

# FOSTER CARE IN GERMANY – CURRENT STATUS AND ISSUES

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## **Abstract**

The paper offers an insight into foster care in Germany from the perspective of law, processes and families. It highlights the role of the state and the authorities, which must properly support children and foster families, provide information, the paper also includes information on the upbringing and education of foster parents in long-term foster care. The author, from the position of a lawyer, deals with the effects of the implementation of the Children and Youth Strengthening Act, which entered into force in Germany in 2021.

## **Keywords**

foster care, providers, long term foster care, legal framework and development, Germany, Youth Strengthening Act 2022

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## **INTRODUCTION**

The upbringing and care of children is the right and duty of the parents (Art. 32 Czech Constitution; Art. 6 German Constitution) even if they are currently unable or only inadequately able to fulfill their duties. The importance of care at first should be presented and discussed by using statistical data. The legal framework is discussed then. This is primarily about the legal status of the foster family in relation to the youth welfare department and the birth parents.

In addition to the legal framework, the actual relationships of the persons involved are also important. The appropriate structuring of these relationships is just as important as the pronounced ability to regulate matters in the interest of the child or to arrange for them to be regulated. It requires constant official information and support.

This applies no less, but more to the area of long-term care in foster families. Here, the legal and obligatory status of a child, which is in family care for a longer period of time,

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must be considered. Furthermore, the integration in the foster family, the continuity of the upbringing, education and training of the foster child are discussed.

The framework conditions and challenges that exist in Germany, will be discussed in the following sections. It is also necessary to take a look at the implementation of the *Children and Youth Strengthening Act* from 2021 and to discuss what fundamental deficits the previous factual and legal situation has brought with it.

### SOME FACTS AND CHARACTERISTICS

The most important services provided by child and youth welfare include so called *educational assistance* (Erziehungshilfe). These are professional advice, support and assistance offers. The services can be used by parents who are not able for upbringing the child its best interest. The number of child-rearing services has increased by more than 20% to over a million cases in the past decade (Bundeszentrale für politische Bildung, Zahlen und Fakten, Erzieherische Hilfen).

The most common educational aids based on Sozialgesetzbuch VIII in 2020 include (Statistisches Bundesamt, Destatis, Hilfe zur Erziehung und Angebote der Jugendarbeit):

- educational counselling (§ 28 SGB VIII): 45,5%
- residential care/assisted living (§ 34 SGB VIII): 13,3%
- socio-educational family support ((§ 31 SGB VIII): 14,1%
- full-time care in foster families (§ 33 SGB VIII): 9,3%.

Providers of educational assistance are:

- the youth welfare departments (35%)
- the Catholic and the Protestant Church each 14%
- the German Parity Welfare Association (7%)
- Workers' welfare (4%).

The protective order in the case of a child endangerment (§ 8a SGB VIII) does not belong to the educational aids. The youth welfare department becomes active here, if there are important indications that the wellbeing of the young person is endangered. In 2020, 60600 cases of *child endangerment* were reported. That was an increase of 9% over the previous year. The number of so-called *taking into care* in 2020 was 45400 (Statistisches Bundesamt, Gesellschaft, Umwelt, Kinderschutz).

In general, the youth welfare department has the task of providing services for children and families (§ 2 SGB VIII), including youth work and *youth social work*, *educational child and youth protection*, *support for bringing up children in families*, *advice and support services for parents in certain situations* (divorce, single parenting). Family support, care assistance and long-term care are regulated in detail in §§ 27 ff. SGB VIII (Witte, Miehlbradt, 2016).

There are different forms of public advice and help; one of these is foster care as an option, which means the decision to place a child outside the family. In addition, there is mutual or arranged accommodation (Witte, Miehlbradt, 2016).

In contrast to day care full-time care is understood as accommodation, care and education of a child or young person outside the parental home in another family day and night (Statistisches Bundesamt, Pressemitteilung).

- Full-time care:	2020: 89736	2012: 64851
- Residential care:	2020: 126912	2012: 66711
- Education in a day group:	2020: 23312	2012: 17086
- Socio-educational individual support:	2019: 7289	2012: 3378

Despite the increasing number of children and young people housed in homes, foster families and foster parents are also becoming increasingly important. Foster parents are parents with whom the child is staying as part of an upbringing assistance according to § 33 SGB VIII. The foster person does not directly represent the child, but the holder of parental authority. Family care also includes family-like forms of upbringing and care. Custody only occurs in 40–50% of cases. 80% of the children come from socially disadvantaged families.

