

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN SWITZERLAND¹

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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 Switzerland

Key words: child participation; family law; child protection; children´s rights; justice system; Switzerland

The right of the child to be heard and the right to assistance

The text below describes the practice of hearing children in family law proceedings and child protection proceedings of Kanton St. Gallen, Switzerland

Legal Framework:

- International level: Art 12 CRC
- Domestic level / Federal Law: Art 298 Civil Procedure Code (CPC)² (marital law), Art 314a Civil Code (CC)³(child protection), Art 9 Abs. 2 Federal Act on child abduction⁴, Art. 29/2 Constitution (Right to be heard), Art 11 Constitution (Protection of Children and Young People), Art 305 and Art 19a CC

The child shall be perceived as fully fledged holder of rights and, accordingly, be able to influence matters affecting the child. The best interests of the child must serve as primary guideline also in civil proceedings, and it should be ensured that the particular needs of children are taken into consideration

¹ Translated from German to English (with minor changes) by Ursina Weidkuhn.

² See <https://www.fedlex.admin.ch/eli/cc/2010/262/en>. Also available in French, Italian, German under the same link.

³ See https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en, also available in French, Italian, German.

⁴ See <https://www.fedlex.admin.ch/eli/cc/2009/379/en>, also available in French, Italian, German.

during such proceedings. Participation rights enable the child to actively participate, which promotes the development of the child.

By defining that such a 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 marital proceedings, the child is usually not a party to the proceedings.⁵ Since 2000, the position of the child has been upgraded to a 'involved third person', in order to consider the child's interests in the best possible way. The interests of the child must be assessed by the court automatically, and if required, the child protection authority or a child care service must be called in. If the authorities order that the child shall be assisted by a representative, then the child becomes – indirectly - a party to the process (limited to matters concerning the child).

In *marital law proceedings*, the court orders that the child shall be assisted by a representative 'if required'. The person representing the child must be a person experienced in welfare and legal matters (but not necessarily a lawyer). Whether such a representation is 'required' or not must be assessed in the light of the best interests of the child, and independently of the age of the child. According to the law, the court shall consider appointing a representative in marital proceedings in particular in the following cases (see Art 299 CPC):

- If the parents submit different applications regarding allocation of parental responsibility; allocation of custody/residence; important questions concerning their personal relations with the child; sharing responsibilities for care; maintenance payments
- If the child protection authority or one of the parents so requests

⁵ Exceptions of this rule are found in proceedings about modification of marital proceedings; and about revocation of the right to decide on the place of residence, Art 284 CPC and Art 310 CC.

- If the court has serious doubts about the parents' joint applications relating to the issues listed under the first line; or
- If the court is considering ordering protection measures for the child.

It is important to note that the child with discernment (power of judgement) can request that a representative shall be appointed; and in such a case, a representative must be appointed. Depending on the development of the child, discernment may be given at age ten; it should be assumed for a child of 12 years of age. In case of doubt, this should be verified by the court.

In *child protection proceedings*, the child protection authority orders the child to be represented 'if necessary', and appoints in such cases a person experienced in welfare and legal matters as the child's deputy. Such an appointment shall be considered in particular in the following cases (see Art 314a CC):

- If the proceedings relate to a placement of the child, or
- If the parties file differing applications in relation to regulating parental responsibility or important issues regarding their contact with the child.

If the child must be committed to a closed institution or a psychiatric hospital, the child with discernment may turn to the court directly (Art 314b CC).

The representative of the child can intervene in all matters concerning the child (allocation of parental responsibility and care; custody/residence of child; contact with parents; alimony; child protection measures), and file applications and appeals. With regard to other issues in marital proceedings (alimony for parents, marital property law), the child representative cannot intervene.

