ON THE HISTORY OF FATHERS' RIGHTS AND MOTHERS' DUTY OF CARE

SIBYLLA FLÜGGE*

In Germany, mothers of out-of-wedlock children did not receive legal authority over their children (as opposed to the rights of personal custody and care of those children) until 1970. Decision-making authority over out-of-wedlock children was in the hands of government youth welfare offices. Since 1970, mothers of out-of-wedlock children have enjoyed complete custody, regardless of whether or not they live with the father of the child.[1] Thus in case of separation, they alone decide with whom the child will live and whether it may have contact with its father. Germany's so-called "new fathers"[2] felt this legal situation to be discriminatory. Unmarried parents who were living together petitioned the custody courts for joint custody; this was refused because of a law placing out-of-wedlock children specifically in their mother's custody,[3] and in 1981 the case reached the Constitutional Court.[4]

---

* First state exam in law, Frankfurt/Main, 1974; second state exam, Frankfurt/Main, 1977; doctorate in women's legal history, Frankfurt/Main, 1993; professor of "women's rights" in the department of social work of Frankfurt am Main Vocational College. Presently half-time women's commissioner at Frankfurt am Main Vocational College. Co-editor of feminist law journal *Streit*. Mother of two out-of-wedlock children.

1 Custody of children born in and out of wedlock is governed by family law, which is regulated by §§ 1297-1921 of the BGB (Civil Code). The Civil Code took effect on 1 Jan. 1900. Its family law portions were first revised in 1938, through the *Gesetz zur Vereinheitlichung des Rechts der Eheschließung und Ehescheidung im Lande Österreich und im übrigen Reichsgebiet* (Law to Create Uniformity in the Law of Marriage and Divorce in Austria and the Other Areas of the Reich), RGBl. I, at 807, and then by the post-war Allied Control Council's "Law No. 16—Marriage Law" of 20 Feb. 1946, KRABl., at 77. The first fundamental reform of marriage law took place in 1957, in the *Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiet des Bürgerlichen Rechts* (Law on Equality of Men and Women in the Area of Civil Law) (BGBl. I, at 609). Out-of-wedlock law was first reformed in 1961 in the *Familienrechtsänderungsgesetz* (Family Law Revision Act), BGBl. I, at 1221, and then underwent fundamental revision in 1969 in the *Gesetz über die rechtliche Stellung der nichtehelichen Kinder* (Law on the Legal Status of Out-of-Wedlock Children), BGBl. I, at 1243, in force since 1 July 1970. Marriage law was once again reformed in the *Erstes Gesetz zur Reform des Ehe- und Familienrechts* (First Law to Reform Marriage and Family Law) of 14 June 1976, BGBl. I, at 1421, in force since 1 July 1977. The sections of the Civil Code concerning custody rights, in all their earlier versions, are found *in* Sibylla Flügge, *Von väterlicher Gewalt und elterlicher Sorge, eine Gesetzesdokumentation 1900-1982*, 1 STREIT 20-24 (1983).

2 This is the phrase used by feminists—in part appreciatively, in part scornfully—to refer to fathers who take their paternal duties more seriously than men of earlier generations, often entering into aggressive competition with women in the process.

3 § 1705 BGB (Civil Code), in its 1970 version.

4 Anyone who believes her basic rights have been violated through enforcement of a law can, under certain conditions, bring the case before the Constitutional Court (*Bundesverfassungsgericht*) [hereinafter BVerfG]. The Court reaches binding decisions on the constitutional application of a law or declares it unconstitutional, and thus null and

The Court was asked to decide whether this provision of the Civil Code discriminated against men or was harmful to children. The Court determined that the "legal deficit" suffered by fathers of children born out of wedlock was in keeping with the fact that the parents had "decided not to give their relationship a legally-binding structure."[5] The court found the general lack of fathers' rights to be in the children's best interests, saying the original grounds for the law, explained in the draft of a 1967 bill,[6] continued to hold true: "Mothers and small children are made for each other, physically and psychologically. The mother must therefore take precedence over the father. Nor should this bond between mother and child be broken by a later change."[7] The court also confirmed that the father of an out-of-wedlock child normally would not have the opportunity to visit his child *against the mother's will*: "If a fundamental right to contact with the unmarried father were recognized, this child would be just as endangered in his development as a child of a divorced marriage. The child born out of wedlock must be spared the fate of a 'divorce orphan.'"[8]

Because this decision was heavily criticized not only by advocates of fathers' rights, but also by women, the Constitutional Court changed course radically only ten years later in a decision on the same issue. Regarding the best interests of the child, it determined in 1991 that "[t]he standpoint of consistency in the child's development and upbringing requires that its emotional bonds be considered should its parents separate. Therefore, parental joint custody after separation can prove as crucial for the good of the common child as for a child born in wedlock after its parent's divorce."[9]

---

void. Basic rights are codified in Arts. 1-19 of the Basic Law for the Federal Republic of Germany of 23 May 1949 (BGBl., at 1), Germany's equivalent of a constitution. Particularly important for family law are Art. 3 (equality of the sexes) and Art. 6 (protection of marriage and the family).

5 Constitutional Court decision of 24 Mar. 1981, 56 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (official compilation of German Constitutional Court decisions) [hereinafter BVERFGE] 363; FAMILIENRECHTSZEITUNG [hereinafter FAMRZ] 429 (1981); and NEUE JURISTISCHE WOCHENSCHRIFT [hereinafter NJW] 1201-04, 1202 (1981).

6 BT-DRUCKS (Bundestag publication) V/2370, at 63. The bill, which was never adopted, proposed a reform of out-of-wedlock law.

7 *See* NJW, *supra* note 5, at 1203.

8 *Id.*

9 Decision of the Constitutional Court of 7 May 1991, FAMRZ 913-17, at 916 (1991). Whereas the 1981 case had attacked § 1705 of the Civil Code, which stated that only mothers could hold custody, the 1991 case, for legal reasons, attacked § 1738 of the Civil Code, under which a mother automatically lost custody if she transferred it to the father. In both cases, parents of out-of-wedlock children were aiming for the right to exercise joint custody. Section 1738 was declared partially unconstitutional by the Court.