It is sometimes claimed that a right to bring up children outside of the family neither laid down in family law nor in child and youth welfare law (Balloff, 2014). There is no self-contained, systematic standardization of this important area of care. However, this in no way means a lack of standardization, but rather – if successful – a wide range of leeway for a child-related largely consensual arrangements.

Full-time care is systematically classified as follows: It stands at the interface between family law and youth welfare law (Küfner, Schönecker, *Rechtlichen Grundlagen und Formen der Vollzeitpflege*) it is structured by both areas of law and is therefore legally complex in individual cases and sometimes unsatisfactory for foster parents.

## LEGAL FRAMEWORK

The two pillars of parental and foster parent rights are the Child and Youth Welfare Act (SGB VIII) and the German Civil Code (BGB) with the custody regulations in §§ 1626 ff. BGB. The regulations have recently been tightened together by the law to strengthen children and young people with regard to the required transparency, cooperation and focus on the best interests of the child (Deutscher Bundestag, *Geszentwurf der Bundesregierung zum KJSG*).

The basic idea of SGB VIII is to standardize the rights and obligations of children and young people and the youth welfare department. The *youth welfare department* is obliged to provide care services to help families in need. The forms of educational assistance have been mentioned above.

The guiding principle of the civil law regulations (§§ 1626 ff. BGB) consists primarily in the regulation of conflicts between those who have custody and in the case of state intervention. In spite of numerous changes, the parents' right to raise children still has priority and the decisions are based on the wishes of the parents. This is not surprising, since the parents' right of custody is guaranteed under constitutional law (Article 6 Para. 2 GG).

This priority applies without prejudice to the justified criticism that the upbringing of the child – especially in the event of a conflict – is developed solely for the child's wellbeing. That means the child is not an object. Nevertheless the interests of the foster family are also kept in mind.

### **Parental Custody and Upbringing of the Child**

Parents are entitled to custody of a minor child (§ 1626 BGB) and this is fundamentally guaranteed by Art. 6 Para.2 GG. Accordingly, the care and upbringing of the children is the right and duty of the parents. Separating the children from their legal guardians is only possible if the child's wellbeing is endangered. The parents exercise custody by mutual agreement in the best interest of the child (§ 1627 BGB). Custody includes custody of persons and custody of property. Personal care is the obligation and the right to care for the child, to bring it up, to supervise it and to determine its whereabouts (§ 1631 Para.1 BGB).

If a child is placed with a foster family by the parents or – with their consent – by the youth welfare department, the parents' custody status does not initially change (Küfner, Schönecker, *Rechtlichen Grundlagen und Formen der Vollzeitpflege*). As long as the wellbeing of the child is not endangered it must remain with the family of origin if the parents do not agree to being placed with a foster family.

However, parental responsibility does not extend to matters relating to the child for which a guardian has been appointed. Even if the parents place the child in family care for a longer period of time, parental custody remains with them (§ 1630 Para. 1 BGB), unless the family court, at their request or that of the caregiver, decides that the parental care transferred to the caregiver (§ 1630 Para. 3 BGB).

The separation of the child from the parental family against the will of the parents and other measures are only permissible if the wellbeing of the child is endangered and

- danger cannot otherwise and
- not even through public aid

be encountered. The *family court* takes the necessary measures in compliance with the principle of proportionality (§ 1666a Para.1 BGB).

Irrespective of this, the parents also have the right in this case to demand the return of the child from anyone who unlawfully withholds it from them (§ 1632 Para. 2 BGB). However, if and for as long as the removal endangers the wellbeing of a child, who has been in foster care for a long time, the family court can order *ex officio* or at the request of the caregiver, that the child remain by the caregiver (§ 1632 Para. 4 BGB).

The caregiver for a child living in family care for a long period of time has the right to make decisions in matters of everyday life.

## The legal status of foster parents

The foster parents are entitled to make decisions about matters of daily life, but subject to the parents' other wishes. Furthermore, an order by the family court to remain means that responsibility for care lies with the foster parents. Unless the family court has already transferred custody to the foster parents in accordance with § 1630 Para. 3 of the German Civil Code. The caregiver is also entitled to claim maintenance and social benefits for the child (§ 1688 Para.1 BGB).

