

The Legal Practices and Challenges of Parental Authority, Custody, and Child Welfare Protection in Divorce Cases Under German Family Law

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doi:10.56397/SLJ.2024.03.09

Abstract

This paper examines the intricacies and challenges inherent in the German legal system's approach to parental authority, custody, and child welfare within the context of divorce proceedings. Grounded in the principles of the Bürgerliches Gesetzbuch (BGB), the review explores the commendable commitment of German family law to the welfare and best interests of children during the tumultuous process of divorce. Through a critical lens, it delves into the dynamic interplay between joint and sole custody arrangements, the pivotal role of children's voices in judicial decisions, and the enforcement of custody and visitation rights. Additionally, the paper scrutinizes the complex landscape of international custody disputes, emphasizing the necessity for nuanced interpretation and application of the Hague Convention on the Civil Aspects of International Child Abduction. Comparative analysis with international norms, particularly the UN Convention on the Rights of the Child, unveils areas of alignment and divergence, spotlighting opportunities for enhancing cross-border cooperation and ensuring a child-centered approach in custody disputes. Proposals for reform are articulated, advocating for structured mechanisms to integrate children's perspectives, standardized assessments of the child's best interest, and strategies for the effective enforcement of custody orders. Emphasizing the importance of domestic reforms and international collaboration, the review argues for ongoing evaluation and adaptation of legal practices to better protect children's interests amid evolving family dynamics and global challenges.

Keywords: German family law, divorce, child welfare, parental authority, custody arrangements, Hague Convention, UN Convention on the Rights of the Child

1. Introduction

Divorce is not merely a legal dissolution of marriage but a complex process that reshapes the lives of families, especially affecting the dynamics of parental responsibilities and child welfare. In Germany, as in many jurisdictions around the world, the legal system strives to

mitigate the impact of divorce on children, prioritizing their welfare in custody and parental authority decisions. However, the intricacies of these legal provisions, coupled with the evolving nature of societal norms and international obligations, present a multifaceted challenge to practitioners, lawmakers, and

families alike.

The German family law system is rooted in principles designed to safeguard the best interests of the child, a notion that is both a legal guideline and a moral imperative. Embedded within the *Bürgerliches Gesetzbuch* (BGB), these principles govern the decisions related to custody, access, and child welfare post-divorce. Nevertheless, the application of these principles in the face of changing family structures, cross-border familial ties, and emerging societal challenges requires a delicate balance between legal frameworks, judicial discretion, and the lived realities of those involved.

Historically, German law has evolved from a more patriarchal notion of parental authority towards a more inclusive and child-centered approach. This shift reflects broader societal changes, including the recognition of diverse family forms and the increasing emphasis on children's rights. The reformation of custody laws, particularly the move towards favoring joint custody arrangements, illustrates an attempt to align legal practices with contemporary understandings of child welfare and the benefits of maintaining strong relationships with both parents post-divorce.

Yet, the practical implementation of these laws unveils a landscape riddled with complexities. For instance, determining the child's best interest in contentious divorces, especially when allegations of domestic abuse or neglect arise, challenges the judiciary to make decisions that profoundly impact the child's future. The reliance on expert assessments, while necessary, introduces another layer of complexity, often leading to debates over the objectivity and influence of such testimonies in custody decisions.

Moreover, the increasing mobility of families across borders brings international laws and conventions, such as the Hague Convention on the Civil Aspects of International Child Abduction, into play. These legal instruments are designed to protect children from the harmful effects of abduction and wrongful retention across international boundaries. However, their implementation raises questions about jurisdiction, the reconciliation of differing legal standards, and the enforcement of court orders across nations, underscoring the challenges of safeguarding child welfare in an interconnected world.

The sociopolitical context in Germany, characterized by a commitment to human rights and the welfare state principle, further influences the interpretation and application of family law. The German legal system, while robust and comprehensive, must navigate the tensions between parental rights, societal values, and the paramountcy of child welfare. This balancing act is complicated by evolving societal norms, such as the recognition of non-traditional family units and the increasing emphasis on children's autonomy and participatory rights in legal processes.

