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AN OVERVIEW ON VISITATION RIGHTS OF PARENTS IN INTERNATIONAL, EUROPEAN AND AUSTRIAN LAW

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1. INTRODUCTION

„Children begin by loving their parents; as they grow older they judge them; sometimes they forgive them.“

Oscar Wilde

Divorces and separations where children are affected always cause emotional stress for all parties. One parent will move out or has already moved out and the once called “home” is now a single-parent family. Regarding their children parents have to decide sooner or later where the children will live, on the amount of subsistence, on care and custody and on how often the non-residential parent is allowed to see the children. Our paper deals only with the last questions, namely with visitation rights of parents.

If the parents are unable to find a mutual agreement regarding visitation rights, it will be up to the court to settle the dispute. Especially with regard to infants and younger children a decision needs to be made urgently in order to prevent an alienation from the non-residential parent. However, when the court must be involved, the situation between the parents has often become highly conflicted. Both parents appear to act in the child's best interests and to know how visitation rights should be exercised. Once the parents are hardened against each other it is very difficult for the court to establish the true facts and to render a decision fast. After all, the court has not to deal solely with a simple legal question as the execution of the visitation rights plays a decisive role in the development of the parent-child-relationship. Therefore, the court faces particular challenges as it has to consider emotional, educational and psychological aspects as well.

In our paper we deal with the fundamentals of visitation rights in international and European law. Following this, we will give an insight in the Austrian legal system on visitation rights and introduce you to some particular Austrian features, which play a major role in the decision-making process and may be an innovative approach for other countries. At the end we review critically the current legal situation and offer perspectives on topics which may concern other European states as well.

2. ABBREVIATIONS

ABGB	Austrian civil code
Art	Article
AußStrG	Austrian code on non-contentious matters
Brussels IIa	Regulation Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
cf.	compare
e.g.	example given
ECHR	European Convention on Human Rights
EctHR	European Court of Human Rights
ECJ	European Court of Justice
EF-Z	*Zeitschrift für Familien- und Erbrecht*
i.e.	id est
iFamZ	*Interdisziplinäre Zeitschrift für Familienrecht*
LG/LGZ	Regional civil court (*Landesgericht für Zivilrechtssachen*)
OGH	Austrian Supreme Court (*Oberster Gerichtshof*)
pub.	Publisher
Rz	Marginal number
TFEU	Treaty on the Functioning of the European Union

3. RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE UNDER THE ECHR

According to Art 8 ECHR and the identical Art 7 of the Charter of Fundamental Rights of the European Union *"everyone has the right to respect for his private and family life […]"*. The existence or non-existence of "family life" is a question of fact, basically depending upon the existence of personal ties.[1] "Family life" is not confined solely to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together outside marriage.[2] A child born out of such a relationship is *ipso iure* part of that "family" unit from the moment and by the very fact of his birth.[3] A mere blood relationship/biological kinship between a natural parent and child is not sufficient to be qualified as existing "family life" under Art 8 ECHR.[4] However, if the non-existence of a "family life" is not attributable to the biological parent, an "intended family life" may also falls in the ambit of Art 8 ECHR.[5]

Within the above described scope, the visitation right falls within the ambit of Art 8 ECHR and is, thus, an acknowledged right of man.[6] Although in principle this right concerns the relationship between family members, third parties are obliged to respect this right and may not interfere in the family life of others.[7] Third persons may only have visitation rights, if strong personal/emotional

1 EctHR L. v. The Netherlands, Judgement of 1 June 2004, Application no. 45582/99; EctHR Nylund v. Finland, Judgement of 29 June 1999, Application no. 27110/95.

2 EctHR Hoffmann v. Germany, Judgement of 11 October 2001, Application no. 34045/96; EctHR Keegan v. Ireland , Judgment of 26 May 1994, Application no. 16969/90.

3 EctHR Hoffmann v. Germany, Judgement of 11 October 2001, Application no. 34045/96; EctHR Keegan v. Ireland , Judgment of 26 May 1994, Application no. 16969/90.

4 EctHR Anayo v. Germany, Judgement of 21 December 2010, Application no. 20578/07; EctHR Nylund v. Finland, Judgement of 29 June 1999, Application no. 27110/95; *Ao. Univ.-Prof. Dr. Lamiss Khakzadeh-Leiler*, iFamZ 2014, 96.

5 EctHR Anayo v. Germany, Judgement of 21 December 2010, Application no. 20578/07; *Khakzadeh-Leiler*, Das KindNamRÄG 2013 aus grundrechtlicher Perspektive Obsorge- und Kontaktrecht sowie verfahrensrechtliche Aspekte, iFamZ 2014, 96.