Though it had not been called upon to do so, the Court took the opportunity to take a position on another legal and political issue under discussion at the time—the question of the significance of joint custody following divorce of married parents. It stated, "[j]oint custody is also useful in making clear to the parents their shared responsibility for the child and contributing to the stability of the relationship."[10]

Until now, courts have always been required to make specific custody decisions in divorce cases. Until the equal rights law of 1957,[11] mothers could be assigned only the personal right to care for the child; legal custody—that is, the right to make decisions affecting the child—remained with the father. Prior to the 1977 family law reform, custody was granted to the parent who was "innocent" in the divorce. Since 1977, courts have been expected to follow the parents' own wishes; if there is conflict, they are to assign custody to the person to whom the child has the strongest ties.[12]

Though joint custody is permitted, custody is generally granted to one parent, with the other parent being granted only regular visitation rights. Many men feel this legal situation discriminates against them, as it grants custody to the person to whom the child has the strongest ties; this is almost always the mother, who—particularly in the case of small children—actually takes care of the child. Fathers must pay support for children, and often for their mother as well, without sharing in custody, a situation many fathers view as unjust.

In 1980, the possibility of granting joint custody after divorce was abolished.[13] Only two years later, however, the Constitutional Court found this law unconstitutional.[14]

In recent years, the Bundestag has been debating—with heavy public involvement—a fundamental reform of custody law for children born in and out of wedlock. Their rights would be largely equalized. The main difference would lie in the fact that fathers of children born out of wedlock would be able to obtain custody only by petitioning for it together with the mother, while husbands would continue to obtain custody through marriage.

The most controversial point has been whether courts would continue to be required to assign custody in every divorce case, or

---

10 *Id.* at 916.

11 *See supra* note 1.

12 Section 1671 of the Civil Code.

13 *Gesetz zur Neuregelung des Rechts der elterlichen Sorge vom 18.7.1979* (Law on Reform of the Right of Parental Custody of 18 July 1979), in force since 1 Jan. 1980. The text and basis for the law are in BT-DRUCKS (Bundestag publication) 8/2788.

14 Constitutional Court decision of 3 Nov. 1982, BGBl. I, at 1596, NJW 101 (1983).

whether both parents would retain custody automatically as long as neither petitioned the court for sole custody. Many women advocate automatic joint custody after divorce, in the hopes that fathers would spend more time caring for their children: "Until now, family courts as a rule assumed that parents who are no longer a couple will no longer be able to agree on issues involving child-rearing. . . . But it was not taken into account that the child often must do entirely without one parent because of sole custody. This would now change."[15]

Yet if we look at the evolution of custody law and place it within the context of the development of the gender-based division of labor in child-rearing, it becomes clear that improvements in the legal position of fathers have been accompanied, historically, by a decreased obligation to care for their children personally. Conversely, the legal status of mothers improved when, after World War II, they began to demand rights in the workplace and family and expected greater participation by fathers in housework and child-rearing. That fact that more and more rights are being demanded for fathers today can be interpreted as a "backlash" against women's emancipation. This will be documented in the following historical summary.

I will divide this history into five roughly-defined epochs:

1) the pre-Christian Middle Ages;
2) the Christian-dominated Reformation and the phase of the Enlightenment;
3) the phase of industrialization leading up to National Socialism;
4) the post-war period in West and East Germany; and
5) developments since the early 1980s.[16]

---

[15] Birgitt von Maltzahn, *Sorgerechtsreform zum Wohle des Kindes*, ZENTRALBLATT FÜR JUGENDRECHT 108-9, 109 (1995). In a 1988 book, Jutta Limbach, one of the foremost female jurists in Germany, took an express position, as a women's lawyer, in favor of joint custody. JUTTA LIMBACH, GEMEINSAME SORGE GESCHIEDENER ELTERN (1988). She was followed in this by another lawyer actively involved in women's rights. WENN AUS EHEN AKTEN WERDEN (Margarethe Fabricius-Brand ed., 1989).

[16] Described in greater detail *in* Sibylla Flügge, *Ambivalenzen im Kampf um das Sorgerecht*, 1 STREIT 4-15 (1991). The following historical discussion is based on research by the author that to some extent contradicts the findings of traditional legal history. The theories have been derived from complicated analysis of sources, and it would go beyond the scope of this article to provide source information in every case. On the methodology, *see* SIBYLLA FLÜGGE, HEBAMMEN UND HEILERINNEN, RECHT UND REALITÄT IM SPIEGEL DER HEBAMMENORDNUNGEN DES 15. UND 16. JAHRHUNDERTS (forthcoming, 1997).

1) The Middle Ages

No formal custody law existed during the Middle Ages. Mothers and fathers were equally responsible for raising and feeding their children; however, the actual work of caring for children was done by neither mothers nor fathers, but by persons not yet, or no longer, able to do productive work. "Parental care" was seen primarily as the right to make the child's marriage contract and as a financial responsibility.

Thus it was typical for that period—though it may seem utopian from today's standpoint—for single mothers to have the right, after birth, to bring the child to the father, who was expected to take it and raise it at his own expense. In addition, he was required to pay the mother compensation for the pain of giving birth.[17] Also, birth control by women, in the form of abortion or killing the child immediately after birth, was socially tolerated. Only the church declared both to be sins, punishing them with religious sanctions.[18]

2) Christian Reformation and Enlightenment

The era of the Reformation brought radical change, at first on the ideological and moral fronts, but increasingly also in law.[19]

Of fundamental importance was the fact that Luther and his fellow reformers translated not only the Bible, but also a plethora of ancient and medieval doctrines, into the vernacular and distributed them with the aid of the printing process. The doctrinal system subscribed to in the ancient period and by the heads of the church, which was often extremely hostile to women, had been known during the Middle Ages to only a small number of educated clerics; now it became common knowledge, available to socially-influential groups and preached to the people from every pulpit.[20]

For purposes of our subject, the spread of the "head of the household" ideology was particularly significant. Thus it was said that, just as God the Father reigned over mankind and Christ

---

17 Examples are found *in* DAS BUCH WEINSBERG-AUS DEM LEBEN EINES KÖLNER RATSHERREN 21, 166, 231 (Johann Jakob Häsßlin ed., 1961).