This review critically examines the legal practices, challenges, and advancements in the realm of parental authority, custody, and child welfare protection in German divorce cases. Through a comparative analysis with international norms and a detailed exploration of case law and empirical studies, we aim to uncover the strengths and weaknesses of the current legal framework. By situating the discussion within a broader sociopolitical and international context, we seek to highlight the ongoing efforts and future directions for ensuring that the legal system effectively serves the best interests of children amidst the complexities of modern family life.

2. Overview of German Family Law on Custody and Child Welfare

The fabric of German family law, intricately woven into the broader tapestry of the *Bürgerliches Gesetzbuch* (BGB), is emblematic of a legal system deeply committed to the welfare and best interests of the child. This foundational principle acts as the lodestar in guiding all decisions pertaining to custody and parental authority in the aftermath of divorce. It's a principle that reflects a profound acknowledgment of the pivotal role both parents play in the developmental and emotional well-being of their children. The legislative framework, thereby, encourages joint custody arrangements, aiming to ensure that, notwithstanding the dissolution of marriage, the parental responsibility remains a joint venture, reinforcing the importance of both parents in the life of the child.

2.1 Legal Foundations and Principles

At the heart of German family law is the assertion that the best interests of the child supersede all other considerations in custody-related matters. The BGB articulates

this through various statutes, mandating courts to prioritize child welfare in their deliberations and decisions. This encompasses a broad spectrum of considerations, including but not limited to, the child's emotional, physical, and psychological needs, the child's established living patterns, and the capacity of each parent to meet these needs.

2.2 Joint Custody: A Preferred Norm

Joint custody, as championed by the BGB, underscores a paradigm shift towards recognizing the benefits of sustained interaction with both parents. This arrangement is predicated on the belief that the involvement of both parents in the child's life is instrumental to the child's overall well-being. In practice, this means that decisions regarding the child's education, health care, and religious upbringing, among other things, are made jointly by both parents. It's a collaborative model that seeks to preserve parental involvement, albeit the parents no longer share a household.

2.3 Sole Custody: Exceptional Circumstances

While joint custody is the normative ideal, German family law is pragmatic in acknowledging that there are circumstances where sole custody may be in the child's best interest. These circumstances are carefully delineated and typically involve situations where joint decision-making would be detrimental to the child's welfare, such as in cases of abuse, neglect, or severe parental conflict. The threshold for awarding sole custody is high, necessitating a thorough judicial assessment to ensure that such a decision unequivocally serves the child's welfare.

2.4 The Child's Voice in Custody Decisions

An increasingly salient aspect of German family law is the emphasis on incorporating the child's perspective in custody decisions. The law stipulates that children of appropriate age and maturity should be given an opportunity to express their preferences, which, while not determinative, must be considered by the court in its decision-making process. This aligns with broader international conventions on children's rights, recognizing children as active participants in matters that directly affect their lives.

2.5 Enforcement and Modification of Custody Orders

The dynamic nature of family life necessitates that custody arrangements be adaptable to

changing circumstances. German law provides mechanisms for the modification of custody orders, contingent upon demonstrating that such changes would enhance the child's welfare. Enforcement of custody and visitation rights is also a critical component of the legal framework, with specific provisions designed to address non-compliance, ensuring that custody arrangements are not only judiciously determined but also effectively implemented.

2.6 Comparative Insights and Challenges

Comparatively, German family law's approach to custody and child welfare is both progressive and child-centric, often serving as a benchmark for other jurisdictions. However, it is not without its challenges. The intricacies of determining the best interests of the child, balancing parental rights, and adapting to the evolving nature of family structures demand continual reassessment and refinement of the legal framework. Moreover, the international dimension of family law, especially in the context of cross-border custody disputes, adds another layer of complexity, necessitating nuanced understanding and cooperation beyond national legal systems.

In conclusion, the overview of German family law on custody and child welfare reveals a system deeply committed to the principle of the child's best interest. Yet, it also underscores the ongoing challenges and complexities inherent in translating this principle into practice. As families evolve and societal norms shift, the legal system must adapt, ensuring that it continues to safeguard the welfare and rights of children amidst the multifaceted realities of family life.

