SHARED PHYSICAL CUSTODY AND HUMAN RIGHTS (PART I)

THE PROBLEM OF THE GENERAL EXCLUSION OR DEPENDENCE ON BOTH PARENT'S AGREEMENT OF SHARED PARENTING

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Abstract:

The general exclusion or dependence on both parent's agreement of shared physical custody prohibits decision making authorities to take the child's best interest into consideration and to verify whether an interventions concerning the rights of the child is necessary. The rebuttable legal presumption that single care usually is necessary if the parents get divorced leads to inferior protection of the child's rights because of the parent's status. This consequence can be avoided, if the requirement to prove the necessity of restriction of the child's human rights remains the norm when parents separate.

Content:

I. Introduction

Frequently, family law legislation and legal practice in many countries support the general conviction that shared parenting is good when parents are married and harmful for children

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when parents live apart. In Switzerland, for example, shared custody[2] was excluded by law outside of marriage until the year 2000.[3] Until July 1, 2014, shared custody remained impossible outside of marriage, unless requested by both parents and accepted by the court.[4]

From the human rights perspective the positive findings of social science research raise important questions. Shared legal and physical custody embody the ideal solution from a human rights perspective, unless a different solution proves to be necessary. Nevertheless, in legal practice, measures against shared parenting remain the norm as soon as parents live apart. In the following chapters the relevance of human rights for legal practice shall be discussed.

II. Social Science Research and Families of the 21st century

A. Relevant conclusions from Social Science Research

Social science research brings valuable information for legal practitioners. Experts may not provide answers for all legal questions; nevertheless, some conclusions can be drawn that are relevant for human rights.[5]

1. Conclusion one: Shared Physical Custody can be in the Child's Best Interest

In studies comparing the well-being of children living in shared physical custody with the well-being of children living in single care arrangements, children living in shared physical custody have "equal or better outcomes when measuring emotional, behavioural, psychological, physical and academic well-being".[6] These results imply that many cases exist; in which shared physical custody is beneficial for children.

2. Conclusion Two: Shared Physical Custody can be in the Child's Best Interest without Consent of both Parents

A consensus seems to exist among experts that in many cases shared physical custody is beneficial for children even if one parent is opposed, for example when there is a parental conflict and little or no communication between parents.[7] An estimated 10% of all conflicts are qualified as "high conflicts" – this is the form of conflict, which is detrimental for children.[8] Even in the midst of high conflicts some families are able to manage shared parenting without harm for their children.[9] We conclude that many cases exist in which shared parenting is possible if one parent is opposed or if there is a parental conflict.[10]

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[2] The expressions *Shared Custody* or *Shared Parenting* used in this document englobe *shared legal* (decision making) and *physical* (child care and residence) *custody*.
[3] Swiss Supreme Court, judgments *K. contre dame K.* (117 II 523) of December 12, 1991 and *P.S. gegen M.S.* (123 III 445) of November 20, 1997.
[4] Federal Decree modifying the Swiss Civil Code from June 26, 1998 (AS 1999 1118); Federal Decree modifying the Swiss Civil Code from June 21, 2013 (AS 2014 357); Swiss Supreme Court, judgment 5A_497/2011 of December 5, 2011, C. 2.1.3.
[5] This document is based upon a limited number of studies and articles. The purpose of this chapter is to outline some conclusions which are relevant for the human rights approach in this article. For further information and other possible conclusions the author suggests e.g. the publications of the Australian Institute for Family Studies, Sanford Braver, William Fabricius, Robert Bauserman, Marygold Melli, Patricia Brown or Edward Kruk [e.g. Kruk (2013)].
[6] Nielsen (2013b), 131; for an overview on the relevant studies see the tables in: Nielsen (2013b), table 2, 125; in German: Sünderhauf (2013), Abb. 14, 265 ff.
[7] Nielsen (2013a), 64 ff.; Warshak (2014), 56 f.; Pruett/DiFonzo (2014), 154.
[8] Compare: Nielsen (2013a), 64.
[9] Pruett/DiFonzo (2014), 154.
[10] See also: Bernard/Meyer Löhrer (2014), N 31.