18 For details, *see* Sibylla Flügge, *Kindesmörderinnen oder: Wie weibliche Freiheit verloren ging*, LOSE GEDANKEN UNGEBUNDEN, READER NR. 1 19-27 (Feministisches Rechtsinstitut Bonn, 1996). On the history of abortion, *see also* GESCHICHTE DER ABTREIBUNG VON DER ANTIKE BIS ZUR GEGENWART (Rober Jütte ed., 1993).

19 On the general status of women in the early modern period, *see* HEIDE WUNDER, ER IST DIE SONN', SIE IST DER MOND (1992); SULLY ROECKEN & CAROLINA BRAUCKMANN, MARGARETHA JEDEFRAU (1989); and MERRY E. WIESNER, WORKING WOMEN IN RENAISSANCE GERMANY (1986).

20 *See* Klaus Schreiner, *Laienbildung als Herausforderung für Kirche und Gesellschaft*, ZEITSCHRIFT FÜR HISTORISCHE FORSCHUNG 257-355 (1984).

reigned over his bride, the Church, so the father of the state reigned over his subjects and the father of the house over his family. This reign was supposed to be tempered by justice and respect, but it deprived its subjects of rights.

While the man advanced to the status of ruler at God's behest, motherhood was declared in this epoch to be the true purpose of a woman's life. However, motherhood was not considered the entire *content* of a woman's life—she continued to be respected as a productive partner and woman of the house at her husband's side.[21] Raising and feeding children was the joint task of both parents. Marriage was portrayed as the only legitimate way of life, and sexuality outside of marriage was prohibited; single mothers and their children faced discrimination.[22] Men also suffered considerable professional disadvantages if they could be proven to have fathered illegitimate children.[23] However, while numerous laws were adopted making it easier to determine unmarried motherhood, it became increasingly difficult to establish paternity; this was taken to an extreme in the Napoleonic Code, which completely prohibited establishing paternity against the will of the man involved.[24] This law also applied in some parts of Germany during the 19th century.

A different tack was taken by the General State Law for the Prussian States of 1794.[25] To grant out-of-wedlock children better chances of survival, it made it possible for mothers to require a paternal commitment from more than one man in case of doubt. Following older Germanic legal traditions, the law detailed the specific conditions under which the father of an out-of-wedlock child had the duty or the right to take the child himself.[26]

While under early absolutism it was taken for granted that single women had the right to raise their children, as they were not subject to the authority of a husband, the enlightened General

---

21 Vividly illustrated *in* DAVID WARREN SABEAN, PROPERTY, PRODUCTION AND FAMILY IN NECKARHAUSEN, 1700-1870 (1990).

22 CHRISTIAN SIMON, UNTERTANENVERHALTEN UND OBRIGKEITLICHE MORALPOLITIK - STUDIEN ZUM VERHÄLTNIS ZWISCHEN STADT UND LAND IM AUSGEHENDEN 18. JH. AM BEISPIEL BASELS (1981).

23 Johannes Heinrich Gebauer, *Die "Unechten" und "Unehrlichen" in der Stadt Hildesheim*, 32 ARCHIV FÜR KULTURGESCHICHTE 118 ff. (1944).

24 Art. 340 of the "code civil" of 1804, cited *in* MARIANNE WEBER, EHEFRAU UND MUTTER IN DER RECHTSENTWICKLUNG 218-331 (1907).

25 *Allgemeines Landrecht für die preußischen Staaten*, Berlin 1794 [hereinafter ALR] (reprinted and edited with an introduction by Hans Hattenhauer, 1970).

26 ALR II, 2, §§ 612-32.

State Law now provided for a sort of state guardianship for fatherless children.[27]

The creeping tendency to deprive mothers of rights that had begun in the Reformation accelerated under the laws of the epoch of absolutism. It was furthered by legal scholars trained primarily in Roman law.[28] For these scholars, custody law contained only the *patria potestas* of paternal authority, as the Roman legal tradition did not provide wives with rights of parental authority.[29] These Roman law scholars were particularly influential in the 19th century as the groundwork was being laid for a civil code.

3) The Phase of Industrialization Leading Up to National Socialism

a) The 19th Century

In addition to the influence of Roman law, changes in the theoretical and scholarly arenas once again influenced custody law in the course of the Enlightenment and at the beginning of the 19th century.

With the development of the modern natural science of human beings, anthropological theories emerged—independently of religion—that portrayed the subjection of women to men as a natural law. Bone, muscle, nerve and brain measurements proved beyond a doubt that women were not built to take part in battle or power, creativity or scholarship, or any responsible activity outside their own four walls. In the eyes of scientists who subscribed to such theories, the "natural destiny of woman," as evidenced by her bodily structure, was limited to pleasing a man, bearing children, and caring for small children.[30] Conversely, the man was now considered aggressive and rough, and thus biologically unequipped to care for small children.

As a result, in the 19th century we are no longer dealing primarily with the concept of a *jointly*-acting couple, a couple in which the female half happily submits to the rule of the man; instead, we

---

27 ALR II, § 614.

28 In the field of family law, various legal systems existed simultaneously in Germany until the end of the 19th century: unwritten regional common law, the law of the Roman emperors that had been further developed by scholars since the Renaissance, and church law. Which law was applied—or whether the various traditions were mixed—depended on which judge was hearing a case.

29 On the influence of Roman law, *see* ANKE LEINEWEBER, DIE RECHTLICHE BEZIEHUNG DES NICHTEHELICHEN KINDES ZU SEINEM ERZEUGER IN DER GESCHICHTE DES PRIVATRECHTS (1978).

30 CLAUDIA HONEGGER, DIE ORDNUNG DER GESCHLECHTER, DIE WISSENSCHAFT VOM MENSCHEN UND DAS WEIB (1991); LONDA SCHIEBINGER, THE MIND HAS NO SEX? WOMEN IN THE ORIGINS OF MODERN SCIENCE (ch. 8 1989).

now encounter primarily the concept of father and mother as *complementary* beings—one capable only of decision-making, the other equipped only for personal care. Consequently, denial of women's decision-making authority and right to act as legal representative was now justified by natural law and anchored in law.[31]

It was no accident that the development of the legally-anchored, biologically justified model of the *caring* mother and the *deciding* father occurred during the era of industrialization. In this period, family businesses in which parents had worked together had to be abandoned on a large scale; fathers began to spend their days outside the household in dependent labor, while the mothers who depended on them watched over the house and children.[32]

The logical consequence of this *complementary parenthood* was that, should one parent be lacking, the other could not step in as a replacement; the divorced man or widower needed a woman to take on the work of caring for the child, and the divorced wife or widow—as well as the single mother—needed a man to exercise parental authority.