3. Empirical Insights into Legal Practices and Judicial Decisions

The empirical examination of legal practices and judicial decisions within the domain of German family law, particularly concerning custody and child welfare post-divorce, unveils a multifaceted landscape. This landscape is characterized by a judicial inclination towards joint custody arrangements, underscored by a robust belief in the imperative of sustaining the child's meaningful connections with both parents. This trend, while largely celebrated for its commitment to preserving familial bonds, has also ignited debates and critical examinations, especially in contexts marked by domestic violence or the specter of international

child abduction.

3.1 Trends in Custody Decisions

A comprehensive analysis of recent case law and judicial decisions indicates a clear preference for joint custody, even amidst acrimonious separations. This predilection is not merely a reflection of legal mandates but also of an evolving jurisprudential philosophy that recognizes the integral role both parents play in the child's development. Studies correlating child outcomes with custody arrangements have fortified this approach, suggesting that children in joint custody scenarios often report higher levels of well-being.

3.2 Challenges in Contentious Cases

Despite the preference for joint custody, the legal system grapples with complex scenarios that challenge this norm. Cases involving allegations of domestic violence or abuse present a significant conundrum. The primary concern in such instances is the safety and psychological well-being of the child, which may necessitate deviation from joint custody norms. The intricacies of these cases often require nuanced judicial interpretation and a careful balancing of the need to protect the child with the benefits of parental involvement.

3.3 The Role of Expert Testimony

In navigating the murky waters of contentious custody disputes, German courts increasingly rely on expert testimony, particularly from child psychologists and psychiatrists. These experts provide invaluable insights into the child's psychological state, the dynamics of parent-child relationships, and the potential impact of various custody arrangements on the child's well-being. The weight accorded to such testimony is significant, often shaping the outcome of custody decisions. This reliance on expert insights underscores the judiciary's commitment to informed, child-centric decision-making.

3.4 International Child Abduction Concerns

The global mobility of families has introduced complex legal challenges, notably in cases of international child abduction. German courts, in these instances, are tasked with navigating not only national laws but also international treaties, such as the Hague Convention on the Civil Aspects of International Child Abduction. The adjudication of such cases demands a delicate balance between ensuring the immediate return

of abducted children and assessing the broader implications for child welfare, especially when returning to the country of origin might expose the child to harm.

3.5 Empirical Studies and Policy Implications

Empirical research into the outcomes of custody decisions underlines the importance of a nuanced approach to family law. Studies focusing on the psychological and developmental impacts of various custody arrangements offer critical insights that could inform policy and practice. For instance, research highlighting the adverse effects of high-conflict environments on children could lead to enhanced support mechanisms and mediation services for families navigating divorce.

In sum, the empirical analysis of custody and child welfare in German divorce proceedings reflects a judicious blend of tradition and innovation. The judiciary's approach, characterized by a preference for joint custody tempered by a readiness to address complex challenges, exemplifies the legal system's overarching commitment to the child's best interests. Nonetheless, the evolving nature of familial relationships and international mobility necessitates continual reassessment and adaptation of legal practices to ensure that the welfare of the child remains paramount.

4. Challenges in Balancing Parental Rights and Child Welfare

The labyrinth of legal, social, and psychological complexities inherent in divorce cases presents formidable challenges to the delicate balance between safeguarding parental rights and ensuring child welfare. German family law, with its firm commitment to the child's best interests, navigates this terrain amidst evolving societal norms and the globalization of family units. This section delves into the multifaceted challenges encountered in reconciling these dual imperatives, highlighting the nuances of legal interpretation, the integration of children's perspectives, enforcement dilemmas, and the implications of international family dynamics.

4.1 Subjective Interpretation of the Child's Best Interest

Central to the ethos of German family law is the principle of the child's best interest, a concept that, despite its universality, suffers from a degree of subjectivity in its application. Judicial

discretion plays a pivotal role in interpreting what constitutes the best interest in varied contexts, influenced by the intricacies of each case. However, this discretion can lead to inconsistencies in decision-making, where similar circumstances yield divergent outcomes based on different judicial perceptions. The subjective nature of this principle poses a challenge to achieving a standardized approach, potentially affecting the predictability and fairness of custody decisions.

