



SHARED PARENTING AND HUMAN RIGHTS

The Right to Respect for Family Life (Art. 8 ECHR)

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HUMAN RIGHTS

- Definition
 - HR = Rights inherent to all human beings that aim to protect the essence of human existence
- Three dimensions
 - duty to *respect, protect* and *fulfil*
- Restrictions
 - Possible when justified

EUROPEAN CONVENTION ON HUMAN RIGHTS

○ Particularities

- Independent Tribunal
- Receives individual applications
- Binding force of Judgements for Contracting Parties
- Minimal Human Rights Standards

RIGHT TO RESPECT FOR FAMILY LIFE

○ Sources

- Art. 8 ECHR
- Art. 16 Convention on the Rights of the Child.

○ Requirements

- Existence of family life
- = Question of facts

○ Protects

- Mutual enjoyment by a parent and child of each other's company

SHARED PARENTING AND ART. 8 ECHR (1)

- *Zaunegger vs. Germany* (22028/04), 3/Dec/2009:
 - Facts:
 - Shared Custody only with agreement of both parents
 - Without consent: Sole custody of the mother
 - Divorce: Sole custody at request if in the best interest of the Child
 - Judgement:
 - Discrimination of unmarried fathers compared to divorced fathers since there is no possibility to have a judicial review of whether or not sole custody is in the child's best interest (§ 64).
 - = Violation of Art. 14 taken together with Art. 8 ECHR
 - Important consequences!

SHARED PARENTING AND ART. 8 ECHR (2)

○ Consequence #1:

- Custody is protected by Family Life

○ Explanation:

- Violation of Art. 14 ECHR requires that the impugned measures interfere with another right protected by the ECHR (see: Art. 14 ECHR).
- If there is a violation of Art. 14 ECHR with respect to measures concerning Custody, Custody necessarily has to be protected by a right of the ECHR.
- In this case there is an interference with the Right to Respect for Family life protected by Art. 8 ECHR (see: §§ 40 and 64).

SHARED PARENTING AND ART. 8 ECHR (3)

○ Consequence #2:

- Custody in the *Zaunegger Judgment* includes:
- Decisions on the child's Education, **Care** and the Determination of where the Child should Live
- *"It follows that the impugned measures in the instant case, namely the decisions which dismissed the applicant's request for **joint custody, the right to exercise joint parental authority as regards, inter alia, his daughter's education, care and the determination of where she should live**, amounted to interference with the applicant's right to respect for his family life as guaranteed by paragraph 1 of Article 8 of the Convention."*
(§ 40)

SHARED PARENTING AND ART. 8 ECHR (4)

○ Consequence #3:

- Custody includes the Right to exercise parental authority as regards **the Care** of the Child
- → The Right to Respect for Family Life includes the Right to take decisions on the Care of the Child
- → In the light of the Principle of Equality and Non-Discrimination both parents have the same Right to Decide on the Care of the Child
- → There is a **Right to Shared Physical Custody** (!)

SHARED PARENTING AND ART. 8 ECHR (5)

- But...

RESTRICTION OF JOINT PHYSICAL CUSTODY (1)

- Restrictions are possible if necessary to safeguard the Child's best Interest
- Requirements for Restrictions: Art. 8 (2) ECHR
 - In accordance with the Law
 - Legitimate Aim
 - Necessary in a Democratic Society
 - Pressing social need
 - Proportionate
- Restriction of JPC requires a negative impact on the Child's best Interest...

RESTRICTION OF JOINT PHYSICAL CUSTODY (2)

○ Requirements for Restrictions: Art. 8 (2) ECHR

- ☑ In accordance with the Law:
Legal Basis usually exists
- ☑ Legitimate Aim:
protection of the Child's best Interest
- ☐ Necessary in a Democratic Society:
 - Pressing social need:
Usually **no need**, since SPC usually is in the Child's best Interest (see: Sünderhauf, Nielsen, Kelly, Lamb,...). But exceptions in the individual case remain possible
 - Proportionate:
Balance between the interests of the parent concerned and the public interest in protecting the child is **not proportionate** (no need for protection)

➔ Restriction is **not necessary** in a Democratic Society!

RESTRICTION OF JOINT PHYSICAL CUSTODY (3)

- Minimal Consequences for national Jurisdictions/Legislations:
 - JPC must be possible against the will of one parent
 - JPC seems to be the better default solution than Single Custody (SC)
 - SC must be possible if necessary to safeguard the Child's best interest
- !Burdon of Proof that negative impact exists lies with the Authorities, Courts or the Legislator!

NEW CHILD-BASED APPROACH

- Art. 8 ECHR & Art. 3, 9, 16 and 18 UN Convention on the Rights of the Child
- If Shared Physical Custody usually is the better solution for the well-being of the Child and the Child's best interest is of paramount importance in Family issues: Why would a Legislator not adapt its national Jurisdiction to be compatible with a Shared Physical Custody? Why would he make the care solution dependent of a consent by both parents?...

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