This new scientific view first began to permeate the law in the major legal achievement of the 19th century, the Civil Code (*Bürgerliches Gesetzbuch*). It came into force on 1 January 1900.[33]

b) The Out-of-Wedlock Law in the Civil Code of 1900

The provisions of the Civil Code were based on the assumption that, as a rule, the father of a child born out of wedlock could not, and had no wish to, exercise paternal authority. If he did not take the child in voluntarily, thus assuring it the status of a legitimate child (because it was under its father's care), he was considered unrelated to the child, expected only to pay minimal support until the child's 16th birthday. The mother had the right, but also the duty, to care for the child born out of wedlock; however, she could not act as its legal representative. Now that the father did not legally exist, this paternal right was exercised by "Father State," at first in the form of honorary guardianship, but beginning in 1924 in the guise of the Youth Welfare Office.

---

31 DORIS ALDER, DIE WURZEL DER POLARITÄTEN (1992).

32 UTE GERHARD, VERHÄLTNISSE UND VERHINDERUNGEN, FRAUENARBEIT, FAMILIE UND RECHT DER FRAUEN IM 19. JAHRHUNDERT (1978).

33 *See supra* note 1.

c) Custody of Children Born in Wedlock in the Civil Code of 1900

The complementarily-conceived, gender-based division of labor in child-rearing was also taken to an extreme in the Civil Code provisions regulating custody of children born to *married* parents. The authors of the Code could apparently rely on the likelihood that a divorced or widowed father would seek another woman as soon as possible to take on the female aspect of child-rearing, whether as wife, relative or employee. This did not have to be required by law.

The situation was different if a child born in wedlock lived with the mother alone following the husband's death or divorce. In such cases, the mother did not necessarily feel pressure to seek a new decision maker. Had the Civil Code not taken countermeasures, many women would have taken on the paternal aspects of child-rearing themselves without complaint. To prevent such "unnatural" behavior, the Civil Code required that custody always remain with the husband, even if he had left his wife and children with malicious intent or mistreated them.[34] Only if he was objectively incapable of making decisions did the state take his place. The husband could decide who would be his children's guardian in case of his death; only if he had not provided for this eventuality could the widow inherit paternal authority—and then only as long as she remained single. Should she remarry, out of financial necessity, for example, her children would be assigned an official guardian.

Not only did the Civil Code grant fathers sole custody; it was also careful to expressly state that wives had an obligation to raise their children personally, run the household and serve their husbands—which included sexual services.[35] Violations of this duty could be punished with divorce and forfeiture of all claims to support and provisions for old age, as well as loss of the children. The woman only had the right to continue taking care of her children personally if the court determined that she was "not guilty" in the divorce. But even in such cases, legal custody (the right to make decisions affecting the child) remained with the father.

The women's movement had begun fighting at the turn of the century against anchoring this division of labor in law.[36] Although

---

[34] Sections 1627-1708 of the Civil Code in its version of 1 Jan. 1900. *See supra* note 1.

[35] This makes marital rape impossible by definition. It has now, for the first time, been made illegal in Germany. BT-DRUCKS 13/2463.

[36] *See* UTE GERHARD, GLEICHHEIT OHNE AUSGLEICHUNG 110-20 (1990).

Art. 119 of the Weimar Constitution[37] proclaimed the equality of men and women in marriage, nothing changed as yet.

d) National Socialism

Nor did the Nazis see any reason to alter this division of duties in their marriage law reform of 1938.[38] They merely introduced the concept of "best interests of the child"; in deciding to whom to grant the right personally to care for children following divorce, primary criteria were to be the parents' joint proposal and the best interests of the children, rather than the issue of guilt for the divorce. However, in this reform the main consideration was not so much concern for the children as concern for ensuring offspring. Thus, after divorce, children were to remain with the mother wherever possible, making it easier for fathers to begin new families. Of course, the Nazis never questioned the sole authority of married and divorced fathers to make decisions for their children.

4) West and East Germany

a) West Germany

A new epoch for wives' custody rights was ushered in with the post-war West German constitutional debate, which also touched upon equality of the sexes.

In the Parliamentary Council for the Western Zones, the binding formulation "men and women possess equal rights"[39] almost failed to be adopted due to the reservations of the conservative majority in parliament, which feared that this principle would turn all of family law on its head. These reservations could not be overcome until, following vigorous protest by women's associations, a compromise was reached: equal rights would not become binding for another four years (until 1953).[40]

However, the West German legislature allowed another four years to go by before reforming family law in the Equal Rights Law of 1957.[41] But reform was minimal: women's basic responsibility for household and children was not eliminated—and fathers retained sole decision-making rights in case of disagreement during marriage. At the time, it was argued that the institution of marriage would collapse if fathers did not retain "ultimate decision-

37 *Verfassung des Deutschen Reiches vom 11.08.1919.*

38 *See supra* note 1.

39 Art. 3 (2) of the Basic Law, *see supra* note 4.

40 MARIANNE FEUERSENGER, DIE GARANTIERTE GLEICHBERECHTIGUNG. EIN UMSTRITTENER SIEG DER FRAUEN 30 (1980).

41 *See supra* note 1.

making power" on questions of child-rearing. Not until 1959 did the Constitutional Court help women achieve equal custody rights.[42]

A year later, the legislature finally decided to grant custody rights to mothers of out-of-wedlock children upon petition. However, the general rule remained, "The mother is not entitled to parental authority over the child. She has the right and the duty to care for the person of the child."[43]

Not until 1969 did the legislature attempt to implement the constitutional requirement, already proclaimed in Art. 121 of the Weimar Constitution of 1919 and adopted from there by Art. 6 (5) of the Basic Law of 1949, that the status of children born in and out of wedlock be made as equal as possible. However, the reform of the Out-of-Wedlock Law of 19 August 1969[44] was aimed primarily at improving the rights of fathers. The relationship between father and child was now legally recognized. But as far as consequences for support and inheritance law, the right to have contact with their children, participation in procedures before the guardianship courts, and involvement in adoptions, these fathers continued to suffer discrimination in comparison with fathers of children born to married couples. In particular, the legislature saw no need to grant fathers of children born out of wedlock and raised by their mothers an opportunity to exercise custody jointly with the mother.[45]