The duty of the representative of the child is to act on behalf of the child. The representative is accompanying the child, 'translator' of his/her will, and 'amplifier' of his/her voice. Prevalent Swiss doctrine qualifies the role of the representative primarily as transmitter of the carefully and thoroughly assessed opinion of the child. Needless to say, the representative of the child also has to take into consideration the well-being of the child; in cases where the child could

endanger him/herself, the representative has to be guided by the (wider) interests of the child. The representative will also flag and discuss with the child any potentially problematic wishes of the child, and inform the child that the court won't take decisions based on his/her wishes only.

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?

In both marital and child protection proceedings, the child is heard *in person* and *in an appropriate way* by the court or by a third party appointed for this purpose, "to the extent that the child's age or other good cause does not preclude a hearing" (see Art 298 CPC; 314a CC). The child with discernment can appeal against a refusal to be heard.

In a first step, the parents or (in child protection procedures) other parties are heard in person. Before hearing the child, the judge or the child protection authority must get an idea of the applications of the adults involved. It is also important to inform the adults on the planned hearing of the child, and prepare them for it. If the child is supported in this step, the child will usually accept an invitation to be heard.

The hearing of the child does not take place in a court hearing (nor in a court room, but in a normal office or a special room, see below). The hearing is conducted by the judge (who receives some special training, see below), and no other involved adults are present during the hearing. The purpose of hearing the child directly is to make the child realize that the child is a distinct human being whose voice is taken seriously, and that the child's opinion matters; the child should feel that he/she can take part in decisions concerning his/her own future.

In the Kanton of St. Gallen, all children between age 6 and 18 are heard directly in the described way. If there are indications that the petitions of the parents might not be in the best interests of the child, or if the parents have highly

diverging opinions on matters concerning the child, a more thorough assessment by an expert might be ordered additionally. A comprehensive manual for child hearings is available for judges, who in addition receive sporadic trainings on child hearings. But first and foremost, this task requires a sense for the condition of children, their concerns and needs.

Below an example of a letter inviting the child to a hearing in marital proceedings:

Dear Lotti

As you know, your parents are about to be divorced. I am involved in this matter as a judge, and I have already spoken with your parents about it. Now I would like to get to know you as well, ask you how you are doing in this situation, and what your wishes are.

I would be happy if you could visit me on Wednesday at 1400 at the court. You can go to the reception, inform them who you are, and then I will pick you up there. We would talk for about half an hour. If you prefer, your mother or your father can accompany you to the court. However, they would not participate in our meeting, as I would like to hear your personal views.

You must not be afraid, and you must not share anything that you would not like to share. Please call me in case you cannot come on Wednesday, or if you have any questions. My phone number is xxx.

With kind regards, the Judge.

The parents receive a copy of this letter. In more complex cases, a child-friendly information leaflet (see an example in the Annex) or a child-friendly brochure might be added to the letter, or handed over during the hearing.

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?

Questions around voluntariness /indirect participation/If there are doubts about what the child really wants / whether the child could express his, her opinion?

The preparatory meeting with the parents paves the way and clears up questions and insecurities on the side of the parents. If the parents support the hearing, the child will appear upon invitation. The child can call if he, she has any questions or worries. If a child calls after having received an invitation to say that he, she would not like to participate, this will be respected. During this call, the child might shortly explain why he, she would not like to come; this will be respected.

In those (few) cases where the child does not want to come to a hearing, the judge can talk about the wishes and needs of the child in an indirect way with the parents in a later hearing (if Lotti was here now, and I would ask her what the parents could additionally do to make it easier for the child to go from mother to father and vice versa, what do you think she would say?). Parents always share one thing: the love for their child. In less contentious cases, one can conclude from such indirect statements of parents whether they will consider the needs of the child in their agreements. Such an indirect hearing might not be required in cases where the parents already produced a written agreement on the consequences of the divorce which seems to consider the presumed opinion of the child. In highly contentious cases, an additional assessment by an expert will usually be required, the mandate of which would of course imply that the wishes and needs of the child are considered.

