

The Judges and their Perspective on Establishing Jurisdiction, Gathering and Validating Information and Hearing the Views of the Child



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Gathering and Validating Information in Proceedings in Germany

- Is ruled by the procedural law

a) for proceedings on parental responsibility:

Act on proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (FamFG)

http://www.gesetze-im-internet.de/englisch_famfg/index.html

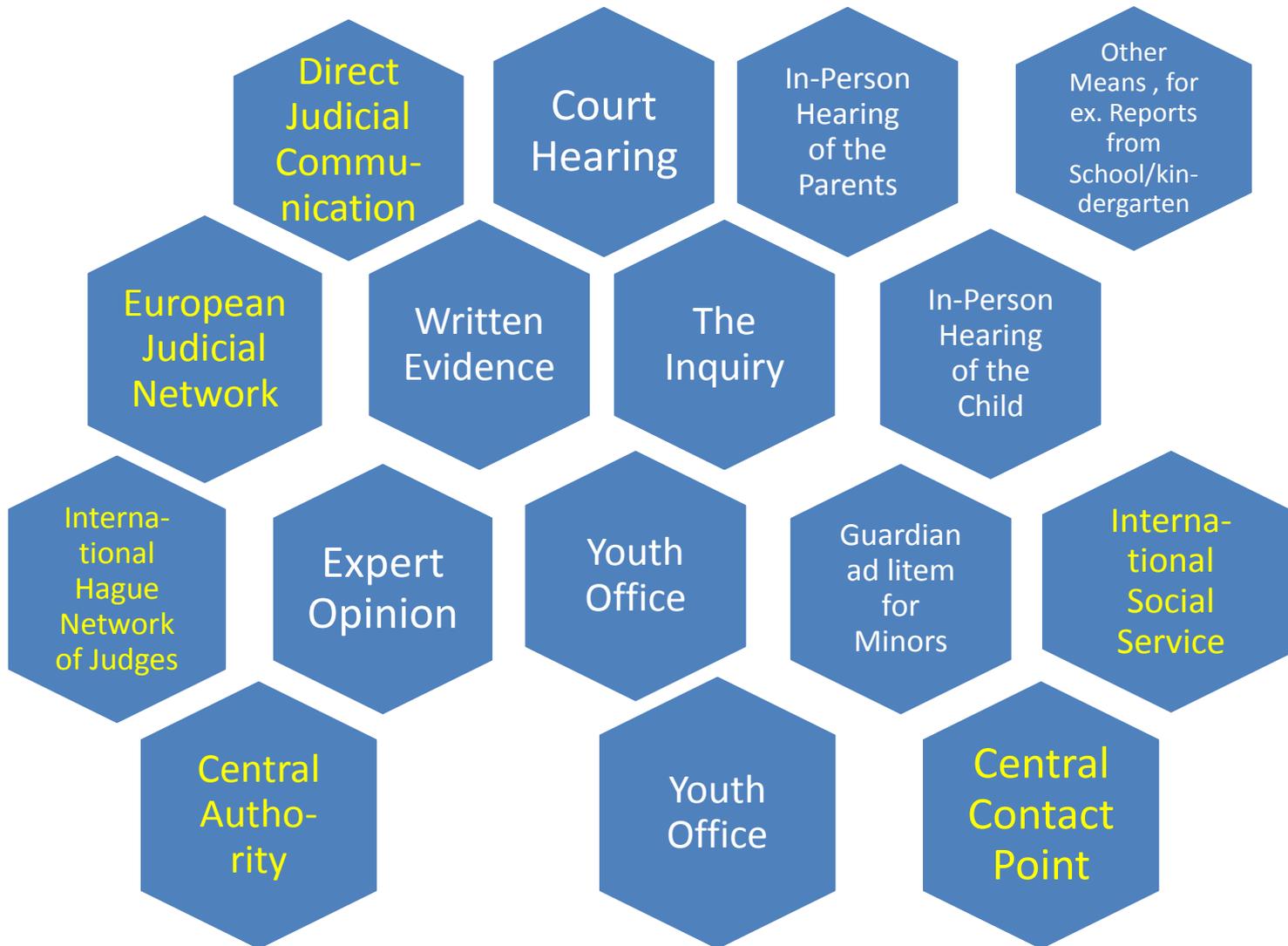
b) for proceedings on return under the 1980 Hague Convention:

International Family Law Procedural Act (IntFamRVG)

http://www.gesetze-im-internet.de/englisch_intfamrvg/index.html

Inquiry ex officio -

The most important Means in Proceedings concerning Children in cross-border Situations



Basis of the Decision

- **Section 37 (1) FamFG:
Basis of Decision**

The court shall decide at its discretion and conviction derived from the total contents of the proceedings.

