

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN AUSTRIA

Dr. Richard Simsalik (President of the Regional Court Krems an der Donau) (richard.simsalik@justiz.gv.at)

Dr. Doris Taubel-Weinreich (family judge at the Innere Stadt Vienna District Court since 1998 and has been chairwoman of the Family Law Section of the Austrian Judges' Association since March 2007) (doris.taeubel-weinreich@justiz.gv.at)

Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on child participation in family and protection matters. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in Austria.

Key words: child participation; family law; child protection; children's rights

By defining that a specific situation concerns the child, does he/she become a party to the proceedings? Does he/she have the right to legal representation by a lawyer? Are there limits to the intervention of this lawyer in comparison with the other parties? The lawyer has an ethical duty to represent only the child's opinion, including cases where he/she does not consider the child's opinion in accordance with his or her best interests?

In such case the child becomes not automatically a party but will be heard in any case. The child as party can either ask for a lawyer or a "person of trust" (but only if the child is above 14 years of age). there are no limits for the lawyer in comparison to lawyers of other parties. The lawyer has to represent the best interest of the child and express the opinion of the child, it is up to the judge to establish if the opinion of the child is in his/her best interests.

How does the child participate in Court proceedings? Directly, in front of the judge, or through an intermediary, either the lawyer or another professional? If it is another professional, can you identify it and specify its responsibilities, please?

The child should participate personally first of all. Only if this is not possible the child can be represented by either caregiver or lawyer, sometimes a “person of trust” is assisting the child, not representing it, by making the child feel more comfortable (children between 10 and 14 will be invited mostly at an extra time, younger ones will be heard by the social services specialized for assisting children at court; or an expert; or the protection services for children. These persons are not representing the child. That can only be a lawyer assisting during the audition, but this lawyer has always to tell the will of the child, which is not always in the best interest of the child.)

If the participation is direct, is it voluntary? In this case, who consults the child if and how he/she wants to participate? Are there any institutional protocols on how to do that? Are there any informative materials specially prepared for children about its participation? Can you share it with our members?

When participation is direct, the parents have to agree until a certain age of the child (14) again; the child can have a lawyer (see above) otherwise the judge discusses with the child, explaining the situation and his/her rights. There are leaflets in child friendly language and guidelines, but only concerning the legal assistance by the above mentioned lawyer: otherwise each judge has his/her own samples

If the child does not want to participate directly, what alternatives are there in your country to ensure indirect participation? If there are doubts about what the child really wants or if his/her opinion is really expressed, what’s the solution in your country?

Indirect participation is ensured either by parents if there is no conflict of interests, otherwise by a lawyer ad litem. The child under 14 is not represented by a given person; it is the judge who has to take care of the best interest of the child. Sometimes a lawyer, as said above, can be nominated but this person cannot file claims. It is in any case the judge who evaluates the testimony / information given by the child. In case there is need, the judge can ask for an expert opinion (child psychologist)

In cases of direct participation, in what procedural phase does it take place? Is there a quantitative limit on consultation with the child? The child participates in this delimitation? How? When the opportunity to participate in the child is offered, what is the extent of options available to the child? I mean, should the child be limited to the aspects considered important by the adults or can the child bring other questions and possibilities?

The child can participate in all phases on the invitation of the judge. The judge will do his/her utmost to limit the amount of consultations to a maximum of three (certainly in penal law) if the child participates, as said above, it is the duty of the judge to explain everything in a child friendly language and to guide the child to answer the relevant questions first of all without limiting the child to any aspect.

How is the courtroom where participation takes place? And the formalities of the child's participation in front of the judge? Is the participation taking place in the regular courtroom or in the office? Who is present in the courtroom/cabinet? How are the people dressed? Can you present a photo of such an atmosphere?

During trial the participation of the child takes place in the courtroom, an usual one. If preliminary information is sought, or if no judgement has to be rendered, the office of the judge can be used. (in specific cases the place where the child lives can be used as well) present with the child in civil matters can be the parties and/or their lawyer, the caregivers (at least one) the "person of trust" if needed and court personnel. The judge will do his/her best to have all formalities fulfilled in a child friendly way trying to speak with the child at eye high. If not at trial the judge and lawyers will not have their robes but "normal" clothes. Most questionings of a child will take place in the office of the judge who will not wear the robe:

Is there a protocol on how to address questions to the child in family and child protection issues? Who developed it? Can you share it with our members? If there is not, how do you do it?

There are guidelines developed by the MoJ with the assistance of the judges association and experts. Furthermore, judges get training on how to deal

with children to a certain extent at the judges academy and later on through available training. There are special trainings for judges; based on their free decision, with the subject of the questioning of children.

Who is allowed to ask questions the child? Are the questions asked directly by the party or are they intermediated by the judge? What are the concerns adopted by the judge to avoid questions that may embarrass or violate the rights of the child? How does the debate unfold around the regularity of questions if the child is present in the atmosphere?

The questions are asked by the judge. It is the duty of the judge to decide if a question can be addressed to a child in his/her best interest. The judge can ask the parties to rephrase a question for better understanding or forbid it if the question is embarrassing or violating any right of the child. The judge will try not to discuss procedural matters in the presence of a child and keep the atmosphere as placid and friendly as possible. In case it is necessary though, the judge can state his/her decision in short and give the explanation later in writing. Concerning children below 14 years of age, the judge speaks first of all alone with the child, but he /she knows of course due to the written claims which questions father-and mother side would have and will ask them certainly. A questioning in the presence of all parties will be avoided as much as possible.

Is the decision taken in front of the child? If the child wants to, can he/she stay in the room?

The decision can be taken in the presence of the child but usually the judge will keep the child in the room only as long as is necessary procedurally. If the child wants to, he/she can stay if his/her best interests are not against.

In family matters decisions in adversarial trial will almost never been given orally; such situations would be really rare. Children above 14 years will get the decision by post, younger ones will get the information by a parent or the lawyer mentioned above.

Are there any special rules about the consideration of the child's opinion in the context of the reasons for the decision? What's the weight given to the child's opinion? Is it the age a criteria? Which one? If the child's degree of

maturity is taken into account, how is this maturity assessed? By whom? What are the criteria considered?

The opinion of the child has to be taken into consideration and is part of the reasoning. The weight given to the child's opinion depends of the maturity of the child, not of his/her age. The maturity is assessed by the judge, unless there are difficulties and an expert is necessary. It will be assessed if the child understands the issue at hand; if he/she can articulate his/her opinion; if the child is credible; if influenced by parties.

How is the decision communicated to the child? Are there any protocols for this communication? If the child has doubts or questions, is he/she allowed to speak with the judge? How do you do that?

If the child is a party, the decision will be communicated in child friendly version by the judge to the child. As far as i know there are no specific protocols for it, but there is the usual procedural protocol, showing what has happened. The child can of course ask the judge, if anything is unclear directly or via lawyer.

As a final remark it can be said that family and youth judges get special training on how to deal with children which is very effective and helpful.

Unfortunately this is not everywhere granted

Does the child have the right to appeal the decision?

Yes, if the child is a party and over 14 years old.

SUPPLEMENTARY MATERIAL

PHOTO GALLERY