With regard to the social law position, reference should be made to the regulations for benefits under §§ 32–34, 35a Para 2 No. 3 and 4 SGB VIII. According to § 37 (1) SGB VIII parents have a right to advice and support and to promoting the relationship with their child in order to restore the ability to raise children within a reasonable period of time. This serves the purpose of allowing the parents to assume responsibility for their upbringing again. If this goal cannot be achieved a long-term life perspective outside of the family of origin that is beneficial for the child must be worked out.

It is the task of the *youth welfare department* to promote cooperation with the foster parents – with the involvement of the parents – on the basis of a *support-plan*. This plan may not be worked out in detail, but offers milestones of reasonable steps for the child's welfare.

What are *characteristic elements of fostering*? The following constellations are predominant for long-term care:

- consensual upbringing in the foster family that includes the family of origin
- conflict-ridden care without/with an order to remain
- „general care“, i.e. (everyday) conflict management with and by all actors.

Especially when it comes to the important decision whether a return to the family of origin or long-term care should be considered, according to the new KSVG legislation, an amicable clarification of perspectives should be sought. The support plan process on which this is based is not just a matter for the professionals, but requires cooperation between the parents of origin and foster parents and the support of the youth welfare department (Veit, *Verbesserungen für die Familienpflege durch das Kinder- und Jugendstärkungsgesetz (KJSG) und das Gesetz zur Reform des Vormundschutz- und Betreuungsrechts*).

However, if no amicable clarification of perspectives succeeds, but the parents of origin demand the child, the family court could previously order the child to remain in the foster family, so that the child's wellbeing is endangered by the surrender. Now the court can also order that the stay in the foster family is permanent (§ 1632 Para. 4 BGB).

However, this *permanent residence order* is subject to strict conditions. The court's decision can only be done if

- an improvement in the upbringing conditions of the parents within a reasonable period of time with regard to the development of the child,
- with high probability is not expected and
- the order is necessary for the best interests of the child.

Foster parenthood regularly requires a permit, due to the state's responsibility for the well-being of the children and young people being cared for („guardianship“). The requirements for reliability are formulated in § 44 SGB VIII. According to this, a caregiver, i.e. someone who wants to take a child into the household day and night, requires permission. In contrast to the permission for day care (§ 43 Para. 2 SGB VIII) and the operation of a care facility (§§ 45a, 45 SGB VIII), the law does not specify any individual requirements for the examination of reliability. However, permission for full-time care must be denied if the well-being of the child or young person is not guaranteed. The youth welfare office makes a case-by-case review obligation; the caregivers have an obligation to inform about important events affecting the child's well-being. Long-term care relationships that come about through the mediation of the youth welfare office, the care of relatives and short-term care (§ 44 Para.1 No.1-6 SGB VIII) do not require a permit. As a rule, the care is designed according to contractual law, namely between the youth welfare office and the parents of origin and a care contract between the foster parents and the youth welfare office.

### **On the innovations of the KJSG**

The KJSG takes into account the interests and needs of the entitled people, the independent youth welfare organizations and the public youth welfare organizations. The *public youth welfare authorities* – cities and counties – need a high level of professional expertise to carry out the new tasks. They urgently need to recruit additional staff and determine a needs-based staffing beforehand (Veit, Verbesserungen für die Familienpflege durch das Kinder- und Jugendstärkungsgesetz (KJSG) und das Gesetz zur Reform des Vormundschafts- und Betreuungsrechts).

The KJSG pursues the goal of involving the people being cared for actively in the help and protection processes. This applies in particular to the strengthening of children and young people who grow up in foster families or educational support institutions. For example, to protect young people in family care, mandatory protection concepts are being introduced for care relationships. The cooperation of parents as well as foster persons is improved by mandatory support from the youth welfare department. Parents have a legal right to get advice and support in their relationship with the child. Of particular importance is that the family court can order the child or young person to remain in the foster family not only (as before) as a temporary measure in the event of „removal at an inopportune time“ in order to protect established bonds and relationships, but also as a permanent measure (Gesetzentwurf der Bundesregierung zum KJSG, Drs. 19/26107). § 37 Para.1 SGB VIII stipulates that the aim of advice and support for the family of origin should develop and secure a different life perspective that is beneficial to the child and is intended to last. Consequently § 37a S.1 SGB VIII grants the caregiver a right to advice and support before and during the care relationship. A concept for protection against violence must be developed for the child during the period of care (§ 37b SGB VIII).