6 RIS-Justiz RS0047754.

7 *Thoma-Twaroch*, Keine Durchsetzung des Besuchskontakts gegen den Hort (als Dritten); Durchsetzung gegenüber der Mutter nach § 110 AußStrG Kontaktrecht, iFamZ 2013/214.

ties between the third person and the child exist.[8]

Under Austrian law the child has the constitutional right of contact with both parents.[9]

An interference with visitation rights is according to Art 8 ECHR only permitted, if the interference is "*in accordance with the law and is necessary in a democratic society in the interests of […] for the protection of health or morals, or for the protection of the rights and freedoms of others*" (including the child). Under Austrian law, an interference in visitation rights is allowed, if it is in the best interests of the child.[10]

Whether an interference is justified or not must be decided in each case individually. However, the EctHR considers a stricter margin of appreciation, if the national limitations effectively curtail family relations between the parents and a young child.[11]

4. EUROPEAN LAW

4.1. BRUSSELS IIA REGULATION

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIa Regulation), applies in all member states of the European Union with the sole exception of Denmark (Art 2 Brussels IIa Regulation). According to Art 1 Sec 2 lit b civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility, explicitly also include rights of custody and rights of access. Thus, visitation rights are captured by definition by the scope of application of this regulation.

As any other regulation, the Brussels IIa Regulation enjoys precedence of application in EU member states (except Denmark) and is directly applicable (Art 288 TFEU).

8 *Khakzadeh-Leiler*, Das KindNamRÄG 2013 aus grundrechtlicher Perspektive Obsorge- und Kontaktrecht sowie verfahrensrechtliche Aspekte, iFamZ 2014, 96.

9 Art 2 Federal Constituion regarding the Rights of Children (*Bundesverfassungsgesetz über die Rechte von Kindern*) BGBl. I. Nr. 4/2011.

10 Art 2 Federal Constituion regarding the Rights of Children (*Bundesverfassungsgesetz über die Rechte von Kindern*) BGBl. I. Nr. 4/2011.

11 EctHR Hoffmann v. Germany, Judgement of 11 October 2001, Application no. 34045/96; EctHR Elsholz v. Germany, Judgement of 13 July 2000, Application no. 25735/94.

The Brussels IIa Regulation does not contain any rules of substantive law. With regard to visitation rights the following provisions are of relevance:

4.1.1. INTERNATIONAL JURISDICTION

In general, the courts of a member state shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that member state at the time the court is seized (Art 8 Brussels IIa Regulation). The "habitual residence" of a child must be established on the basis of all the circumstances specific to each individual case.[12] Criteria that must be taken into consideration are e.g. the (not only temporary) physical presence of the child (duration), conditions and reasons for the stay, degree of integration (in the social and family environment), the child's nationality, the place and conditions of attendance at school, linguistic knowledge.[13] Art 9 and 10 Brussels IIa Regulation state exceptions from this general rule, if the child moves or is abducted.

4.1.2. AUTOMATIC RECOGNITION AND ENFORCEMENT OF VISITATIONS RIGHTS

An enforceable judgment regarding visitations rights given in a member state shall be recognized and enforceable in another member state without the need for a declaration of enforceability and without any possibility of opposing its recognition (Art 41 Sec 1 Brussels IIa Regulations). An important condition for the automatic recognition and enforcement is that all parties concerned were given an opportunity to be heard, which includes the concerned child, unless a hearing was considered inappropriate with regard to the age or degree of maturity (Art 41 Sec 2 Brussels IIa Regulations). Further requirements must be fulfilled for judgments given in default (Art 41 Sec 2 lit a Brussels IIa Regulations). If these procedural standards are not complied with, a direct recognition is not possible. Although not mentioned directly in the Brussels IIa Regulations, the enforcing court is allowed to object the recognition/enforcement due to non-compliance with public policy as enforcement procedures are subject to the law of the state in which enforcement is sought. For example, in Austria it is not permissible to remove a child from one of its parents in order to enforce visitation rights. Therefore, stricter means of enforcement may not be enforced by those member states with reference to public policy/unconstitutionality.[14]

12 EJC C-523/07.

13 EJC C-523/07.

14 *Thoma-Twaroch*, Grenzüberschreitende Ausübung des Besuchsrechts, Studie, 2010.

