (§ 1632 para. 4 German CC) or the spouse, the registered partner or a person with a contact right (see § 1682 German CC). If the court does not appoint a curator it has to justify this in its decision concerning the child (§ 50 para. 1 sent. 2 German Act on Voluntary Jurisdiction). An appointment of a curator is not necessary or no longer necessary where the interests of the child can be reasonably represented by an attorney or another person in the proceedings (§ 50 para. 3 German Act on Voluntary Jurisdiction).

The institution of this special curator is not well defined in the law. Because the goal is not clear, it is not clear who is best to perform the task. It is also not clear what kind of qualifications or professional skills a curator should have.²⁸⁷ There is also no clear guidance as to whether the curator must act for the actual interests of the child as they exist or should rather act with respect to the objective best interests of the child that are already represented by the youth office.²⁸⁸ Therefore it is also not clear what direction the activities of the curator should take. The family courts appoint different groups of persons as curators, e.g. social workers, but also attorneys and in some cases even officials of the youth offices.²⁸⁹ The courts sometimes seem to be reluctant to appoint such a curator.

²⁸⁵ See A. HANNEMANN and P.-C. KUNKEL, 'Der Verfahrenspfleger - das ,unbekannte Wesen', *FamRZ* 2004, 1833, 1834 note 15; R. PROKSCH, *Rechtstatsächliche Untersuchung zur Reform des Kindesrechts*, Köln: Bundesanzeiger Verlag, 2002, p. 248.

²⁸⁶ M. COESTER, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin, 2000, § 1666 German CC No. 210.

²⁸⁷ A. HANNEMANN and P.-C. KUNKEL, 'Der Verfahrenspfleger - das ,unbekannte Wesen', *FamRZ* 2004, 1833, 1835.

²⁸⁸ For a child centered and against a 'neutral' position A. HANNEMANN and P.-C. KUNKEL, 'Der Verfahrenspfleger - das ,unbekannte Wesen', *FamRZ* 2004, 1833, 1835. – See also L. M. PESCHEL-GUTZEIT, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: Gruyter, 2002, vor §§ 1626 et seq German CC No. 78. A. HANNEMANN and P.-C. KUNKEL, 'Der Verfahrenspfleger - das ,unbekannte Wesen', *FamRZ* 2004, 1833 et seq. See also R. PROKSCH, *Rechtstatsächliche Untersuchung zur Reform des Kindesrechts*, Köln: Bundesanzeiger Verlag, 2002, p. 247 et seq.

²⁸⁹ A. HANNEMANN and P.-C. KUNKEL, 'Der Verfahrenspfleger - das ,unbekannte Wesen', *FamRZ* 2004, 1833 et seq. See also R. PROKSCH, *Rechtstatsächliche Untersuchung zur Reform des Kindesrechts*, Köln: Bundesanzeiger Verlag, 2002, p. 247 et seq.

(b) The child's residence

In the situations set out by § 50 para. 2 No. 2 German Act on Voluntary Jurisdiction, the welfare of the child is in jeopardy (§§ 1666, 1666a), see (a). By court order a separation from the family can be ordered. Therefore such a proceeding also concerns the child's residence. In the case of removal of the child from a foster person, the spouse, the registered partner or a person with a contact right (§ 50 para. 2 No. 3 German Act on Voluntary Jurisdiction), the residence of the child must also be decided. The appointment of a curator is also possible if there is a parental dispute that concerns only the residence of a child.²⁹⁰

(c) Contact

A proceeding on contact also concerns the 'person' of the child. Therefore the statutory provision on the appointment of a curator also applies here.²⁹¹

62. What relevance is given in your national legal system to the age and maturity of the child in respect of Q 59-61?

The age and maturity of the child influence the child's procedural position. A child over fourteen must always be personally heard in proceedings concerning the child's care (§ 50b para. 2 sent. 1 German Act on Voluntary Jurisdiction),²⁹² see Q 59. Such a child can also lodge an appeal without the help of a legal representative § 59 para. 1, 3 German Act on Voluntary Jurisdiction. Where the child is younger, a legal representative is necessary. Any decision against which the child can lodge an appeal must be made known to the child personally. The reasons shall not be communicated to the child, however, where detriments for his development or education have to be feared, § 59 para. 2 German Act on Voluntary Jurisdiction.

The age and maturity of a child also influence whether a hearing of the child could be dangerous to him or her (see § 50b para. 3 German Act on Voluntary Jurisdiction) and to what extent appropriate information shall be given (§ 50b para. 2 Act on Voluntary Jurisdiction). A statutory rule on a certain age does not exist. There is contradictory case law about which age it is best to hear children. Some courts argue that the child is to be heard at the age of three.²⁹³ Other courts and authors propose the age of four²⁹⁴ or of five years.²⁹⁵ Above this age limit there seems to be consensus that a hearing generally must take place.²⁹⁶

²⁹⁰ See R. PROKSCH, *Rechtstatsächliche Untersuchung zur Reform des Kindesrechts*, Köln: Bundesanzeiger Verlag, 2002, p. 247.

²⁹¹ See A. HANNEMANN and P.-C. KUNKEL, 'Der Verfahrenspfleger - das ,unbekannte Wesen', *FamRZ* 2004, 1833, 1836;

²⁹² H.-U. MAURER, 'Das Verfahren der Familiengerichte', in: D. SCHWAB, *Handbuch des Scheidungsrechts*, 5th Edition, München: Vahlen, 2004, Part. I No. 445 *et seq.*

²⁹³ OLG Frankfurt a.M., 22.05.1996, *FamRZ* 1997, 571; OLG Brandenburg, 14.10.2002, *FamRZ* 2002, 624.

²⁹⁴ BayObLG, 15.12.1987, *FamRZ* 1988, 871, 873; 30.04.1996, *FamRZ* 1997, 223, 224.

²⁹⁵ OLG Zweibrücken, 12.08.1996, *FamRZ* 1997, 687; U. MAURER, in: SCHWAB, *Handbuch des Scheidungsrechts*, 5th Edition: Vahlen, 2004, Part. I No. 450. - Contra KG, 10.02.1999, *FamRZ* 1999, 808, 809 annotated by LIERMANN.

²⁹⁶ OLG Karlsruhe, 21.01.1993, *FamRZ* 1994, 393 (6 years); OLG Hamm, 22.09.1995, *FamRZ* 1996, 421, 422 (6 years).