The mothers of children born out of wedlock were finally granted not only the duty of care, but also full legal custody—decision-making authority over their children. However, restrictions continued to apply. In legal disputes with fathers—if they involved determination of paternity, child support payments or inheritance—children born out of wedlock were represented by the Youth Welfare Office. Mothers had the right of representation only if the Youth Office trusted them. On this issue, the most important commentary on the Civil Code says, "The mother has basic, unrestricted custody of the child. However, because experience shows she is often not equal to a number of particularly difficult issues, the law provides the child from birth with a guardian with limited duties."[46]

---

42 10 BVERFGE 59; §§ 1628 and 1629 (1) of the Civil Code of 18 June 1957 were declared unconstitutional.

43 Section 1707 of the Civil Code, in the version of 11 Aug. 1961, *see supra* note 1.

44 *See supra* note 1.

45 *See supra,* notes 6 and 7.

46 PALANDT-DIEDERICHSEN, BGB-KOMMENTAR, notes 1 on para. 1706 (54th ed. 1995).

Family law was again completely overhauled in the reformist era of the mid-1970s. The principle of guilt was finally eliminated from divorce law, so that wives no longer needed to fear loss of claims to support payments for themselves and their children, or even custody of their children, if they refused to submit to their husbands or simply wished to leave. The new law, which went into force on 1 July 1977,[47] made custody determinations dependent solely on the wishes of the parents or, if they were unable to agree, on the best interests of the child. Under the influence of psychology, the best interests of the child were defined primarily through the child's relationships, with the result being that, in disputed cases, children were almost always given to the mother.

In the course of the 1970s, mothers achieved their strongest position in custody law. If unmarried, they had—apart from some restrictions through the Youth Welfare Offices' official guardianship role—sole decision-making authority over their children; in particular, the decision whether the father could have contact with the child lay solely in their hands. If married, they enjoyed a relatively strong position vis-à-vis their husbands, whom they could leave at any time, taking the children.

b) East Germany

In East Germany, too, a connection can be seen between women's emancipation and a strengthening in the legal position of women in the area of custody law.

Art. 7 of the East German constitution of 1949[48] also adopted the principle of equality of the sexes; there, however, it immediately became applicable law, as equality between men and women had been one of the main goals of the Social Democratic and Communist movements from the beginning.

In 1950, the future East German minister of justice, Hilde Benjamin,[49] instituted the first legal reforms with a "Law on Protection of Mothers and Children and the Rights of Women."[50] Women were granted the right and opportunity to have both careers and children. The man's sole decision-making authority in the

---

47 *See supra* note 1.

48 DDR Gesetzblatt (East German Legal Bulletin) I no. 8, at 199.

49 During the Weimar Republic, Hilde Benjamin became one of Germany's first female lawyers. In 1933, the Nazis forbade her to practice law. From 1949-53 she was vice president of the East German Supreme Court, and served as justice minister from 1953-67. It was largely her doing that women achieved equal rights in family and labor law in East Germany.

50 *Gesetz über den Mutter- und Kinderschutz und die Rechte der Frau*, DDR Gesetzesblatt no. 111, at 1037.

family was eliminated. Mothers of children born out of wedlock received sole custody.

In 1954—at a time when no one in Bonn was seriously working on a reform of family law—Hilde Benjamin proposed a draft family law that eliminated all male prerogatives. However, at the time, the self-declared socialists and communists in the government, parliament and the population were not yet ready to draw such practical conclusions from their world view. Thus the draft family law remained an informal, more or less practiced law[51] for a decade, before going into force, in somewhat altered form, in 1965[52]—still some twelve years earlier than the family law reform enacted in Bonn in 1976, which largely implemented formal equal rights for women in the west as well.[53]

What could not be eliminated as easily by law in either East or West Germany was the actual division of labor between mothers and fathers. In this context, one provision of the East German family law code is particularly impressive. In paragraph 10 of the Code, men were expressly required to share housework and child-rearing with women and to support women in their professional development:

Paragraph 10 of the East German Family Law Code of 20 December 1965[54] states:

(1) Both spouses take part in raising and caring for children and running the household. The spouses' relationship to one another is to be structured such that the woman can combine career and socially-useful activity with motherhood.

(2) Should a heretofore unemployed spouse take up a career or should a spouse decide to continue his or her education or do socially useful work, the other will support the spouse in this intention through comradely consideration and aid.

---

51 As in West Germany between 1953 and 1957 (between adoption of Art. 3 of the Basic Law—equal rights for men and women, *see supra* note 4—and adoption of the Equal Rights Law, *see supra* note 1), East Germany also experienced something of a legal vacuum with respect to marriage law. *See* Marie Elisabeth von Friesen & Wolfgang Heller, Das Familienrecht in Mitteldeutschland (1967).

52 DDR Gesetzblatt I 66 no. 1, at 1.

53 On legal developments in East Germany, *see* Karin Bastian et al., *Zur Situation von Frauen als Arbeitskraft in der Geschichte der DDR, mit einer Gesetzesdokumentation von Sibylla Flügge*, 2 STREIT 59-74 (1990); *see also* Anita Grandke, *Equal Rights—Compatibility of Family and Career—Legal Comparison: East Germany (GDR) and Federal Republic of Germany Today*, 3 CARDOZO WOMEN'S L.J. 287 (1996).

54 *See supra* note 52.