In-Person Hearing of the Parents

- **Section 160**

- Hearing of the Parents**

- (1) In proceedings that concern the child the court should conduct an in-person hearing with the parents...

- (3) A hearing shall only be omitted based upon substantial grounds.

- Face-to-face and orally by the Judge

- Aims:

- To guarantee the right to be heard

- To establish facts, especially personal Impression of the persons involved

Youth Office

- **Section 162**

- **Cooperation of the Youth Office**

(1) In proceedings that concern the person of the child, the court shall hear the Youth Office...

- is the competent specialised authority
- Is independant from the court
- Gives a report on the views of the participants of the proceedings, on the situation of the child and proposes an order

Guardian ad litem for Minors

- **Section 158 FamFG Guardian ad litem for Minors (*Verfahrensbeistand*)**

(1) The court shall appoint a suitable guardian ad litem for minors for minor children in parent and child matters concerning the child to the extent necessary for representing his interests....

(4) The guardian ad litem for minors shall determine the interests of the child and shall assert these in the court proceedings. He shall inform the child of the object, course, and potential result of the proceedings in a suitable manner. ...He is not the legal representative of the child.

- Secures that the constitutional rights of the child are observed
- Is appointed by the court if necessary
- Is independent
- Professionals mostly with a social background (social workers, psychologists) or lawyers
- Determines the interests of the child and asserts these in the proceedings
- Informs the child about the proceedings and accompanies the child in an in-person hearing by the judge

Hearing the Views of the Child



through the Eyes of the Parents and their Lawyers
(dangerous)

Report by the Youth Office and other Authorities

Report by the Guardian ad litem

In-Person Hearing of the Child

Expert Opinion

THE RIGHT OF THE CHILD TO BE HEARD

- Art. 12 UN Convention on the Rights of the Child of 20 November 1989 (UNCRC)
- Art. 24 (1) Charta of Fundamental Rights of the European Union
- UN Committee on the Rights of the Child

Why- Hearing the opinion of a child

- is in the superior interest of the child:
to be included into the proceedings
to express views
to secure the right to be heard
- is an essential tool to enable better assessment of the factual situation

How -Hearing the opinion of a child

- Different national systems with varying requirements and methods
- Safeguards in international instruments:

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (17 November 2010)

see IV.D.3.-6.:

Respect of right to be heard when sufficient understanding

Means adapted to level of understanding and wishes

Information about the right to be heard

Child-friendly organisation, environment and language

Trained professionals

How - Methods of carrying out the hearing of a child

- Recital 19 Brussels II bis: no modification of the national procedures for the hearing of the child
- Different approaches in different States
- Various models: child psychiatrist, trained court officer, social worker, trial judge – in court / in private?
- Many Member States have introduced new legislation on the child's right to be heard, still no uniform approach

THE RIGHT OF THE CHILD TO BE HEARD - **The German Perspektive**

Section 159 FamFG

In-person hearing of the child

(1) The court shall conduct an in-person hearing with the child when he has reached the age of 14. ...

(2) If the child has not reached the age of 14, he shall be heard in-person when the preferences, relationships, or the desires of the child are significant to the decision or when an in-person hearing is otherwise indicated.

...(4) The child should be informed of the object, course, and potential result of the proceedings in a suitable manner for his age to the extent there is no fear of a negative impact on his development, education, or health. He shall be given the opportunity to make a statement. If the court appointed a guardian ad litem for minors for the child pursuant to section 158, the in-person hearing shall take place in his presence. Otherwise, the form of the in-person hearing may be determined within the discretion of the court.