Special features are to be determined in the so called *aid planning*. If a sustainable improvement in the development, participation and upbringing conditions in the family of origin cannot be achieved in the foreseeable future, then a different, long-term life perspective should be developed for the child (§ 37c Para.2 SGB VIII).

The KJSG organizational reform, which primarily aims to include disabled people, has an independent significance. Services for development, participation and education should be provided in the future from a single source by the youth welfare office. The aim is to strengthen the inclusive design of child and youth work by combining services for children and young people with disabilities (SGB IX). This shift in tasks not only changes the responsibilities, but also the number of cases to be managed. At the same time, staff relocations are to be expected.

It is up to the federal states which (municipal) administrative level they entrust with tasks. Typically, both the social welfare offices and the youth welfare offices are organized at the level of the rural districts and urban districts. The change of task then remains with the same administrative body. In some federal states, the rehabilitation of disabled children and young people is organized regionally. So there is a shift in responsibility to the *youth welfare offices* located in the municipalities.

The changed need for staff at the youth welfare offices is not only due to the increase in the number of cases. Due to the extensive outsourcing of assistance planning to the social welfare offices, the number of cases there was about three times as high as in the youth welfare offices. In addition, the degree of specialization for case processing is likely to increase; where the staffing situation does not allow this due to the small size of the youth welfare office, the training effort per case and thus the need for staff increases.

The further development of professional standards, especially in the design of the inclusive support plan procedure, is likely to prove to be a challenge. Instead of the hitherto customary, hierarchical, problem-oriented way of working, which acts in relation to needs and costs, a participatory and multi-professional help plan should now be designed and scientifically accompanied.

### **Relevance of case law – some examples**

In principle, the foster family can invoke Article 6 Para. 1 and 3 GG (*BVerfG*, NJW 1999, 3623. (Kindler e.a., 2011), especially if the foster parents have cared for the child for many years, or if other important circumstances prevent the foster family from being dissolved (*BVerfG*, NJW 1999, 3623). (Kindler e.a., 2011). When examining the impairment of fundamental rights, different standards are to be assumed for the foster parents and the foster child.

Foster parents can only request the parents to return the foster child if there is a direct temporal connection between the removal and the procedure for ordering the child's whereabouts (*BGH*, Beschluss v. 16.11.2016 ). However, the principle mentioned does not do justice to some individual cases because the child's wellbeing is neglected. Life

situations are conceivable in which a repatriation is still possible months after being taken into care:

- danger situation in the foster family does not exist
- bonds during the taking into care are not as intense as with the foster parents
- foster children wish to return to their foster family or
- other comprehensible reasons (Lack, Anmerkung zu BGH, Beschluss v. 16.11.2016, NJW 2017, 4722016).

The formulation that foster child relationships are institutionally designed for a limited period of time is correct, but too sweeping in individual cases. In fact, these can be temporary or permanent (Art. 20 Para. 1 UN-CRC; §§ 33 Para.1, 37 Para.1 Sentence 4 SGB VIII). The order to remain in the foster family is the mildest remedy compared to a withdrawal of custody, even if the child would be taken out at an inopportune time (BGH, Beschluss v. 22.01.14). However, this should hardly make sense if a child stays with the foster parents in the long term. In this case, the foster parents should also be given rights that go beyond the decision-making powers in matters of everyday life (§ 1688 Abs. 1 BGB; BGH, Beschluss v. 22.01.14).

In contrast to removal from the parental family, removal from the foster family is possible under easier circumstances. A possible endangerment of the child's welfare as a result of the removal from the foster family has a significant risk compared to another, which would threaten the child concerned if it remained there (e.g.: the foster mother is overwhelmed despite close assistance) priority (OLG Braunschweig, Beschluss v. 09.03.2018).

The decision to place a child permanently in a foster family is preceded by a complex decision-making process that takes into account a large number of individual aspects, the expertise of other specialist bodies (psychological services, doctors, social workers, self-help groups) and is usually made and implemented with the consent of the parents of origin. The following statement is by no means intended to disparage other, just as viable and responsible alternatives for placing children and young people, but to support placement in a foster family as a custody decision that is particularly beneficial to the child's well-being.