In fact, laws aside, in East Germany 80% of all housework was still performed by women,[55] and thus custody decisions in 95% of all divorce cases were made in favor of women.[56]

East German family law also restructured out-of-wedlock law. A passage from the official textbook on family law provides an idea of how law might be formulated were a patriarchal legal tradition being consciously jettisoned:

> The possibility of acknowledgment [of paternity] is tied to an important condition: the mother's agreement. This law ensures that parenthood, even if no marriage exists, is based on the joint agreement of both parents. For married parents this is part of the marriage, which includes the desire for a shared child. If there is no marriage, this may be the case for many reasons in the partners' relationship. This law does not provide a basis for paternity that is rejected by the mother. . . . This law thus aims to respect the dignity of the woman, which would unquestionably be violated if acknowledgment were possible without her participation or even against her will. It additionally aims to ensure the conditions for child rearing by the mother, without burdening it with paternity that is rejected by the mother.[57]

Because East German family law aimed from the start to eliminate discrimination against women and out-of-wedlock children, mothers' custody of out-of-wedlock children in East Germany was not restricted by any institution like official guardianship, and the authors of the Unification Treaty between East and West Germany[58] were sensitive enough to spare the residents of the eastern German states the elimination of their rights in this regard. Because of this differing status of women in eastern and western Germany, which continues to this day, the federal government has been urged to eliminate state guardianship in western Germany as well. Women in the west continue to wait in vain for such a law—a scandal that is almost never discussed publicly.

Thus parallels exist in the evolution of East and West Germany; in both societies, women succeeded in overcoming the limits set by biologically-influenced theorists in the 19th century—the limits of household, child care, and subordination to the needs of others. What is still missing are men who have also undergone this

---

55 FAMILIENRECHT-LEHRBUCH 101, 281 (Anita Grandke et al. eds., 3d ed. 1981) (Grandke was the head of this author's collective).

56 *Id.* at 281.

57 *Id.* at 204.

58 Art. 3 of the Unification Treaty of 31 Aug. 1990, BT-DRUCKS 11/7760, at 53, with which the laws of the former GDR were largely eliminated and replaced by West German law.

evolution to equality by overcoming the limits of traditional maleness and taking equal part in caring activities.

5) Developments Since the Early 1980s

Men first began to organize into gender-based interest groups in the course of the 1980s, as a reaction to the women's movement. At first, associations of men "harmed by divorce" emerged,[59] fighting against women's rights to alimony and for men's custody rights. Later, organizations were formed that argued less aggressively and with less hostility to women; their main goal was to assure custody rights for fathers.[60] Finally, in recent years, more and more consciousness-raising groups for men and men's centers have emerged, in which men work on strengthening their relationships to their children. For them, custody rights play a subordinate role.[61]

The most important demands of fathers' rights advocates are: (1) a share in custody rights for children born out of wedlock; and (2) retention of joint custody following divorce of married parents.

In regard to the first demand, as mentioned above, fathers' rights advocates achieved a victory before the Constitutional Court in 1991.[62] However, the decision has yet to become law. While the Constitutional Court determined in 1981 that the constitution did not require making joint custody possible for parents of children born out of wedlock, even if the parents lived in a marriage-like relationship,[63] the court did not uphold this view ten years later. In the meantime, a new view of the significance of the father had taken hold; psychoanalytic and systematic studies of the significance of the father and third parties for the child's psychological development[64] have been interpreted by a society excited by gene

---

59 The first groups to appear were the "Interest and Protection Group for Support-Paying Fathers and Mothers" (*Interessen- und Schutzgemeinschaft unterhaltspflichtiger Väter und Mütter*) and the "Association of People Harmed by Divorce—Citizens' Initiative Against Taking Away Children and Abuse of Support Payments" (*Verband Scheidungsgeschädigter—Bürgerinitiative gegen Kindesentzug und Unterhaltsmißbrauch*). Most of these groups also had some women as members. *See* Marlene Stein-Hilbers, *Biologie und Gefühl—Geschlechterbeziehungen im neuen Kindschaftsrecht, in* ZEITSCHRIFT FÜR RECHTSPOLITIK [hereinafter ZRP] 256-261 (1993). A pioneering work in this direction is VASSILIOS FTHENAKIS, VÄTER, ZUR PSYCHOLOGIE DER VATER-KIND-BEZIEHUNG (vol. 1 1985), and ZUR VATER-KIND-BEZIEHUNG IN VERSCHIEDENEN FAMILIENSTRUKTUREN (vol. 2 1985).

60 Typical of this trend is, for example, ANDREAS SCHMIDT, VÄTER OHNE KINDER (1993).

61 For a critical view of the recent re-valuation of fatherhood, *see, e.g.*, HORST HERRMANN, VATERLIEBE—ICH WILL JA NUR DEIN BESTES (1989).

62 *See supra* note 9 and accompanying text.

63 Decision of the Constitutional Court of 24 Mar. 1981, 56 BVerfGE 363, *in* FAMRZ 429 (1981). *See supra* notes 5 and 9.

64 *See, e.g.*, Jessica Benjamin, Bonds of Love. Psychoanalysis, Feminism, and the Problem of Domination (1988).

and reproductive technologies to mean that a child must know and love its genetic father.[65] In 1989, the Constitutional Court raised the "right to know one's own origins" to the status of a basic right protected by the constitution,[66] and in numerous judgments fathers were granted the right to interact with their children, even against the will of the mother and the child. At the same time, no comparable efforts were made to grant rights of contact to stepfathers or other important people in a child's life.[67]

With regard to the demand to "eliminate sole custody,"[68] the Constitutional Court decided in 1982 that the legislature had to give spouses the opportunity to exercise custody jointly even after divorce.[69] Yet this decision did not end the battle over custody following divorce. It soon became clear that few divorced couples were in a position to agree on joint custody of children.[70] For the women, there was no reason to give up sole custody if the father desired only limited contact with the child. Fathers' advocates thus focused on making joint custody after divorce the rule. They aimed to force women attempting to reclaim sole custody to justify themselves. In recent years, numerous books have been published and judgments handed down depicting women who petition for sole custody without a compelling reason to be bad mothers. They are accused of denying their children the "fundamental right" to a relationship with their father.[71] A proven allegation of sexual abuse is considered one legitimate reason to limit or deny fathers'

---

65 *See* Marlene Stein-Hilbers, *Männer und Kinder—Reale, ideologische und rechtliche Umstrukturierungen von Geschlechter- und Elternbeziehungen*, FAMILIE UND RECHT [hereinafter FuR] 198-205, 202 (1991).