4.2 Marginalization of Children's Voices

Although recent reforms and jurisprudential trends emphasize incorporating the child's voice in custody decisions, practical implementation often falls short. The mechanisms for eliciting and considering children's preferences can vary widely, with some cases inadequately addressing or altogether overlooking the child's perspective. This marginalization not only contravenes the spirit of participatory rights enshrined in international conventions like the UN Convention on the Rights of the Child but also risks outcomes that may not fully align with the child's welfare and psychological needs.

4.3 Enforcement and Compliance with Visitation Rights

Post-divorce, the enforcement of custody and visitation rights emerges as a significant challenge, particularly in high-conflict separations. The reluctance or refusal of one parent to comply with court-ordered arrangements can impair the child's relationship with the non-custodial parent, undermining the child's right to maintain personal relations and direct contact with both parents. The legal system's mechanisms for enforcing these rights are often cumbersome and can exacerbate the child's emotional distress, highlighting the need for more effective and less adversarial enforcement strategies.

4.4 International Child Abduction and Cross-Border Custody Disputes

The increasing internationalization of families introduces complex legal challenges, particularly with respect to the Hague Convention on the Civil Aspects of International Child Abduction. Cross-border custody disputes necessitate navigating not only domestic laws but also international treaties and foreign legal systems. These cases require a delicate balance between facilitating the prompt return of abducted children and ensuring that such

returns do not jeopardize the child's safety or welfare. The interplay between safeguarding against wrongful removal and respecting the jurisdictional and legal nuances of different countries presents a labyrinth of legal and ethical considerations.

4.5 Towards a More Holistic Approach

Addressing these challenges necessitates a holistic approach that transcends legalistic solutions, integrating psychological support, mediation, and international cooperation. Enhancing mechanisms for children's participation, standardizing the interpretation of the best interests principle, and developing more effective enforcement strategies are crucial steps forward. Moreover, fostering collaboration between countries in handling international custody disputes can ensure that the welfare of the child remains paramount, irrespective of borders.

In conclusion, the quest to balance parental rights with child welfare in the context of divorce under German family law illuminates the complexity of adapting legal frameworks to the realities of contemporary family life. These challenges underscore the need for ongoing reform and adaptation of the legal system to ensure it effectively safeguards the interests and well-being of children amid the evolving landscape of familial relationships and international dynamics.

5. Comparative Analysis with International Norms

The intricate dance between national family law frameworks and international norms is pivotal in shaping the landscape of child custody and welfare. This comparative analysis illuminates the alignment and divergence between German family law and international standards, particularly those encapsulated in the UN Convention on the Rights of the Child (CRC). Through this lens, we scrutinize Germany's legal practices in custody disputes, highlighting both congruences and gaps that offer avenues for enhancing child welfare protection in a global context.

5.1 Germany's Alignment with the UN Convention on the Rights of the Child

Germany's ratification of the CRC underscores its commitment to upholding international standards regarding children's rights and welfare. The principles embedded in the CRC —

including the paramountcy of the child's best interests, the right to life, survival and development, and the right of the child to be heard — resonate with the tenets of German family law. Specifically, the Bürgerliches Gesetzbuch (BGB) and related statutes reflect these principles by prioritizing the child's best interest in custody decisions, advocating for joint custody to foster development through familial bonds, and increasingly recognizing the child's voice in judicial proceedings.

5.2 Areas of Convergence

The most notable area of convergence lies in the legal recognition and operationalization of the child's best interests as a primary consideration in all actions concerning children, as stipulated by Article 3 of the CRC. German courts' emphasis on joint custody and the inclusion of children's views in custody decisions echo the CRC's advocacy for considering the child's best interest in parental care and judicial processes. Moreover, Germany's legal framework for protecting children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (CRC Article 19), aligns with its stringent measures against child abuse and neglect in the context of family law.