4.1.3. PRACTICAL ARRANGEMENTS FOR THE EXECUTION OF VISITATION RIGHTS

With regard to the direct recognition of visitation rights the enforcing court could make practical arrangements for organizing the execution of visitation rights, if the necessary arrangements have not (sufficiently) been made in the judgment to be enforced (Art 48 Sec 1 Brussels IIa Regulation). These practical arrangements shall cease to apply pursuant to a later judgment by the courts of the member state having jurisdiction (Art 48 Sec 2 Brussels IIa Regulation).

4.2. ALTERNATIVE VISITATION RIGHTS CONCEPTS

In order to compare the Austrian system to other countries, we have picked three European countries with – in our view – interesting or surprising regulations regarding visitation rights:

4.2.1. BELGIUM

As a general principle after a divorce the judge must explore, whether the right of custody can be exercised by both parents on equal terms, meaning that the child should reside (alternating) with both parents for the same amount of time. Thus, the child lives with both parents and therefore it is not necessary to deal with visitation rights. If the court is of the opinion that a "fifty-fifty residence" is not suitable in the individual case, the judge can rule otherwise. However, such an judgment must state the reasons for such a decision . This provision was initiated by a discussion regarding gender equality, as politics noticed that mothers were generally privileged regarding custody rights.[15]

4.2.2. SLOVENIA

The most important maxim is the best interests of the child. Thus, the child has to be heard and its will and desires must be taken into consideration. The parents are obliged to act loyal, which means they not only have to neglect all measures that inflict the visitation right of the other parent, but have also to support the visitation rights, e.g. to smooth (psychic) resistance of the child against the visitation. A violation of these obligations can be sanctioned with the deprivation of visitation rights and/or custody rights. Regarding the visitation rights a court may only decide once the parents have unsuccessfully tried to find a mutual agreement with the help of social service.[16]

4.2.3. CZECH REPUBLIC

In case of restriction of custody rights, the courts of the Czech Republic must mandatory check, whether not only the custody rights, but also the visitations rights of this parent should get

15 *Bergmann/Ferid/Henrich*, Internationales Ehe- und Kindschaftsrecht (BFH Online), Belgien III.A.7.c.

16 *Bergmann/Ferid/Henrich*, Internationales Ehe- und Kindschaftsrecht (BFH Online), Slowenien III.A.7.d.

restricted. In case of deprivation of custody rights, the court must explicitly grant this parent visitation rights, if this lies in the best interests of the child. The court can exclude certain persons or determine specific conditions regarding the execution of visitation rights. The person having the care and custody of the child has certain obligations, like preparing the child for the visit or to cooperate with the visiting parent. A violation of these duties may be a reason for a new court decision with respect to child custody.[17]

5. AUSTRIAN LAW

5.1. AGREEMENTS AND DECISIONS REGARDING VISITATION RIGHTS

In Austria the legal position of children differs with respect to their age. The law defines three groups of underage persons: persons under 7 years are not legally competent at all ("children"), underage minors (7 years – 14 years) and children of the age of consent (14 years – 18 years/age of majority).[18]

Primarily, visitation rights are regulated by specific consensual agreements stipulated by the parents without any interference of the court. Parties of such agreements would be the child and both parents. A child of the age of consent doesn't need a representative for such agreements. Depending on its ability to reason and its power of judgment also an underage minor can be involved in such an agreement.[19]

In case of a consensual divorce parents must have agreed upon the extent of the visitation right of the parent that will live separated (non-residential parent) before the divorce may be carried out. This way conflicts after the divorce are obviated.[20] Within a contentious divorce visitation rights don't get regulated at all.

Although in practice it is very common to agree upon a consensual solution, it must be considered that an agreement, which is not made in front of the court is not binding and conclusive. Regarding visitation rights in principle only a decision rendered by the court or an agreement made

17 *Bergmann/Ferid/Henrich*, Internationales Ehe- und Kindschaftsrecht (BFH Online), Tschechische Republik III.A.7.

18 § 21 ABGB; § 865 ABGB.

19 *Fischer-Czermak* in *Kletečka/Schauer,* ABGB-ON[1.03], § 187 Rz 10 (Stand 01.03.2015, rdb.at).