66 BVerfG of 31 Jan. 1989, BGBl. I 1989, at 253, NJW 891 (1989). The ruling came in a suit by an out-of-wedlock child who, after reaching majority, attempted to contest legitimacy and determine who was his real father. Because the child's legitimacy had not been contested at birth, and the parents' marriage did not end in divorce, the child was found to have no right to contest legitimacy under §§ 1594-1598 of the Civil Code. So far, no legal right to information has been established. The Constitutional Court called upon the legislature to enact laws granting children the right to know their biological parents. Anonymous sperm donorship is thus forbidden.

67 *See* Carsten Rummel, *Die Rechtsprechung zum Sorgerecht aus den Jahren 1993/94, in* FuR 130-38 (1995).

68 *See* UWE-JÜRGEN JOPT, IM NAMEN DES KINDES—PLÄDOYER FÜR DIE ABSCHAFFUNG DES ALLEINIGEN SORGERECHTS (1992).

69 BVERFG decision of 3 Nov. 1982, BGBl. I 1982, at 1596, NJW 101 (1983). *See supra* notes 14-15.

70 *See* JUTTA LIMBACH, *supra* note 15.

71 Since the Federal Republic signed the UN Convention on the Rights of the Child (BGBl. II 1992, at 122, Convention on the Rights of the Child of 20 Nov. 1989, G.A. Res., U. N. GAOR, 44th Sess.), fathers'-rights activists have referred mainly to Arts. 9 and 18 of the Convention. *See* Steindorff, *Die UN-Kinderrechtskonvention als Legitimationsgrundlage für Elternrechte?* FuR 214 (1991). For a critical view, *see* Frances Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INT'L J. OF L. AND THE FAM. 192, 199 (1990).

rights; as a result, in theory and practice, it has been claimed more and more frequently that women abuse the allegation of abuse.[72]

Aside from what might be termed the "discovery of the father" by science, the fathers' campaign was also sparked by the family law reform of 1977[73] and the emancipation of wives associated with it. Prior to 1977, men knew they were in no danger of losing their children against their will, as long as they fulfilled their obligations as fathers and husbands. In particular, they could be sure that their wives could not demand alimony for themselves as long as they behaved more or less decently as husbands. Since 1977, mothers' custody rights following separation or divorce—at least as long as the children are of school age—have generally been linked with an entitlement to support, not only for the child, but also for the mother. A husband who feels no responsibility for the divorce can no longer derive rights from this fact. He must pay support to his wife and child, regardless of guilt. The fact that smaller children, in particular, almost always remain with the mother following divorce leads fathers to fear losing not only their children, but frequently also a great deal of money. Especially when fathers feel "innocent" of responsibility for the separation, they may come to feel they have been deprived of their rights or, even worse, are suffering discrimination in comparison with women, because they have no chance of gaining custody.

The members of an organization called "Fathers Come Out for Children" describe the situation as follows:

> More and more fathers would like to spend more time looking after their children. . . . To do so, fathers need more time. They should not and cannot, nor do they wish to, give up their jobs. But work must be more compatible with child care. For this, fathers need:
>
> - paternity leave parallel to maternity laws . . .
> - better-paid child-raising leave . . .
> - a right to part-time work for parents . . .
> - reduced working hours and flextime. . . .[74]

Because the association realistically assumes that this legal situation, created by men, is unlikely to change any time soon, they demand increased decision-making authority as an immediate measure for fathers who, because of the difficulty of combining

---

72 The phrase "abuse of abuse" has been popularized mainly by KATHARINA RUTSCHKY, ERREGTE AUFKLÄRUNG. KINDESMIßBRAUCH: FAKTEN UND FIKTIONEN (1992).

73 *See supra* note 1.

74 From a flyer from the association "Fathers Come Out for Children" (*Vateraufbruch für Kinder*) (1994) (in the possession of the author).

career and child-rearing, can contribute only rudimentary child care.

Many women support the demands of fathers' advocates. They hope that men's involvement in custody would lead to greater involvement in child-rearing and housework. I hope I have shown in my brief historical sketch that rights of custody have not, historically, automatically resulted in assumption of duties of care. Otherwise, Germany would have had the most tender, self-sacrificing fathers in the decades prior to 1960.

Empirical studies in both Germany[75] and the U.S.A.[76] have shown that the argument also fails to apply to the present generation of fathers. They indicate not only that joint custody has not had the hoped-for educational effect on fathers, but also that, on the contrary, fathers of children born out of wedlock who do not have custody are on average more closely involved with their children, and have more contact with them even after separation from the mother, than fathers of children born in wedlock.[77]

A man with no legal authority to make decisions for his child must make an effort to build a relationship if he wishes to remain in contact with the child. He finds himself in a situation similar to that of women in previous epochs. Because of their lack of rights, women internalized various social techniques that men did not need to develop in the same fashion. A father without rights quickly realizes that he will have a say in child-rearing decisions if he succeeds, as far as possible, in avoiding conflicts with the mother of his child, or in dealing with possible conflicts in such a way that they do not poison his relationship with his children. Yet this educational argument plays no role in the current public debate.

Progressive women politicians in the opposition Social Democratic Party (SPD) do believe in the educational effect of joint custody. In 1992, they proposed a law providing that custody decisions in divorce cases no longer be made automatically in every case, but instead only by petition.[78] A storm of indignation there-

---

75 ROSEMARIE NAVE-HERZ & D. KRÜGER, EIN-ELTERN-FAMILIEN. EINE EMPIRISCHE STUDIE ZUR LEBENSSITUATION UND LEBENSPLANUNG ALLEINERZIEHENDER MÜTTER UND VÄTER (1992).

76 FRANK FURSTENBERG & ANDREW CHERLIN, DIVIDED FAMILIES (1991). A German translation of this book was published in 1993 with an afterward by the vice president of the *Deutscher Kinderschutzbund* (German Child Protection Association), Professor Ludwig Salgo. In it, he emphasized that joint custody following divorce had not proved successful in the United States. The book was very influential in Germany.

77 Rosemarie Nave-Herz, *Kinder mit nicht-sorgeberechtigen Vätern, Zusammenfassung soziologischer und sozialpsychologischer Forschungsergebnisse, in* FuR 102ff. (1995).

