Children's rights in proceedings according to German law

I. Introduction

In Germany - as well as in other countries - family law has faced a true wave of reforms in the last few years, which is due to the changing society and the change in the understanding of the concept of marriage and family as such. Of these reforms especially the law reform for child custody cases from 1998 will dominate our topic today:

The law reform for child custody cases has essentially changed and modernised the entire child custody law, which had largely remained unmodified since the custody rights reform of 1980.

The aim of the reform was mainly to improve the legal position of the child and to stimulate the child's well-being. With the 1998 child custody law the legislator enabled unmarried parents for the first time to justify the joint parental care. In addition, visitation rights were uniformly shaped as a child's right and differences in the right to succeed and in maintenance law were reduced.

Before we deal with the rights of children in trials according to German law, it is certainly helpful to know that parental care in Germany – i.e. the right to determine with respect to the care of a person and property as well as the stay of the child – can be exercised jointly by both parents when the child is born within a marriage. In divorce procedures a decision about custody is only made when either the husband or the wife or both request this (§ 1671 paragraph 1 BGB). Without such a request, joint custody remains also after the divorce.

When parents are not married, the mother is initially entitled to custody. However, the parents can, in agreement with each other, establish joint custody by submitting a declaration of custody (§ 162a BGB). This so-called declaration of custody must be submitted at a notary or a youth welfare office.

The right of visitation, to which the child has a right to with the mother or father who does not have predominant custody, has to be distinguished from this.

The legal proceedings to such matters should proceed smoothly/ speedy, but in cases where the well-being of the child is endangered there is a speeding-up principle, which is explicitly mentioned in the law. Accordingly, a hearing has to take place within one month after the submission of the request to a court.

II. Children's rights during proceedings

When proceedings concerning child custody cases – i.e. parental care and visitation – are initiated in court, the children concerned are to take part.

1. Hearing of the child by the court

The judge will regularly hear the child itself during the procedure (§ 50b FGG):

Accordingly, the court hears the child in procedures about parental care when the tendencies, attachments or the will of the child is important for the verdict or when it seems reasonable that for the determination of circumstances the court obtains an instant impression of the child. If the child is older than 14 years, the court hears the child always personally. In proprietary matters the child is only to be heard personally, when this is necessary according to the nature of the matter.

In these hearings the child is to be informed about the object or the possible result of the procedure in an appropriate way – if this does not damage the development or the upbringing of the child. The child must be given the opportunity to express itself.

In addition, participation right of the child in cases of endangerment of the child's well-being – i.e. for instance in case of abuse, negligence or something similar – has been implemented in the past year:

Accordingly, in appropriate cases the court has to discuss with the child how a possible endangerment of the child's well-being can be remedied.

In practice, the child is always heard – also in procedures concerning visitation – and this is only refrained from with very small children (up to about 3 years) and if the parents reach an early agreement.

These hearings are conducted without the other parties to the proceedings. They are informed about the result by the judge.

2. Task of the youth welfare office

The youth welfare office, a public authority, also participates in the legal proceedings. It has to report to the court after communications with the participants for the preparation of a verdict. Within the framework of these communications the child can also be heard, which does not happen very often especially because of the shortage of personnel of these offices.

The child itself can also address the youth welfare office. However, communication regularly only happens through the parent and therefore it mostly does not remain uninfluenced.

3. Guardian ad litem (Children's lawyer)

The court can appoint a guardian ad litem for the child according to § 50 of the law on matters of non-contentious jurisdiction. According to the legal text, the appointment is required - and therefore obligatory – if

a. the interest of the child is in great contrast with that of its legal representative,
b. the object of the proceedings are measures due to the endangerment of the child's well-being, which are accompanied by the separation of the child from its family or divestment of the entire care of a person (§§ 1666, 1666a BGB), or
c. the object of the proceedings is the removal of the child from the care giver (§ 1632 paragraph 4 BGB) or from the spouse, life partner or holder of visitation rights (§ 1682 BGB).

An appointment is not to proceed or to be cancelled if the interests of the child are adequately represented by a lawyer or another appropriate legal representative.

Tasks:

The guardian ad litem has the duty to represent the interests of the child in the proceedings before the family court. He can make requests, appeal and participate in the hearings. He is also referred to as the “children’s lawyer”. As party representative he has – just like a lawyer – the same rights and duties concerning his clients. The corresponding rules of data protection and the privilege to refuse to give evidence, therefore apply for him, too.

The guardian ad litem has to explain to the child the result of the legal proceedings as well as the judicial details. He also has to inform the court about the will and wishes of the child.

Regularly, the guardian ad litem fulfils his duties by conversations with the child itself. He may also speak with the parents or other persons. In addition, he regularly draws up a written opinion which has to contain a request or a suggestion. This opinion is communicated to all of the parties to the proceedings.

He can make requests, interrogations, suggest gathering of evidence, present proof.

The appointment of the guardian ad litem ends with the conclusion of the proceedings. He can only appeal against a judgement insofar as the child would also have the right to appeal.

Qualification:

A special form of the qualification of the guardian ad litem is not stipulated. Consequently, the guardian ad litem can also be a lawyer. Often, people with a pedagogical or psychological education who mostly offer their services as a private service provider are chosen.

There is an association of German guardians ad litem that deals with the developing of standards in order to safeguard quality standards.

4. Child representation by a lawyer

In addition, it is of course possible that a chosen lawyer represents the child in child custody proceedings.

III. Reform of the legal proceedings of 1 September 2009

The reform draft on the procedural law e.g. in family matters, provides several measures for the protection of the child’s interests, of which the following are important for the position of the child in the proceedings:

With the coming into force of the reform, it will no longer be at the discretion of the court to decide whether a guardian ad litem is to be appointed to the child, but will have to do so at the submission of the conditions. This has as a consequence that in

all proceedings in which children are taking part, a so-called proceedings counsel is to be appointed.

The proceedings counsel should then also actively take part in the solving of conflicts in visitation matters, i.e. arbitrate.

To secure the accomplishment of the visitation there is the possibility to also appoint a guardian for the child.

It is to be feared that in practise, this extension will not result in an improvement in quality. On the contrary: since at the same time the remuneration of the guardian is to be drastically reduced, the range of their activities and consequently the quality of their work will most likely reduce as well.

Particularly in proceedings concerning the access to a child the speeding up principle will also apply, which means that a hearing in court is to take place within a month.