20 *Beclin*, Neuerungen im Obsorge- und Kontaktrecht durch das KindNamRÄG 2013, 81, in *Deixler-Hübner/Deixler* (pub.), Kindschafts- und Namensrechts-Änderungsgesetz (2013).

in front of the court is enforceable (§ 110 Abs 1 Z 2 AußstrG).[21] Thus, the parties always have the possibility to propose a motion to have the visitation rights settled by court, if this serves the child's needs better.[22] The court can only act *ex officio* if the well-being of the child is endangered.[23]

The guiding principle for decisions and agreements regarding visitation rights is the maintenance/realization of the best interests of the child. Parents and also courts have to accept the dominate role of the child's best interests.[24]

5.2. OBLIGATION TO HEAR THE CHILD

According to § 105 Abs 1 AußStrG every child has to be heard by the court in law suits concerning care, parenting and visitation rights. Hearing a child allows the court to consider the wishes of the child depending in consideration of its age. Thereby the court examines if the minor has been influenced somehow or if the child's statement expresses its own interests and wishes.[25]

Interviewing a child under the age of ten is mainly supposed to ascertain its attitude towards the questions to be cleared. This way the court can understand the circumstances from the child's view. Furthermore the child gets informed about the stand of the trial.[26]

While the testimony of an underage minor serves only as evidence within the trial, children of the age of consent do have a legal standing, and therefore have a right to be heard.[27]

According to § 105 Abs 1 AußStrG interviewing a child counts to the duties of the guardianship court. Interviewing children over the age of ten falls in the exclusive competence of the court. With respect to children under the age of ten, the court can always instruct other persons or institutions to interview the child.[28] However, irrespective of the age of the child, interviewing the child by a third person, i.e. not the person responsible for the decision, is only permitted, if particular circumstances

21 *Fischer-Czermak* in *Kletečka/Schauer,* ABGB-ON1.03,§ 187 Rz 10 (Stand 01.03.2015, rdb.at).

22 *Beclin,* Neuerungen im Obsorge- und Kontaktrecht durch das KindNamRÄG 2013, 80.

23 *Fischer-Czermak* in *Kletečka/Schauer,* ABGB-ON[1.03],§ 187 Rz 11 (Stand 01.03.2015, rdb.at).

24 *Fischer-Czermak* in *Kletečka/Schauer,* ABGB-ON[1.03],§ 187 Rz 3 (Stand 01.03.2015, rdb.at).

25 *Beck* in *Gitschthaler/Höllwerth,* Kommentar zum Außerstreitgesetz, AußStrG § 105 Rz 13 (Stand 1.11.2013, rdb.at).

26 *Beck* in *Gitschthaler/Höllwerth,* AußStrG § 105 Rz 13 (Stand 1.11.2013, rdb.at).

27 *Beck* in *Gitschthaler/Höllwerth,* AußStrG § 105 Rz 3 (Stand 1.11.2013, rdb.at).

28 *Beck* in *Gitschthaler/Höllwerth,* AußStrG § 105 Rz 14, 15 (Stand 1.11.2013, rdb.at).

require it,[29] like the child's well-being would be endangered or because of a lack of the capability for understanding (§ 105 Abs 2 AußStrG).

There is no need to conduct a hearing in order to interview a minor. Usually it is in the child's interest to do the interview outside of an oral proceeding (§ 20 AußStrG). A child should not be heard in the presence of its parents in order to avoid emotional burden and mental overload of the child. The focus of the interview really should be on the child and its interests, but not on the arguments of the parents.[30]

The jurisdiction takes the view that children under the age of four should not be interviewed, because they are not capable to make a considered statement.[31] Children between the age of five and six should only be interviewed, when it is important for the court to make its decision.[32] Children between eight and ten years are – according to constant jurisdiction of the OGH – able to express their opinion accurately.[33]

The court is allowed to desist from hearing a minor, if the child's well-being is endangered, either directly through the hearing or the delay, that is caused by a hearing. That would be the case, when there were suspicions of child abuse, where fast actions are necessary.[34] Hearing the child should also be avoided, when it would lead to a conflict of loyalties for the child harmful for its development.[35] This doesn't mean, that the hearing has to remain completely undone, but rather, to perform it oriented by the child's well-being. So questions, that give the child the impression, it has to chose somehow between its parents, must not be asked at any costs.[36]

Anyhow there is no court settlement to be declared, when a child at the age of consent refuses to visit its parent. The court has to try to come to an amicable settlement and can even offer

29 *Beck* in *Gitschthaler/Höllwerth, AußStrG* § 105 Rz 16 (Stand 1.11.2013, rdb.at).

30 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 105 Rz 21 (Stand 1.11.2013, rdb.at).

31 OGH 5 Ob 272/03s, OGH 6 Ob 2/11d.

32 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 105 Rz 28 (Stand 1.11.2013, rdb.at).