5.3 Discrepancies and Areas for Improvement

Despite these alignments, discrepancies emerge in the application and interpretation of these international norms, particularly in cross-border custody disputes and cases involving international child abduction. The CRC's emphasis on preserving the child's identity, including nationality, name, and family relations (Article 8), presents challenges in the context of the Hague Convention on the Civil Aspects of International Child Abduction. German courts, while striving to adhere to these international mandates, sometimes face dilemmas in balancing the immediate return of abducted children with the potential impact on their welfare and rights, as envisioned by the CRC.

The CRC's advocacy for the child's right to maintain personal relations and direct contact with both parents (Article 9) further highlights the need for enhanced cross-border cooperation. Instances of non-compliance with visitation rights in international contexts underscore the difficulties in ensuring the enforcement of custody decisions across jurisdictions. This

divergence points to the necessity for robust mechanisms to facilitate international legal cooperation and ensure adherence to the CRC's principles in transnational custody disputes.

5.4 Enhancing Cross-Border Cooperation

Enhancing cross-border cooperation necessitates a multifaceted approach, encompassing harmonization of legal standards, mutual recognition of judicial decisions, and effective mechanisms for dispute resolution. Strengthening collaborations between German authorities and international bodies, and fostering dialogue on best practices can pave the way for more seamless integration of CRC principles in cross-border custody disputes. Additionally, investing in bilateral agreements and participating in international forums dedicated to children's rights can further align Germany's domestic practices with global norms.

5.5 Towards a More Child-Centered Approach

Moving towards a more child-centered approach in custody disputes requires continuous reflection and adaptation of legal frameworks, both at the national and international levels. Recognizing and addressing the unique challenges posed by international family dynamics, and ensuring that the child's voice is heard and considered in all proceedings, are essential steps in this direction. The comparative analysis not only showcases Germany's commitment to international norms but also highlights the dynamic nature of legal practices in the face of evolving global standards.

In conclusion, this comparative analysis between German family law and international norms, particularly the CRC, reveals a landscape marked by significant alignment yet punctuated by areas requiring further integration and improvement. As families increasingly transcend borders, the imperative for a child-centered approach in custody disputes becomes ever more critical, demanding concerted efforts to bridge gaps and enhance cross-border cooperation to safeguard children's welfare and rights globally.

6. Recommendations for Reform

In light of the complexities and challenges identified within the realms of parental authority, custody decisions, and the overarching framework of child welfare

protection under German family law, a series of reforms are imperative. These reforms aim not only to refine the existing legal framework but also to ensure that it remains adaptive and responsive to the evolving needs of children and families, particularly in an increasingly globalized context. The recommendations put forth are designed to enhance the child-centric nature of custody disputes, improve the consistency and fairness of judicial decisions, and strengthen international cooperation in transnational family cases.

6.1 Structured Mechanisms for Incorporating Children's Perspectives

The voice of the child in custody and parental authority disputes must be given greater structural importance within legal proceedings. This can be achieved through the development of standardized protocols for interviewing children, ensuring that their perspectives are gathered in a manner that is both age-appropriate and psychologically sensitive. Legal professionals, including judges and family law practitioners, should receive specialized training to understand and interpret children's expressions of their needs and preferences. Furthermore, the introduction of child advocates or representatives in custody proceedings could serve as a vital mechanism to ensure that children's voices are not only heard but are also given due consideration in judicial decisions.

6.2 Standardizing the Assessment of the Child's Best Interest

Given the subjective nature of determining the child's best interest, there is a pressing need for standardized guidelines that can assist judges and legal practitioners in their assessments. These guidelines should encompass a broad range of factors, including the child's emotional, physical, and educational needs, the capacity of each parent to meet these needs, and the potential impact of any changes in the child's living arrangements. Developing a more structured approach to evaluating the child's best interest can contribute to greater consistency in custody decisions and ensure that all relevant aspects of the child's welfare are comprehensively considered.

6.3 Enhancing Enforcement of Custody and Visitation Orders

The effectiveness of custody and visitation agreements is fundamentally contingent upon their enforceability. To mitigate the challenges

associated with non-compliance, the legal system should introduce more efficient and less confrontational enforcement mechanisms. These could include the establishment of specialized enforcement units within family courts, dedicated to facilitating compliance with custody and visitation orders. Additionally, the introduction of mediation and conflict resolution services can offer alternative avenues for addressing disputes, reducing the need for coercive enforcement measures and minimizing the emotional toll on children.