Despite the strong alignment of the accommodation structure in the two out-of-home care facilities, there are still significant differences between home placement and admission to a foster family in essential areas. Family-like structures in the homes enable stable relationships with a trusted person, but prevent frequent changes and thus the at least temporary loss of the caregiver. Despite innovative working time and shift models for employees, the situation of a foster child housed in a home is often marked by a deficit in personal, emotional attention and is therefore „unstable“. In contrast, placement in a foster family is usually characterized by a person of trust and thus enables a personal development process to begin. The positive situation is often reinforced by another foster parent or other members of the foster family. These conditions are certainly not fully guaranteed in all foster families and for foster children of all ages, but structurally they are more suitable for compensating for the mostly considerable lack of attention in the family of origin.



The benchmark for the reduced value of out-of-home care is the legal and factual fixation on the bourgeois nuclear family. Apart from historically conditioned fixation, there are considerable doubts about the model of the nuclear family today. In view of the social reality (e.g.: high divorce rates, changing partnerships, patchwork families), the model appears inappropriate as an abstract exaggeration of the family structure, which is undoubtedly an indispensable basis for successful socialization. The constitutional protection should be further developed and include the changed social realities. On the one hand, this applies to new forms of living together, but also to situations in which a secure development of the child and young person is not possible in the family of origin in the long term.

From a pedagogical point of view, handing over the child to a foster family is only justifiable and legally permissible if the parent's ability to bring up the child cannot be restored in the foreseeable future. The parents of origin are not on their own, but are entitled to help from social services. Circumstances that are only of a temporary nature and are part of the general risk of life are out of the question for permanent out-of-home care. These include typical stresses on the child that also occur in the family, for example due to separation from a parent, prolonged absence or death. Only if the help does not promise success in the foreseeable future is out-of-home accommodation considered. Of course, the temporal component must be determined from the child's point of view, so the short developmental stages of children and young people must be taken into account.

The prospect of returning to the family of origin, which is a goal that is aspired to as a model – even in times of prolonged educational disabilities – is important. This is by no means a form of biologism, but a psycho-social basic constant of the bond with the family of origin. It is just as important – especially in the first decade of the child's life – to have a reference person with whom trust can be built and personality development can succeed. Although this relationship of trust is typically linked to the family of origin, it is just as important for the development of children and young people in the foster family. The return option is necessarily at odds with this strength of the foster family.

Especially the development-promoting quality of the foster family sometimes arouses reluctance and distrust towards this form of accommodation. This is not a dilemma or a contradiction – at least according to more recent professional assessments – but a strength that only develops because the family of origin does not guarantee the necessary upbringing in the long term. If there is no socio-psychological minus in long-term care, this form of care should also be legally strengthened. The upgrading of long-term care in § 33 SGB VIII is a step in the right direction.

Of course, the family perspective – contacts with the family of origin, their intensification or reduction – is also linked to the consent of the child and young person with increasing age. Here the perspective is open, so as elsewhere in the progressive educational process, it is primarily the decision of the adolescent and young adult. They also determine the quality and extent of contact with the family of origin.

## CONCLUSIONS

In Germany (and probably in many other countries of the world) the upbringing and care of children is the right and duty of the parents, even if they are currently unable or only inadequately able to fulfill their duties. Educational support provided by state or non-governmental bodies primarily serves to (re)establish the parents' ability to raise children. It doesn't work without consent of parents of origin. In exceptional cases – to avert dangers to the child – custody or care of the child by a caregiver may be considered. This is generally considered to be temporary.

The foster family has priority over the home placement. Therefore, early return to the family has high priority in short-term care. On the other hand, long-term care is indicated, if the parents' ability to bring up children is not (or no longer) to be expected in the foreseeable future and therefore a life perspective outside of the family of origin must be developed and realized.

However long-term care should also be arranged in agreement with the family of origin and it depends on their will, how long it lasts. Exceptionally (§ 1632, Para. 4 BGB) a family court order to remain shall be issued if the child's wellbeing would otherwise be endangered.

Long-term care also takes into account the origin of the child and the legal position of the family of origin. This has constitutional reasons, but it is subject to socio-psychological objections also. The longer long-term care lasts the more unsatisfactory the relatively weak legal situation is for the foster family and the foster child. The next legal step should be an improvement of the legal status of the foster family after 5 or 7 years. Withdrawal of this legal status should be subject to similarly high hurdles as taking the child into care if the child's wellbeing is endangered.

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