

Giving children their own voice in family court proceedings:

A German perspective

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1. Introduction

Children need care and protection, especially when their parents separate.

In the last 25 years in Germany there has been a development to recognize children as subjects of rights, with a particular right to have a voice in decisions and arrangements that concern them.

Lisa Parkinson, a very experienced English mediator, reports about a study carried out at the Centre for Family Research at the University of Cambridge (Morrow, 1998). This study found that most children wanted to be able to have a say in matters affecting them. Even young children could understand and talk about the notion of having rights and being listened to.

Other studies in Great Britain and recently in Australia found that the majority of children think that children should have opportunities to talk about their wishes and feelings and to be consulted. Many parents are perceived that they know their children's wishes and feelings. Mitchell, a British scientist, found, however, that parents who claimed to know their children's views often attributed their own views to the children. When children themselves were asked, their views often differed from those attributed to them by their parents. One girl said about her mother: *"She didn't understand how I felt. She was too busy being angry."* (Mitchell, p.94). A boy said: *"You're the first person who's ever bothered to ask me how I felt"* (Mitchell, p. 81).

Just to complete this from another point of view I would like to report one of my experiences of communications with children: Even young children understand pretty well that a judge is a very different person in comparison with a social worker, a

mediator or therapist, and that family court proceedings are not the same as counselling or making therapy or mediation.

In contrast to the reported outcomes of research judges (as well as other competent professionals) are almost very reluctant to communicate with children personally. As one explanation for this phenomenon Lisa Parkinson draws the attention on the problem that professionals often disagree with each other about the need to consult children and how to do so. As a result, adults usually avoid to communicate with children personally, largely because of their own uncertainty, lack of confidence and skills and feelings of inadequacy, especially in coming to terms with children's pain.

2. The legal basis for the obligation of German judges to communicate personally with the child.

In Germany, the obligation of the appointed judges giving the decision to personally hear the parents and the children is based on **the German Basic Law (Grundgesetz)** and on the consistent past decisions of the German Federal Constitutional Court, according to which the children concerned, as possessors of their own basic rights in custody and access proceedings, must receive an opportunity to make their personal relationships to both parents, as the case may be, known to the court which is giving the decision.

Next there is the **UN Convention on the Rights of the Child dated 20 November 1989**. Pursuant to **Article 12** the child who is capable of forming his or her own views is assured the right to express those views freely in all matters affecting the child. In particular, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in accordance with the age and maturity of the child and in a manner consistent with the procedural rules of national law.

Following the jurisdiction of the European Court of Human Rights, pursuant to **Article 8 of the European Convention on Human Rights**, in decisions concerning personal hearings the circumstances of the case with due consideration being given

to the age and maturity of the child concerned are decisive. A hearing is only able to be dispensed with, if the hearing of the child itself would be a detriment to the child and if this detriment could not be otherwise preventable by the court making special arrangements (Re Sahin v. Germany, Decision No. 30943/96 of the Grand Chamber dated 8 July 2003).

Also, **Article 24 of the Constitution of the European Union from 29th October 2004** stipulates that children may express their views freely and that such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

3. The legal regulations for German family judges how to organize the personal communication with the child concerned

Starting from the paramount principle of the best interests of the child as the primary concern one must bear in mind that parents are often so concerned with their own relationship problems that they have far too much on their plate and find it hard to recognise and acknowledge their children's needs. The judge's observations during a communication with the child can often help the parents to focus attention more on the needs of their children and to move closer to reaching an amicable agreement.

If the parents cannot agree on questions of custody or access regarding the child the local family court has to decide. The court will ask the youth authorities for useful information about the family.

As the next step the court is obliged to hear the child personally, if it is possible to effectively communicate with it. Consistent past decisions by the Federal Court of Justice and the Higher Regional Courts assume that children older than approximately four years of age are considered to be capable of expressing themselves. In practice, however, Family Courts sometimes do not hear the children until they have reached the age required for attending school.

The conversation with the child is held without parents and without any lawyers being present. The judge must take down the conversation with the children for the record. The children must receive an opportunity to state their position on this.

Afterwards the judge will report to the parents and to their lawyers about how the child behaved, what the child said and what impression he, the judge, got. (*I will come back to some reflections how to report it to the parents in an appropriate manner later on.*) In the further course of the hearing the parents are invited to make a statement personally. German courts think that is important that the parents express themselves personally and not only through their lawyers.

If it is necessary in order to safeguard the child's best interests, the court must appoint a guardian to the child for the proceeding. This applies particularly to cases in which the interests of the child conflict greatly with those of their statutory representative.