33 LG Linz, EF 122.255; LGZ Wien, EF 81.041.

34 LG Salzburg, EF 118.889.

35 RIS-Justiz RS0119597.

36 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 105 Rz 30 (Stand 1.11.2013, rdb.at).

the child mediation. Do these efforts stay unsuccessful, the motion has to be denied.[37]

5.3. CHILDREN ADVISOR (KINDERBEISTAND)

According to § 104a Abs 1 AußStrG an advisor for an underage minor has to be appointed in lawsuits concerning custody or the right of visitation, if it is – under the aspect of the intensity of the dispute – required to support the child. In case of particular need and with the approval of the child, such an advisor can also be appointed for a child over the age of fourteen up to the age of sixteen. It is required though, that the court has someone qualified on hand. Examples, where the need of an advisor is indicated are e.g. parents not being able to agree upon visitation rights at court and unwilling to try mediation in order to find a solution. Basically, a children advisor is required because usually a child is under massive emotional drain during its parents dispute.[38]

A children advisor is appointed *ex officio*. Neither the parents nor the child have a right of motion. They only can suggest the appointment of a children advisor, however, these suggestions are not subject to a formal court decision. So if no advisor is appointed, there is no legal remedy against this decision.[39]

Advisors are selected by the court. However, the court can only appoint persons that are listed by the Federal Ministry of Justice (§ 104a Sec 1 AußStrG). Only psychologists and pedagogues can be named as advisor of a child. The advisor has to have several years of relevant professional experience with minors and broken homes. He/she also needs to be at the current state of research/knowledge regarding the (psychological) burden of a child with a divorce. In general, the requirements to be named as an advisor are very strict.[40]

An advisor should be appointed as soon as possible in order to evade early escalations and support the child. The appointment of an advisor can be fought by the parties with an appeal. In principle, the decision to appoint a children advisor is only binding and enforceable after it has become final, but the court can state that despite legal remedies the decision is binding and enforceable, if otherwise a significant disadvantage for the child is possible (§ 44 AußStrG). An advisor can be declined in cases of a close relationship to one of the parties or some other reason to

37 *Fischer-Czermak* in *Kletečka/Schauer,* ABGB-ON[1.03], § 187 Rz 13 (Stand 01.03.2015, rdb.at).

38 *Barth/Gröger,* Das neue Kinderbeistand-Gesetz im Überblick: Bestellung - Einsatzbereich - Rechte und Pflichten - Dauer - Finanzierung, iFamZ 2010, 221.

39 *Barth/Gröger,* Das neue Kinderbeistand-Gesetz im Überblick, iFamZ 2010, 221.

40 *Barth/Gröger,* Das neue Kinderbeistand-Gesetz im Überblick, iFamZ 2010, 221.

doubt the independence.[41]

According to Austrian law the advisor himself is not a party of the court proceedings. This means that he or she has no right of appeal against a decision. The advisor should orientate his professional actions only by the wishes of the child. He gives the child a "voice" in the proceedings and is supposed to do so, when the child wants to express itself in front of the court. This way the child gets the chance to talk about its own needs and conflicting wishes. The advisor takes only the will of the child into consideration in order to somehow give the parents a "wake-up call". Still, the advisor is obliged to confidentiality towards the child. He or she can only talk with the child's parents within the agreement between the child and the advisor.[42]

The appointment of an advisor doesn't influence the courts obligation to hear the child.[43] Of course the advisor is allowed to attend all hearings. He or she has the right to inspect the court's files and all motions/written pleadings must be sent to him or her as well.[44] His or her appointment ends with the final judgment.[45]

5.4. FAMILY AND YOUTH COURT COUNSELING SERVICES (FAMILIEN- UND JUGENDGERICHTSHILFE)[46]

In visitation rights proceedings the principle of establishing the truth applies *ex officio*; the court is not bound by the arguments adduced or evidence produced by the parties, but has to examine all facts and circumstances for the decision *ex officio* (§ 16 Abs 1 AußStrG). Besides, the court must endeavor to reach an amicable solution at all stages of the proceedings (§ 13 Abs 3 AußStrG). In order to comply with these principles the courts have to perform a balance act where an emphatic approach to the parents and keeping distance to avoid an appearance of bias must be aligned. Furthermore, it is crucial that the judge in charge has sufficient psychological and pedagogical skills to assess the child's best interests.

41 *Barth/Gröger*, Das neue Kinderbeistand-Gesetz im Überblick, iFamZ 2010, 221.

42 *Barth/Gröger*, Das neue Kinderbeistand-Gesetz im Überblick, iFamZ 2010, 221.

43 *Fucik*, Kinderbeistand und Kindesanhörung Differenzierung nach Fallgruppen, iFamZ 2010, 229.

44 *Fucik*, Kinderbeistand und Kindesanhörung Differenzierung nach Fallgruppen, iFamZ 2010, 229.