6.4 Fostering International Collaboration

The global nature of many contemporary families necessitates enhanced international collaboration and harmonization of legal practices. Germany should actively pursue bilateral and multilateral agreements focused on family law and child protection, aiming to streamline the handling of cross-border custody disputes. Participation in international forums and networks dedicated to family law can facilitate the exchange of best practices and innovations. Moreover, closer cooperation with international organizations, such as the Hague Conference on Private International Law, can bolster efforts to address the challenges of international child abduction and ensure the effective implementation of relevant conventions.

6.5 Harmonizing Legal Practices with Global Standards

Aligning German family law more closely with international norms and standards, particularly those set forth in the UN Convention on the Rights of the Child, can enhance the protection and welfare of children in custody disputes. This entails not only the ratification of international treaties but also their effective incorporation into domestic law and practice. Legislative reforms should be undertaken with a view to eliminating discrepancies between national laws and international obligations, ensuring that Germany's legal framework for child welfare and custody is both globally coherent and locally effective.

In conclusion, the recommended reforms aim to fortify the legal and institutional framework governing custody and child welfare in Germany. By adopting a more structured, child-centered approach, enhancing enforcement mechanisms, and fostering international collaboration, the legal system can

better navigate the complexities of modern family dynamics. These reforms hold the promise of creating a more equitable, effective, and compassionate legal landscape for children and families navigating the challenges of divorce and separation.

7. Conclusion

The conclusion of this review underscores the pivotal role of the German legal framework in navigating the intricate and often turbulent waters of divorce, particularly concerning parental authority, custody, and child welfare. This critical examination has illuminated not only the strengths of the current system but also the areas where challenges persist, reflecting the complex interplay between evolving societal norms, familial dynamics, and international obligations. The overarching commitment to the child's best interests stands as a testament to Germany's dedication to upholding the rights and welfare of children amidst the dissolution of marital relationships. Yet, as this review has highlighted, the path towards fully realizing these noble objectives is one that requires continuous reflection, adaptation, and action.

German family law, with its robust foundation in the Bürgerliches Gesetzbuch (BGB), has shown a commendable commitment to ensuring that the welfare of the child remains central in divorce proceedings. The preference for joint custody arrangements, the emphasis on the child's best interest as a guiding principle, and the mechanisms for incorporating the child's voice in judicial decisions are indicative of a legal system that values the holistic well-being of children. However, the challenges unearthed in this review - from the subjective interpretation of the child's best interest to the complexities of enforcing custody and visitation orders, and navigating international custody disputes - underscore the need for a nuanced approach that can adapt to the multifaceted realities of family life.

The future of German family law, particularly in the realm of divorce and child custody, hinges on its ability to evolve. This evolution encompasses a spectrum of reforms aimed at refining domestic legal practices and enhancing international cooperation. Structured mechanisms for capturing children's perspectives, standardized assessments of the child's best interest, and more effective enforcement strategies are paramount in

ensuring that legal outcomes align more consistently with the welfare of the child. Additionally, the international dimension of family law necessitates a concerted effort towards greater collaboration and harmonization with global standards, particularly those set forth in the UN Convention on the Rights of the Child.

As family dynamics continue to transform and cross-border relationships become increasingly common, the German legal system must remain agile. This entails not only adapting to new challenges but also embracing innovative practices that can better serve the needs of children and families. Leveraging technology for dispute resolution, enhancing interdisciplinary collaboration among legal, psychological, and social work professionals, and developing more robust support systems for families in transition are just a few avenues through which the legal framework can be strengthened.

In conclusion, the journey towards a more effective and compassionate legal framework for managing parental authority, custody, and child welfare in divorce cases is ongoing. Germany's commitment to protecting the interests of children is evident, but the path forward demands a proactive stance - one that embraces reform, fosters international cooperation, and seeks innovative solutions to complex challenges. By doing so, Germany can ensure that its legal system not only adheres to international norms but also meets the unique needs of its families, thereby keeping the welfare of the child at the heart of divorce proceedings in both principle and practice.

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