During the whole proceedings the court is seeking to achieve a consensus between the parents. The court will try in particular to make both parents understand that an ongoing quarrel is detrimental to the further development of the child. It will also make clear that it is a right of a child to have regular contact with both parents (also with the parent who is not the primary carer).

The proceedings before Family Courts in these cases are principally not open to the public.

For the investigation of the facts of the case, the principle of ex-officio judicial investigation applies, not the principle of party autonomy. The courts are not bound to statements made by the parents, they may conduct their own investigations or delegate this task to other official bodies. The courts may, for instance, hear grandparents and other relatives, new partners, kindergarten teachers or other teachers, or it may require that they submit statements.

4. Doubts and risks regarding a communication with especially smaller children.

Often the argument is raised that the hearing would be too much of a strain on the child. That has to be assessed differentiated. If and to what extent the child finds the hearing a strain essentially depends on the strains under which it has been placed due to events in the family prior to the hearing. Naturally, what the child has experienced at home will resurface during the hearing. However, if the judge tries hard to approach the hearing sensitively, it can often even help lessen the strain the child is under because it can support the child in better dealing with its difficult situation.

It can be problematical and indeed a great strain on children if the hearing is not handled appropriately. The outcome and success of a personal hearing of a child by a court "crucially (depends) on to what extent the judge is able to empathise with the child's particular psychological state and whether he/she is able to strike up a conversation with the child" as was emphasised by the Federal Constitutional Court in a decision of 5 November 1980. For a careful approach to the child the family court judges have to take further training on basic educational theory and psychology and they need practical training, skills and experience in order to communicate with children and adolescents concerned.

The administrations of justice of the federal *Länder* are responsible for providing such training courses. Unfortunately, however, in times of decreasing public budgets they have not all been fulfilling this duty sufficiently in the last years.

Yet, if the hearing is handled sensitively and in a manner appropriate to the child's age, the process can boost the child's self-esteem and make it more self-confident. If the child is then asked about its wishes and needs in a suitable setting and atmosphere (given that this may be the first time this has occurred since the conflict surrounding the separation began), without the child being prompted to give the "right" answers or to produce the "correct" results, the child can then be perceived as a person in its own right and will feel that it is being taken seriously.

Example:

"I would really like to get to know you and hear your opinion, that's if you want to tell me it. I will do my best to stop your parents fighting and to find a solution which is good for you. Perhaps you can help me with this.. "

A child can regain its self-confidence and, in accordance with its age and maturity, stop being a mere object of its parents' decisions. As well as talking about its own wishes and needs, if the hearing is successful the child can go one step further by actually contributing its own suggestions as to how the situation can be resolved and improved. However, when handling the hearing one must be very careful to avoid a situation in which the child takes on responsibility for its parents.

5. Important objectives of communicating personally with children

- The most important one is that the communication gives the judge the ***opportunity to become familiar with the child and his/her wishes, fears, interests, and needs.***

- Release of the child from responsibility:

Making a decision against one of their parents makes the children feel guilty and puts even more pressure on the parent-child relationship. So, the judge should avoid any question or proposal which could expose the child to any conflict of loyalty. He should not ask a child, anyhow not a little child, to decide itself for or against one parent as he does with questions as: *"With whom do you want to live?"* or: *"Do you want to see your father in any case?"*).

At the beginning of the hearing the judge should make clear to the child that it may express its wishes, but that it will not be up to the child to make decisions.

Example:

This is about the question of whether you will live with your mother or with your father. You are not here in order to decide about this. Your parents must agree on this. If they can't, I as judge will decide about this. From you I would only like to learn how you feel and what is good for you and what is difficult for you. Do you understand?

- **Releaving the child of the burden of making a decision:**

The hearing can also help the child to understand its own feelings of responsibility and guilt and to take steps to rid itself of these feelings. The feeling of being co-responsible for the argument often puts the children, especially younger ones, under pressure. The judge can make it easier for the child to stop feeling guilty and to release of the child from feeling co-responsible for what is the sole responsibility of its parents as well as to help the child understand that it is not in a unique and hopeless situation.

Example:

"Over the past few years I've got to know lots of children your age whose parents have separated. They have often thought that they themselves have been partly to blame. But that was never the case. It's just that their parents didn't get on anymore and couldn't carry on living together. And so of course they are responsible for what happened, not the children! But it was always a really difficult time for the children. Thankfully after a while parents usually start being sensible again and talk normally to each other ..."