45 *Barth/Gröger*, Das neue Kinderbeistand-Gesetz im Überblick, iFamZ 2010, 221.

46 Konsolidierter Erlass zur Familiengerichtshilfe vom 27. November 2015 des Bundesministeriums für Justiz, BMJ-V319.00/0065-III 4/2014 (Consolidated Decree on the Family and Youth Court Counseling Services of November 27, 2015 of the Federal Ministry of Justice).

To meet these challenges the Family and Youth Court Counseling Services were installed at every district court in Austria in 2015. Employees of the Family and Youth Court Counseling Services are social workers, psychologists and educationalists. Family and Youth Court Counseling Services are directly located in the courthouses and are part of the judicial system. On the contrary to youth welfare offices the Family and Youth Court Counseling Services have no executive power and are subject to directives of the court; they are a mere – but highly effective - auxiliary for family courts.

The scope of duties of the Family and Youth Court Services comprise clearing tasks, gather information for a better basis for decision-making, provide professional opinion and assist at monitored exchanges (see 5.4.3.).

5.4.1. CLEARINGS

Normally clearings are ordered by the court in the beginning of visitation rights proceedings. The main aim is to reach an amicable settlement, but also to clarify the circumstances of the case for the further proceedings. Therefore, employees of the Family and Youth Court Counseling Services meet with the parents – and if necessary or ordered by the court also with the child – without presence of the judge in charge. If no amicable settlement can be reached, the employees of the Family and Youth Court Counseling Services provide the requesting court with a report containing a statement of facts of the parents and – if feasible – the child and a recommendation for further measures, e.g. family counseling, mediation, educational domestic advice.

5.4.2. GATHERING INFORMATION FOR THE DECISION-MAKING

The court can instruct the employees of the Family and Youth Court Services to conduct specific surveys to obtain further information, e.g. inquiries at schools, kindergarten or home visits.

5.4.3. MONITORED EXCHANGE OF THE CHILD

In cases where it is established, that the contact between the parent applying for the visitations and the child is in the best interests of the child, employees of the Family and Youth Court Counseling Services can assist in monitored exchanges of the child even before a (final) decision is rendered. The employees monitor the handover and return of the child and focus particularly on the behaviour of the parents towards each other and towards the child. At the same time they observe the behaviour of the child before and after the visitation. Subsequently the employees provide the court with a detailed report on their perceptions of the exchange. For the first five months of visitation rights proceedings this particular service is free. Following the initial five-months period

the monitor exchange services cost currently EUR 210 for another three months. A continuous supervised visitation is not the task of the Family and Youth Court Services.

5.5. CHILDREN AND YOUTH ADVOCACY (KINDER- UND JUGENDANWALTSCHAFT)[47]

Based on federal law every federate state in Austria is obliged to install a Children and Youth Advocacy. They advise children, juveniles, parents and other custodians in all matters concerning children and juveniles as well as parental responsibilities.

The scope of their tasks comprises further to provide assistance in conflicts between parents and their children, but also public relation activities in child and juvenile related matters. Furthermore they represent the interests of children and juveniles in legislative processes and collaborate with national and international institutions.

The Children and Youth Advocacy offers their services free of charge and works – on the contrary to the Family and Youth Court Services and youth welfare offices – independently.

5.6. EXECUTION AND ENFORCEMENT OF VISITATION RIGHTS

Sometimes the residential parent prevents the execution of a binding agreement or decision regarding visitation rights or is unwilling to let the non-residential parent exercise the visitation rights without the presence of a third person. In order to enforce or execute visitation rights the court has the following options:

5.6.1. REMOVAL OF THE CHILD

The most straightforward solution would be removing the child from the residential parent. However, the removal of the child in order to enforce visitation rights is not permissible under Austrian law.[48]

5.6.2. ENFORCEMENT OF VISITATION RIGHTS WITH FINES IN AUSTRIA

In order to enforce agreements and decisions on visitation rights in Austria, mostly fines are inflicted. The court order of a fine does not require a prior warning. But if there has been a prior warning and in this warning a concrete amount of a fine was stated, the imposed fine hereafter must not exceed this announced amount.[49] The amount of the fine is depending on manner and length of

47 cf. § 35 Bundes-Kinder- und Jugendhilfegesetz 2013.

48 *Thoma-Twaroch*, Grenzüberschreitende Ausübung des Besuchsrechts, Studie, 2010; *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 110 Rz 59 (Stand 1.11.2013, rdb.at).