THE RIGHT OF THE CHILD TO BE HEARD - The German Perspektive (2)

- Face-to-face and orally by the judge
- Aims:
 - Guarantee of the right to be heard
 - Fundamental rights guaranteed by the German Federal Constitution (GG):

human dignity, Art. 1 (1) GG and personal rights, Art. 2 (1) GG

- Establishment of facts, especially personal impression of the child
 - Child has the opportunity to express his/her personal relationship to other members of the family.
 - An order concerning a child has to be oriented towards the best interests of the child. This generally requires to hear the child in order to respect the child as a person entitled to basic rights.

The RIGHT OF THE CHILD TO BE HEARD- The German Perspective (3)

- Compulsory for children aged 14 and more
- For younger children:

Constitutional Court decisions starting 1981:

- Strengthen the rights of the child to be heard
- Starting at the age of 3 a personal hearing of the child might be important. Small children do not yet have their own freewill, but quite notable wishes, tendencies, preferences and aversions that might become visible by attitudes or reactions and that be relevant for the decision.

Practical questions

- Procedure can pose a major challenge in order not to cause more harm than good to the child in these sensitive cross-border family cases
- are important to reach the aim of minimising the risk of parental influences and of putting pressure on the child

Requirements

- Judge interviewing must have received adequate training
- Correct time management
- Arrangement of an adequate and friendly environment
- Preparation of the hearing and questions
- Duty of the judge to inform the child about the conditions and possible consequences of the hearing

Examples of Children's Rooms in German Courts



Hearing of the child and Brussels II bis

- Recital 19
- Art. 23 (a) and (b)
- Art. 41 (2)(c)
- Art. 42 (2)(a)
- Art. 11 (2) of Brussels II bis Regulation
- Principle of hearing the voice of the child in family proceedings
- Exception: not hearing the child if it was considered inappropriate having regard to age or degree of maturity, must be interpreted restrictively having regard to the individual case

Hearing of the child and Brussels II bis (2)

- ECJ Case C-491/10 PPU (Aguirre Zarraga v Pelz)

After separation in Spain custody to father with whom child lives

15.8.2008 retention by mother after holiday in Germany

1.7.2009 German Court rejects application for return after hearing the child (Art. 13 (2) 1980 HC)

16.12.2009 Spanish Court grants custody to father without hearing the child, mother didn't bring the child, no permission to leave Spain freely, no videoconference

5.2.2010 Spanish Art. 42 certificate stating that the child was given the opportunity to be heard

German Court ask the ECJ for a preliminary ruling:

Is there a duty to enforce in case of a manifestly inaccurate declaration which means a serious infringement of fundamental rights? Or has the enforcement court an exceptional power to review?

Hearing of the child and Brussels II bis (3)

- ECJ Case C-491/10 PPU (Aguirre Zarraga v Pelz)

22.12.2010 ECJ Judgment:

Art. 42 (2) Brussels II bis doesn't refer to the hearing of the child per se, but to the child's having the opportunity to be heard.

“The ruling court assesses whether a hearing is appropriate. Conflicts create situations on which the hearing of the child ... may prove to be inappropriate, and even harmful to the psychological health of the child....hearing of the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case...

...it is not a necessary consequence of the right of the child to be heard that a hearing before the court of the Member State of origin takes place, but that right does require that there are made available to the child legal procedures and conditions which enable the child to express his or her views freely and that those views are obtained by the court ...where the court decides to hear the child , those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views.“

The court of enforcement is obliged to enforce, has no power to oppose.

Taking of Evidence on Cross-Border Civil Matters

- Problem: sometimes the presence of the child in the court may not be possible, for example custody proceedings concerning an abducted child not being present
- Recital 20 Brussels II bis: possibility for hearing the child by using the means laid down in the Council Regulation (EC) No 1206/2001 on the taking of evidence

Hearing the Child by Using the Means of the Regulation on the Taking of Evidence

- Main objective: to ensure an improved, simplified and accelerated cooperation in the taking of evidence in cases with a cross-border element
- Possibility to employ communications technology, in particular videoconference, Art. 10 (4)
- Practice Guide for the application of the Regulation on the taking of evidence
- Advantages? Possibilities? Potential risks?

Videoconferencing



- Practical Guide on using videoconferencing
- Information on national facilities:

https://e-justice.europa.eu/content_information_on_national_facilities-151-EU-en.do