Questions around when to hear the child; duration of hearing; conditions and limitations: *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?*

The hearing of the child takes place after the hearing of the parents/concerned adults. The perceptions of the parents must first be clarified. The child is heard by the judge/child protection authority in the absence of parents or lawyers. The duration of the hearing should not exceed half an hour. There are no limitations content-wise; it is about informing the child, and about the right of the child (but not a duty of the child) to express his, her wishes in the context of the case (e.g. the divorce of the parents). It is important for the decision maker to know the opinion of the child, so that it can be incorporated in the agreement of the parents or in the order of the court/authority, even if it is often not possible to fulfill all the wishes of the child. The older the child, the more the child can co-determine the outcome. The child can expect from the hearing that the child's well-being is taken very seriously. The judge makes notes during the hearing and summarizes the content of the hearing at the end. The child has then the opportunity to make amendments, correct or delete parts of the statement. If something should not appear in the record, it will be deleted.

Questions around place of hearing, formalities, participants, cloth, picture: *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?*



The child is not heard in a courtroom, but in the office of the person who is hearing the child (see picture attached), or in a special room that is suitable for children. Crayons and drawing paper are available, for smaller children maybe a story-book in addition, so that the children feel as well as possible. It is ensured that the hearing does not interfere with school-time. The person hearing the child (judge or child protection authority) is wearing no gown or wig, but dressed like a 'normal' adult person who is going for work. This brings a bit of normality for a child in a situation that is away from daily routine.

Questions around how to hear the child: *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?*

In the Kanton St. Gallen, a comprehensive guide for child hearings has been developed, following up on a workshop that was conducted which judges, child protection authorities and child psychologists (*the undersigned tries to get permission for sharing it*).

Rough description of how a child hearing takes place: The judge/the child protection authority shortly introduce themselves. The child is informed that his/her statement will be summarized at the end, and that the parents are allowed

to read it. The child is informed that he, she may call the judge/authority after the hearing again, if wanted. Short description of what this is about (e.g. parents not in agreement about whether the child should live with the mother or the father; or the parents are in agreement, but the opinion of the child should be heard, in addition). Let the child talk about his/her daily routine, life situation, siblings, school, spare time. Ask the child what kind of thing he, she likes to do with the mother; what kind of things he, she likes to do with the father; and what are the wishes of the child for the future (smaller children have not yet clear ideas about their future, but juveniles have). Ask smaller children what could be changed in the current situation to ensure he, she feels well. Details can be important, e.g. pets, who brings the child to sports class, how the child can visit his, her friends, grandparents, godparents.

Helpful questions.

- What do you like doing with your father? What do you like doing with your mother?

- How is it when you go from the mother to father (and vice versa)? How you do go there?

- What should your parents in any case consider / not forget?

- What would be the best solution for you? What would be the second-best?

- If you could perform magic, or had 3 wishes...?

If the child does not want to talk, the child can be told that some children who are in a similar situation feel lonely, or guilty; inform that it is never the fault of the child when parents separate; that the love between child and parents never stops; that the child will be sometimes with the mother, sometimes with the father; two children's rooms, twice Christmas....; ask the child about his/her needs; about his/her ideas.

Important: never ask the child directly whether the child would prefer to stay with the mother or with the father! The child will either say this spontaneously, or not say anything in order to not disappoint anyone (conflict of

loyalty, which would be normal for children up to about 12 years of age).

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?

Only the person hearing the child (judge or child protection authority) may ask questions, and the person is alone with the child. The adult parties are not present. Hearings are usually conducted as described above, which avoids that the child feels embarrassed, or that his/her rights could be violated. Situations similar to cross-examination or strategic questions are prohibited. Questions shall be open-ended and adequate. To be heard is a right of the child, and the hearing should strengthen the position of the child.

