

Opening Statement

The Role of the Child in Child Custody Proceedings: The Rights of the Child according to International Conventions and US-American Law.

(I) The Rights of the Child within an International Context

(1) The United Nations Convention on the Rights of the Child

The Convention on the Rights of the Child as a UN Convention, which came into effect on September 20, 1990 and which has been ratified by more than 190 nations, constitutes the convention which enjoys the most widespread acceptance among UN member states.

The ten basic rights of children as shaped by the UN Convention such as the protection against discrimination and the right to health and education have been amended through Article 12 by taking into consideration the child's choice. The contracting states have committed themselves in Article 12 of the Convention to warrant the child the freedom to form his or her own opinion, they have awarded him or her the right to freely express this opinion in all matters concerning the child and they have committed themselves to duly consider the opinion of the child in accordance with his or her age and degree of maturity. Through Article 12, Section 2 of the UN Convention this has also been standardized with regards to the rights of child in the procedures which concern him or her in that the contracting states have committed themselves to allow the child the chance to be heard in all court or administrative proceedings either directly or through a representative or suitable party in accordance with the domestic rules of procedure.

The monitoring of the stipulations laid down in Article 12 of the UN Convention are subject to the UN Committee on the Rights of the Child which receives the respective reports of the individual contracting states.

(2) The European Convention on Human Rights (Convention for the Protection of Human Rights and Basic Liberties) of the European Council

The European Convention on Human Rights, whose member states are all member states of the European Council and which has been integrated into the domestic law of the member states, protects, in Article 8, the right to family and marriage. Through the directives describing the decisions of the European Court of Human Rights the domestic specialty courts of the member states are called upon making use of applicable law with regards to parental custody and contact in such a way that it does not contravene the stipulations of the Convention. The European Court of Human Rights (ECHR) in Strasbourg thus provides a system of legal protection, which, within the framework of individual complaints, enables every citizen to contest a contravention of the Convention with regards to parental custody and contact.

(3) The Hague Convention on Child Abduction of 1980

The Hague Convention on Child Abduction of 1980 (The Hague Convention on the Civil Aspects of International Child Abduction) with which all member states of the EU and an additional 70 nations all over the world are associated, describes, only with regard to the implementation of exceptional rules - in which case the return of a child to the jurisdiction of the home state may be disregarded - an obligation of the court to hear the child and a special right of the child to be heard.

According to Article 13, Section 2 of the Hague Convention on Child Abduction the court may only refuse to order the return of a child after it has ascertained that the child opposes the return and that the child has reached an age and degree of maturity which make it appropriate to consider the child's choice. Consequently, the courts are called upon considering the child's choice within the framework of the exceptional rules laid down in Article 13 (to be interpreted restrictively) in so far as the child resists the return to his or her home state.

As all EU member states have been required to integrate these EU stipulations into the implementing regulations of their national procedural law, with all of the EU member states having met these requirements, it can be expected – as is the case in Germany – that the hearing of a child in ongoing child abduction cases is required, in any case, however, when the court considers refraining from returning the child to his or her home state.

(4) The Hague Convention on the Protection of Minors/ The Regulation Concerning Marriage and Family (Brussels IIbis Regulations)

The Hague Convention on the Protection of Minors (The Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants of 1961) which provides for measures directed at the protection of the person and property of minors and which in the near future will be superseded by the Hague Convention on Child Abduction, overlaps in Europe with the Regulation Concerning Marriage and Family (Regulation (EC) No. 201/2003) Brussels IIa-Regulation, Brussels IIbis Regulation).

Article 8 of the Regulation now provides courts in EU member states with the exception of Denmark with the possibility to take measures with regards to parental care before the court at the child's general place of abode. Consequently, the Regulation Concerning Marriage and Family applies to children who have their general place of abode in one of the EU member states with the exception of Denmark, regardless of the children's nationality. As it is known, Article 8 of the Regulation Concerning Marriage and Family regulates the basic jurisdiction of courts and authorities at the children's usual place of abode and only in one special case provides for an annexing jurisdiction, namely in the case of pending divorce proceedings as laid down in Article 12, Section 1. Furthermore, the jurisdiction regulations and the jurisdiction regulations for proper, preliminary measures have been amended by Article 15 and Article 20 respectively.

Furthermore the Regulation concerning Marriage and Family regulates the recognition rules of the decisions once made in the country which is the child's usual place of abode, pursuant to Article 24 et seq. of the Regulation.

In only two parts the Regulation Concerning Marriage and Family contains provisions regarding the child's right to be heard.

a) Through the modification of the Hague Convention on Child Abduction of 1980 a provision has been included in Article 11 which guarantees that, in those cases where the court considers refraining from ordering the return of a child, the child is given the opportunity to be heard during the proceedings, in as much as this seems advisable with regards to the child's age and degree of maturity.

b) There is an additional provision which urgently stipulates a child's court hearing. Pursuant to Article 23 (b) of the Regulation Concerning Marriage and Family a decision reached in another EU member state regarding parental responsibility is not to be recognized – except in urgent cases – if the child was not given the opportunity to be heard. As pointed out in this Article of the Regulation Concerning Marriage and Family, a disregard of this provision would constitute a violation of fundamental procedural principles of the member state in which the recognition has been applied for.

In Germany this has very recently led to the rejection of an application for recognition and enforcement of a child custody decision reached in Milan, Italy, by courts of first and second instance as being unfounded, as the Italian court had not given the children the opportunity to be heard. The German court has stated that it is not sufficient to invite the children to a hearing, if they are then kept from attending the hearing by their mother. The German court has further pointed out that it is not at the discretion of a court in a member state whether there will be a hearing or not, but that the hearing of the child plays an important role in the implementation of the Regulation. According to the decision of the German court the child must be given a proper opportunity to be heard, if necessary by way of domestic legal assistance.

The decisions of the German courts are dated November 2007 and May 2008, respectively.

In Europe the child's right to be heard has thus already been formulated in an EU Regulation as an immediate chartered right of the child effective in every EU member state with the exception of Denmark.

(II) The role of the child in US child custody procedures

In the USA family law and therefore filiation law is subject to the regulations of the individual states; federal law only constitutes a general framework. Apart from this common law is mostly a case law and largely refrains from codification.

In almost every state of the USA child custody and access proceedings must be given priority over all other procedures. In many states a representative is made available to the child during the proceedings; this "guardian ad litem" is neither the legal representative nor the guardian of the child; the representative, however,

defends the interests of the child and acts as a contact person for both the court and the parents. As in most states these “guardians ad litem” have undergone special training, it is their task to mediate between the parents and the court, having to keep all parties involved informed about the child.

The representative law governing the jurisdiction and procedures in child custody cases (Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Marriage and Divorce Act, both being skeleton laws which have been ratified by many individual states), stipulates that the decision-making process of the court in child custody cases must be based on the child’s wellbeing, equally considering the requests of the parents and those of the child as well as the interactions and family relationships.

As the court at the request of a party may order an examination of the general circumstances pertaining to a child custody case, the court is also allowed to order medical, psychiatric and other examinations as a result of the request. The person or institution commissioned to conduct the examinations is obliged to meet with all parties involved and write a report, which is then considered as evidence in the litigious child custody proceedings.

As a matter of principle the opportunity for the child to be heard is provided for; the court may rule that the child has to appear before the court in the form of a private hearing.

In practice this means that decisions in child custody and access proceedings are based almost exclusively on the reports written by the persons or institutions commissioned; the court usually refrains from ordering the hearing of a child. A personal hearing of the child is only rarely executed.