49 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 110 Rz 36 (Stand 1.11.2013, rdb.at).

the violation of duty. The fine is supposed to be a burden to the parent.[50] Austrian jurisdiction lately tends to award penalties between € 200 and € 500.[51] Even though the Austrian law knows of a coercive detention for the violation of duties concerning the performance of visitation rights and fines stay unsuccessful, but in practice it is not reasonable to order it to the residential parent.[52]

In cases of persistent violation of visitation rights and if the imposition of fines was unsuccessful, under the law, there is the possibility of taking the parent into custody. However, this usually does not lie in the best interests of the child. Consistent to the principle that the well-being of the child has top priority, an agreement regarding visitation rights can not be enforced against the best interests of the child.[53]

5.6.3. SUPERVISED VISITATION

Once it is determined, that the personal contact between the non-residential parent and the child is in the best interests of the child, the court has to establish how the visitations will be executed. In general the contact between a visiting parent and a child should take place without third persons involved (including the residential parent) and without being specific to a certain location. This in order to allow the non-residential parent to shape the contacts individually and to develop a personal relationship in a normal environment. Only if the child's well-being requires the presence of a third person during the visitation, the court can order supervised visitations.[54] This for instance is the case where an abuse of the visitation right or an endangerment of the welfare of the child is feared; nevertheless, abstract fears, differences between the parents or unresolved grief or anger due to the separation do not justify supervised visitations.[55]

The underlying idea of supervised visitation is that due to the particular form of the execution visitation rights become more feasible and receive approval of the residential parent.[56]

Primary objective of supervised contacts is the establishment respectively the restoration of a

50 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 110 Rz 37 (Stand 1.11.2013, rdb.at).

51 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 110 Rz 38 (Stand 1.11.2013, rdb.at).

52 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 110 Rz 44 (Stand 1.11.2013, rdb.at).

53 OGH 7 Ob 8/09s.

54 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 3 (Stand 1.11.2013, rdb.at).

55 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 3, 12 (Stand 1.11.2013, rdb.at).

56 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 7, 8 (Stand 1.11.2013, rdb.at).

parent-child-relationship. Additionally after some time both parents should become able to cooperate with each other, act in the interests of the child and reach a mutually acceptable agreement regarding visitations.[57] Basically, supervised visitations should be exercised for a restricted period of time and are not to become a durable solution.

The person of the supervisor firstly has to be proposed to the court by the applying parent. However, the court is not bound by this recommendation and can present an alternative suggestion. If this alternative suggestion is not accepted by the parent and he or she does not agree on another person either, the motion for visitation has to be dismissed.[58]

In general any „qualified" person can be appointed as a supervisor; there are no special skills or education legally required.[59] The supervisor can be a third person or even a family member, if both parents agree on this person. Also certain facilities – especially "Visitation Cafés" (see below) can assume the duties of a supervisor.

In practice "Visitation Cafés" (*Besuchscafé*) are the rule and the appointment of a third person as a supervisor is the exception. "Visitation Café" offer the visiting parent the possibility to meet the child on neutral grounds under supervision of expert personnel. The courts often request reports on the course of the supervised visitations from the "Visitation Cafés" and take them into consideration in further visitation rights proceedings.

When the court makes an order about supervised visitations, it must not only appoint the supervisor, but also has to outline the scope of his or her activities and set out the number and duration of the supervised visitations.[60] The definition of the exact terms and times can be left open in order to provide the supervisor with more flexibility for the execution of the visitations.[61]

Besides the permanent supervision during the visitations there is also the possibility of monitored exchanges (see 5.4.3.) by a supervisor. In this form, the supervisor usually picks up the child from the residential parent, brings the child to the non-residential parent and later returns the child, but is not present during the visitation.

The supervisor is not entitled to impose sanctions on the parents if they prevent the execution of

57 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 9 (Stand 1.11.2013, rdb.at).

58 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 43 (Stand 1.11.2013, rdb.at).

59 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 45 (Stand 1.11.2013, rdb.at).

60 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 53, 54 (Stand 1.11.2013, rdb.at).

61 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 59 (Stand 1.11.2013, rdb.at).

the visitations. On the other hand the supervisor cannot be forced to fulfill his/her duties by the court or the parents. [62]

5.7. CRITICS AND PERSPECTIVES – ROOM FOR IMPROVEMENT?

In Austria family law is subject to constant alteration. Although there are many facilities and services within the Austrian legal system which clearly have made a decisive contribution to the acceleration of visitation rights proceedings, to the reduction of emotional strain of the involved parties and also to the simplification of decision-making, one questions remains: Can we do better?