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

Responsible for the decisions are the court/the child protection authority and the participating adults. The child is not present at this moment. The decision is taken after the hearing of the child has been analyzed (after which the parents might be heard again), and not on the same day as the child hearing. Depending on the circumstances, some time may elapse between child hearing and decision making.

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 decision of the court is based on all circumstances that are relevant for the well-being/best interests of the child. Not only the petitions of the parents, but also the opinion of the child must be taken into consideration. The Federal

Court held with regard to the allocation of custody/residence that the wish of the child should be considered if it is a manifestation of a particular inner bond with a parent, and if this request is - based on the age and development of the child - well established and not just based on a desire for more freedom or material benefits. The maturity of the child is linked with the child's power of judgement. It is generally assumed that the child reaches discernment / power of judgement at age 12. A well-established will of the child should first be discussed with the parents, to enable them to amend or change their agreements concerning the child accordingly (the purpose of a child hearing is not to unburden the parents on the costs of the child). If the parents fight for the child, a child hearing can become a catalyst for positive developments. The worries of the child address the parents on a deeper emotional level.

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?

According to Art 301 CPC, notice of the decision is given to the child who is at least 14 years old. The law sets thus an age limit, but it is suggested to apply the same rule to younger children who seem to have reached discernment / power of judgement, according to the assessment of the hearing judge. By informing the child on the outcome of a case, the message is conveyed that the child is perceived (and treated) as rights holder. The parts of the decision that affect the child directly are communicated to the child by the judge in a letter to the child. In this letter, the child is also offered to call the judge in case the child has doubts or questions.

Does the child have the right to appeal the decision?

If the child is assisted by a representative, the decision is communicated to the representative, who will then inform the child on the decision and discusses with the child in a child-adapted way whether or not to appeal the decision.

If the child is not assisted by a representative, but has discernment/ power of judgement, the child is usually not able to exercise his, her rights alone effectively. If the child has, at an earlier stage, been informed on his, her right to

be assisted by a representative, but the child waived this right, then the child has no right to appeal the decision. If the child was not informed on this right, then the child must be granted the right to appeal. In such a case, a representative will be called in for the appeals procedure.

Annex: Example of child-friendly leaflet

What *may* a child?

When parents get divorced, children are concerned. The child **may tell** the judge tell **his/her opinion**, if the child wants to do so.

The child will be invited for a talk. This is called a **child hearing**. It does not take place in a court-room, but in an office. The child can **just go there**. If the child has questions, the child **may call** in advance.

Maybe the child **would rather not go** to this talk. Maybe the child is afraid, or the child does not want to talk to anyone about his/her worries and wishes.

However, it's **mostly much better for the child** if the judge can get to know the child and learn from the child what is important for the child. How the child feels at home and in his/her environment; where the child lives; what the child likes doing with the mother, what the child likes doing with the father, and whether the child has ideas about what the parents could do to make things a bit lighter, better for the child.

The child **may** also say when he, she **does not want to tell** something. This will be respected.

The judge takes notes of what the child is telling the judge. The judge asks the child whether the judge may tell the parents what the child told the judge. It can help parents when they are aware about the ideas and wishes of the child. They can then find better solutions, because both love their child. There is never a divorce between parent and child; not even not when parents do not stay together anymore.

The child **may** tell the judge if something the child said should not be written in the summary that will be shared with the parents. That part will then be **deleted**.

The child **may expect** from the court that the court **takes the child's well-being very serious**. The judge will talk with the parents and look for the best solution for the child together with the parents. If the parents don't agree, three judges will decide.

If the parents do not agree about where the child shall live and go to school, and how often the child shall see the parent with whom the child is not living, and if this fight goes on for some time and burdens the child, then the child **may** wish to have **his/her own representative**. This person is called the **child's representative**. The judge will examine the wish of the child.

The older the child, the more the child **may co-determine and have a say**. Where the child wants to live, how often the child wants to see the other parent.

A child has not only rights, but also **duties**. The child shall consider and respect the parents.