- **In cases of interruptions of contact for a long time or creation of the first contact in the child's life** the judge can cautiously explain the wishes and interests of the parent not living with the child and, in appropriate cases, develop understanding for the views of the absent parent.

- The communication can **encourage the child to take an independent role:**

Children know their parents best. Often it is the children who come up with ideas and who can make concrete suggestions on what areas even parents who are bitterly estranged can achieve a mutual agreement in, at any rate with the help of the court. Even if this relates only to a smaller problem which seems hardly relevant in relation to the overall conflict. We could also describe this as "tracking down islands of understanding" which exist even when parents are arguing bitterly. If children are asked cautiously about such positive resources of their parents' they can be encouraged to risk giving up what they feel is a passive role and very carefully take a pro-active role. When they see that their parents can reach agreement over a more minor problem, this can "open doors", especially when the parents' relationship is intensely conflict-ridden. Nevertheless, the judge must be very careful that the child

does not side against one parent when it is coming up with ideas and suggestions. The judge must also be careful that he/she and not the child takes responsibility if such "small-scale agreements" fail.

6. Some rules for structuring a communication with children and for reporting it to the parents.

The judge should give ***a child-appropriate explanation of his own role.***

The judge should also give ***a child-appropriate explanation of the role of the child*** in the proceeding and the meaning of the statements of the child differentiated according to age, maturity, and capacity to understand.

As an example he might say:

"It is very important to me to get to know you and to hear your opinion, if you want it to tell me. But you can't decide how this will now go forward. Your parents have to decide that together. I will help them to find a good solution, but if they don't succeed, then I, as judge, have to decide. But I will try my best to respect as well as possible what I understood from speaking with you."

Prior to setting the hearing date the judge should assess whether the children should be interviewed during a separate appointment or during the same appointment with the parents. In the second case it should also be assessed whether the children should have the opportunity to greet the non-care giving parent prior to the conversation with the judge or whether a corresponding offer should be made at the end of the hearing.

In any event –with rare exceptions- the hearing should take place in the absence of the parents and other participants in the proceeding. It can be very helpful for a child to have the chance to talk alone with a neutral third person about its feelings, needs and wishes without being stigmatized as consulting a therapist or a counsellor.

At a hearing with several children a judge should interview each child individually as far as possible and in appropriate cases hold a joint conversation with all children at the end of the hearing (“children’s council”).

In appellate proceedings it has to be assessed whether the children must be heard in the presence of the entire appellate court panel or –preferable- whether a reduction of the burden on the child through a hearing only before the reporting judge is possible.

It is very important also to consider ***some rules how to report the communication with the child to the parents*** in an appropriate manner. (*I confine myself to some notes.*):

- Generally the judge should show respect to the parents as he wants the parents show respect to the child. He has to pay attention that no parent could lose the face and should not assess or disparage one parent. The report of the communication with the child shall not bring the child in a position of taking responsibility or making decisions.
- It can be very helpful to use special mediation techniques as reframing, normalizing and focussing on future solutions, particularly on that which, in the preliminary assessment of the court, is “doable” and ascertaining of what is “doable” for both parents.
- The judge should avoid that the parents take fixed legal positions (“I want what I’m entitled to”) and primarily orientate the parents on the interests and needs of the children by persistently addressing concrete, practical questions regarding support, care, education, sports, organization of free time and vacations, medical care, participation in appointments with nursery school, school, etc.
- In appropriate cases, the judge can propose test phases and partial agreements in order to enable a reduction of problems and of fear and mistrust in regards to the other parent/both parents and to build some trust to the other parent again.

7. Conclusions:

The experience of family judges communicating personally with also little children indicates that the benefits and advantages of communicating with the children about their feelings, needs, wishes, fears and hopes greatly outweigh any negative consequences, if the judge has sufficient training and sensitivity.

A properly conducted communication allows the children to influence the decision making process without burdening them with responsibility for making the decision and without making them feel guilty.

Involving children in decision-making support them in their self-esteem in a situation where they feel like being a victim of the quarrel of their parents and their decisions. It increases their sense of identity and personal autonomy. Even if the parents or the judge do not follow the wishes of the child, the participation in the decision-making process still leaves the child with the positive feeling of being heard and treated with respect.

Making this experience they learned at the same time the importance of constructive participation in a social sense.

Having the voice of the child in the solution-finding process very often leads to the revelation of resources and new alternatives and can be an effective catalyst in breaking up the adversarial relation between hostile parents. So the child can contribute to find an amicable solution of the conflict without taking the responsibility for it.