5.7.1. COSTS OF SUPERVISED VISITATIONS

Contrary to the legislative intent, namely to order supervised visitations generally in exceptional cases only, in practice decisions regarding visitations rights show the tendency to order supervised visitation also in doubtful cases or as a precaution and to await the further course.[63] However, it must be taken into consideration that the costs of supervised visitations are not covered by court fees, but must be paid by the non-residential parent individually to the supervisor. Given that one hour at a "Visitation Café" costs on average of € 50, supervised contacts create an extreme financial burden for the non-residential parent. Although the Federal Ministry for Social Affairs offers financial support for low-income parents, the support is basically limited to only 40 hours per year, which in our opinion is far to little contact between a parent and the child. It would be desirable that supervised visitations become an exception – as intended by the legislator – and also that the subsidies are increased.[64] It is also worth mentioning, that the costs of supervised visitations cannot be covered by legal aid as these costs are not considered as procedural costs.[65]

5.7.2. FAMILY AND YOUTH COURT COUNSELING SERVICES TOO POWERFUL?

The Family and Youth Court Counseling Services can be entrusted with comprehensive tasks which are primarily judicial activities (e.g. elucidation of facts in the context of clearings). At the same time employees of the Family and Youth Court Counseling Services assume a position equivalent to a witness when they provide the court with reports and have the status of an expert when they give professional opinion. It remains to be seen if the Family and Youth Court Services

62 *Fucik/Kloiber*, Kurzkommentar zum Außerstreitgesetz, § 111 AußStrG Rz 5 (Stand 1.1.2005, rdb.at).

63 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 13 (Stand 1.11.2013, rdb.at).

64 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 91 (Stand 1.11.2013, rdb.at).

65 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 75 (Stand 1.11.2013, rdb.at).

will be able to cope with this magnitude of tasks and power.[66]

5.7.3. POSSIBLE ROLE CONFLICT FOR VISITATION SUPERVISORS

According to legislation, giving advisory opinion is not a supervisor's task. However, in practice the courts often request written reports on the course of the visitations from the „Visitation Cafés“. This may lead to a conflicting situation where not only the parents perceive the supervisor as biased but also the long-term success of the supervised visitations is endangered.[67]

5.7.4. NO COURT-ORDERED PSYCHIATRIC TREATMENT

The OGH ruled in two cases regarding visitation rights that parents cannot be instructed to undergo psychotherapy as there is no corresponding legal basis.[68] In view of these rulings the current legal situation has been subject to harsh criticism and controversy in the legal literature. Susanne Beck, a well-known family judge, is arguing that the current legal situation tolerates efforts of residential parents to deprive non-residential parents of visitations.[69] However, since February 1st, 2013 there is the possibility to instruct parents to seek parent/family/educational counseling, to do an informational interview on mediation or conciliation proceedings or to participate in a violence and aggression management training.[70]

5.7.5. AGE OR ABILITY TO REASON DECISIVE?

According to the current legal situation the expressed will of a child over fourteen years old is binding for the court (see 5.2.). However, it seems doubtful that this regulation always meets the child's best interests. Particularly in long-lasting visitation rights proceedings the residential parent can influence the child to his/her favour, so the ability of the child to express its will freely and independently becomes uncertain..

On the other hand it seems inequitable to deprive a child sufficiently able to reason of their legal standing. The current legal situation grants the status of a party only for children above fourteen years (see 5.2.). By comparison, the French legal system grants children who are able to reason

66 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 106a Rz 8 (Stand 1.11.2013, rdb.at).

67 *Beck* in *Gitschthaler/Höllwerth*, AußStrG § 111 Rz 62 (Stand 1.11.2013, rdb.at).

68 *Gitschthaler* in EF-Z 2014/148, RIS-Justiz RS0129658.

69 *Beck*, Zwang zur Familientherapie?, EF-Z 2012/40.

70 § 107 Abs 3 AußStrG.

legal standing and the right to make an application for their own examination as a party.[71]

5.7.6. CLAUSULA REBUS SIC STANTIBUS

Once a decision regarding visitation rights becomes legally binding, it has to be carried out by the parents. However, this duty of execution can be overcome by the *clausula rebus sic stantibus*. If the circumstances change after the rendering of the decision, the parents can file a new motion regarding the visitation rights.[72] In practice sometimes this principle is misused by parents in highly conflicted situations in order to prevent the execution of an unwelcome decision by filing a motion for suspension of the visitations based on flimsy reasons.

71 *Nademleinsky*, Die Stellung des Kindes bei der Entscheidung über Obsorge und Besuchsrecht im internationalen Vergleich, juridikum 2006, 147.

72 RIS-Justiz RS0048663.