78 Draft Reform of Child Law by Deputy Margot von Renesse et al. and the SPD Parliamentary Party, BT-DRUCKS 12/4024 of 17 Dec. 1992. The draft contains many other re-

upon arose from associations of single mothers, commissioners for equal rights,[79] and feminist lawyers.[80] They pointed out that granting custody to fathers who were unable to cooperate with mothers meant perverting custody into a right to "interfere" or "intervene" in the mother's child-rearing and lifestyle. This, they said, not only restricted the mother's constitutional right to free development of her personality,[81] but also subjected the child to repeated conflicts of loyalty.[82] Feminists also raised constitutional questions about a legally-compelled division of labor that left the work of child-rearing to the mother while granting fathers decision-making powers not accompanied by similar duties. Thus lawyer Jutta Bahr-Jendges wrote in the feminist legal journal *Streit*, "The one-sided grant of rights to persons (fathers) who carry out few or no duties, and the one-sided loading of duties onto one person who is restricted in her rights, cannot in my opinion be constitutional."[83] Rarely mentioned is the fear, undoubtedly coupled with hope on the fathers' part, that joint custody would allow fathers to claim they did their share of child-rearing and were thus no longer obliged, or less obliged, to pay child support.

In summer 1995, the SPD party group in Parliament partially addressed this criticism with a revised version of the law,[84] which provided that joint custody should be sought in every case, but should be denied by the court if, even after counseling by the

---

forms, most required by judgments of the Constitutional Court. It makes some efforts to strengthen the rights of children in custody cases.

79 Commissioners for equal rights (also known as commissioners for women's affairs) are found in every government office and institution (for example, television stations, universities, the railroads). Their task is to represent the interests of women within the bureaucracy or the institution. Women's affairs commissioners in local government additionally represent the interests of women in the community. There are also women's affairs commissioners in many private businesses.

80 As the start of a joint campaign, the "Association of Single Mothers and Fathers" (*Verband alleinerziehender Mütter und Väter, VAMV*) held a conference in Bonn on 30 Sept. 1992. A documentation of the proceedings of the conference, *Gemeinsames Sorgerecht—zwischen Ideologie und Realität*, was published by the state VAMV branch in Essen. Another conference was held on 14-15 Dec. 1995 in Essen. Its proceedings were published as GEMEINSAMES SORGERECHT—AMERIKANISCHE ERFAHRUNGEN, DEUTSCHE DISKUSSION (Joint Custody—American Experiences, the German Debate) (1996). Robert H. Mnookin of Harvard University spoke about the United States.

81 Art. 2 (1) of the Basic Law guarantees the right to free development of the personality.

82 *See, e.g.*, Anita Heiliger, *Zur Problematik einer Konzeption nichtehelicher gemeinsamer elterlicher Sorge*, FAMRZ 1006 (1992); Jutta Bahr-Jendges, *Gleichberechtigung und Kindeswohl—ein Widerspruch?* STREIT 27 (1993); and Ludwig Salgo, *Zur gemeinsamen elterlichen Sorge nach Scheidung als Regelfall—ein Zwischenruf*, FAMRZ 449 (1996).

83 Jutta Bahr-Jendges, *Alle Jahre wieder: Gemeinsame oder alleinige elterliche Sorge. Den Vätern das Recht, den Müttern die Sorge*, 4 STREIT 151 ff., at 154 (1995).

84 Deputy Dr. Herta Däubler-Gmelin et al. and the SPD Parliamentary Party, Draft Reform of Child Law, BT-DRUCKS, 13/1752 of 26 June 1995.

Youth Welfare Office, the parents were unable to offer a joint proposal concerning where the child would live in the future and how he or she was to remain in contact with the other parent. In the explanation of the bill, it was additionally maintained that a mother or father who is primary caretaker of the child should be able to make all decisions, with the exception of significant decisions such as emigration, change of religion or placement in boarding school (uncommon in Germany).

In March 1996, the governing coalition (CDU and FDP) presented its own initial proposal to reform child custody laws,[85] in which it essentially accepted all the proposals in the SPD draft.[86] With regard to joint custody, the proposal provides that courts will assign custody to one parent in divorce cases only if one of the parents petitions for sole custody *and* "it is to be expected that ending joint custody and granting it to the petitioner would best serve the best interests of the child."[87] In this draft, too, the child's primary caretaker would be allowed to make "everyday decisions" on his or her own, while all questions of "fundamental importance" would be made by the parents together. The governing coalition, like the SPD parliamentary group, believes that in the future, conflicts between parents and fathers' lack of interest in their children could be dealt with through counseling or crisis intervention offered by the Youth Welfare Offices. They thus employ the "American" argument[88] that parents' freedoms should be protected from state intervention, as long as this does not endanger the child's best interests. This argument, also brought strongly to bear by advocates of fathers' rights, has thus far been alien to the German legal tradition, which has placed primary emphasis on the state's duty to protect the Christian institution of marriage and the interests of the child.

If we consider what legal changes may be expected in the near future, it becomes apparent that the main issue is one of granting fathers the right to interfere in the lives of their children and the mothers of their children, however the children or the mother may perceive such contact. This right to interfere is concealed beneath

---

85 Section 1671 of the Civil ode, in the government draft version, Bundesratsdrucksache (Bundesrat publication) BT-DRUCKS, 180/96 of 22 Mar. 1996.

86 These included unlimited custody rights for mothers of out-of-wedlock children, the possibility of joint custody for parents of out-of-wedlock children, visitation rights for stepparents and grandparents, and rights to support payments for mothers of out-of-wedlock children for the child's first three years (*Betreuungsunterhalt*—payment for caregiving).

87 Bahr-Jendges, *supra* note 83, at 151.

88 *See* Frances E. Olsen, *The Myth of State Intervention in the Family*, 4 U. MICH. J. L. REF. 835-64 (1985).

the concept of the "best interests of the child"—not, it should be noted, the "child's wishes." Underlying this is the belief that fathers know what is best for their children. After all, it was on this basis that they earlier had the final say in the family.

In recent decades, women have largely liberated themselves from such paternalism. Many women fear that, through joint custody for fathers of out-of-wedlock children and divorced fathers, they will now be deprived of the opportunity to end their dependence on men by refusing to marry or by divorcing. The battle against joint custody for fathers who do not join mothers in caring for their children is, therefore, being fought by feminists in Germany almost as fiercely as the struggle against prohibitions on abortion.