3. Conclusion three: Shared Physical Custody can be in the Best Interest of very young Children

The "*woozling*" and misinterpretation of some of the few studies that exist are one of the reasons for the widely spread belief that shared physical custody is harmful for young children. This sometimes leads to the exclusion of shared custody by the courts.[11] Serious concerns about this development and the consequences for children led to the establishment of an important and rare *consensus report*,[12] signed by 110 experts. The experts "(…) find the theoretical and practical considerations favoring overnights for most young children to be more compelling than concerns that overnights might jeopardize children's development" and that there "is no evidence to support postponing the introduction of regular and frequent involvement, including overnights, of both parents with their babies and toddlers".[13] Even the scientist most frequently woozled and misinterpreted shares the view that "cautions against any overnight care during the first three years have not been supported",[14] and suggests situations in which shared physical custody for small children are appropriate.[15] Particular attention to the needs of small children is necessary. But from what we know about young children's needs we have to assume that sometimes shared physical custody is in their best interest.[16]

4. Conclusion four: Parents acting in the Child's Best Interest usually support Shared Parenting

Among social scientists and practitioners exists a broad consensus that social science research strongly supports shared physical custody if both parents agree to it.[17] Since parents asking for shared physical custody are often being confronted with the reproach that they are only thinking of themselves instead of their children, it seems appropriate to point out, that social sciences suggest that a parent opposing shared parenting is acting contrary to the child's best interests.[18]

5. Conclusion five: Shared Physical Custody should be as important as single care

In April 2014 a report of a think tank of 32 experts was published. The experts concluded that the "Promotion of Shared Parenting constitutes a public health issue that extends beyond legal concern".[19] The experts recommend a legal presumption that shared legal custody is in the child's best interest, but also suggest a case by case approach with respect to care arrangements, giving neither preference to single care nor shared physical custody.[20] The 110 experts who signed the consensus report go even further, by coming to the conclusion that "social science evidence (...) supports the view that shared parenting should be the norm for parenting plans for

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[11] For an overview see: Arndt (2014a) or Arndt (2014b); for detailed information on "woozling" see: Nielsen (2014a), 164 ff.; Warshak (2014); Nielsen (2013c).
[12] According to the author it is only the second consensus report in the field of parenting plans (Warshak (2014), 58 f.).
[13] Warshak (2014), 59 f.
[14] Pruett/McIntosh/Kelly (2014a), 250; Arndt (2014b).
[15] Pruett/McIntosh/Kelly (2014b).
[16] For a critical overview on the existing studies see: Nielsen (2014b); Pruett/DiFonzo (2014), 154; Warshak (2014), consensus point 4, 60.
[17] Pruett/DiFonzo, 154; Warshak (2014), 59 f.; in German: Sünderhauf (2013), 361 ff.; in French: Neyrand/Zaouche Gaudron (2014).
[18] Compare e.g: Guerra González (2012), 48 ff.
[19] Pruett/DiFonzo, 160; The Association of Familiy and Conciliation Courts (AFCC) that organized the gathering has not always been in favour of Shared Parenting (for small children): It has been heavily criticized for publishing a 2011 special issue edited by Jennifer E. McIntosh of its well-known interdisciplinary journal *Family Court Review* which, apparently, provided a "misleadingly narrow view of attachment theory" and shared parenting [e.g. Lamb (2012), 481) or Ludolph (2012)]. In an exemplary reaction AFCC provided four authors and the editor space to present their views in a 2012 issue (ibid.).
[20] Pruett/DiFonzo, 154; Nielsen (2013a), 64 ff.; Sünderhauf (2013), 339 ff.

children of all ages".[21] We also have noticed that the more equal the parenting time is shared between the parents, the more the children seem to profit.[22] This is also true when parents live together.[23] From the child's perspective it seems wrong to conclude that single care should remain the norm. The same importance and relevance should be attributed to shared physical custody so that it is treated equally to single care.

B. Family life in the 21st century

There may still be many families with a traditional distribution of parental tasks. However, many families exist where both parents are highly involved in the care and education of their children.[24] Even in a country as conservative as Switzerland, fathers accomplish in average 37% of all child related house and family tasks.[25] However, after separation, fathers usually care less than 20% for their children, when children are very young sometimes only a few hours a month.[26] Father drop outs are estimated to be as high as 50%.[27] At the time of divorce most children concerned are between 5 and 14 (66%), 11% younger than 5 and 23% older than 14 years old.[28]

III. Human Rights Protection of Children and Families

A. General Considerations

Human rights are rights inherent to all human beings that protect the *essence of human existence*.[29] Whoever acts in the name and with the power of the State has to refrain from actions that violate individual's human rights. Restrictions of human rights are possible, but only if certain conditions are met.[30] States have the duty to respect, protect and fulfil human rights.[31]

Children, their parents and family life are protected by many national and the most important international human rights instruments, notably the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR).

B. Protection of Children, Parents and their Family Life by the UN instruments

1. The Rights of the Child

According to Art. 3 CRC "the best interests of the child shall be a primary consideration" in "*all* actions concerning children".[32] The principle of the Child's best interest should be reflected in national legislations "in a way that enables it to be invoked before the courts".[33] Art. 7 applied

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[21] Warshak (2014), 59.
[22] Bergström et al. (2013), table 2.
[23] Bürgisser (2005).
[24] Bernard/Meyer Löhrer, N 47 ff.
[25] Swiss Federal Statistical Office (2014a); the number of hours spent by fathers for child related house and family work was confirmed by an independent study: Pro Familia (2011), 11 f.
[26] For more details on Swiss visiting rights see: Bernard/Meyer Löhrer, N 2 ff.
[27] Compare e.g.: Tazi-Preve et al. (2007), 120 f., 157 ff. und 257 ff.; unfortunately, no official numbers exist.
[28] Swiss Federal Statistical Office (2014b).
[29] Belser/Waldmann/Molinari (2012), 4 N 1 ff.
[30] Kilkelly (2003), 23 ff.
[31] Office of the High Commissioner for Human Rights (2014).
[32] Art. 3 CRC (*italics* by M. Widrig); CRC/C/GC/14, N. 6 and 17 ff.; CRC/GC/2003/5, N. 12; Hodgkin/Newell (UNICEF 2007), Art. 3, 36 f.; compare further e.g.: Art. 11 Swiss Constitution; ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), §§ 26 f. and 60 with respect to custody decisions.
[33] Art. 3 CRC; Hodgkin/Newell (UNICEF 2007), Art. 3, 39.

together with Art. 18 CRC awards each child a *right to be cared for by both parents*.[34] This right upholds a presumption running through the Convention that under normal circumstances the child is best off with both parents.[35] Hence, the child should not be separated from his/her parents, unless this measure is necessary for the best interest of the child.[36] Each such measure has to be subject to judicial review, the separation period should be as short as possible and the need for speed should be assumed to be a necessary component of the judicial review.[37] If a separation from the parents is necessary, the child has a *right to maintain relations and contact with both parents on a regular basis*, unless this is contrary to the child's best interest.[38] Art. 7 applied together with Art. 9 and 18 CRC imply that national law "should presume that, unless the contrary is proven, the continued involvement of both parents in the child's live is in his or her best interest".[39] If however interventions with the rights of the child are necessary to protect the child from harm, the state has the duty to protect the child and to intervene.[40]

2. The Role and Privilege of the Child's Parents

Generally parents are being attributed the privilege of being primarily responsible for their children (parental responsibility).[41] The best interest of the child is their basic concern.[42] According to the German Constitution the aforementioned privilege is even a *natural right* of the parents.[43] This parental responsibility is a common responsibility belonging to both parents equally.[44] "Any discriminatory treatment in regard to (...) child custody, maintenance or alimony, visiting rights or the loss of recovery of parental authority must be prohibited".[45] States party to the Convention "have to 'use their best endeavours' to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child".[46] The law should presume that the involvement of both parents in the child's life is in the child's best interest, until the contrary is proven.[47] Art. 5 CRC links parental responsibilities to parental rights and duties which are needed to fulfil their responsibilities.[48] Strict limits are put on state intervention as well as the separation of children from their parents.[49]

C. Relevance of the Requirement to prove the Necessity of Human Rights Interventions

The requirement to prove the necessity of interventions with human rights [the necessity-requirement] is an important human rights standard.[50] It contributes essentially to human rights protection by requiring the intervening authority to provide reasons for its decision. This assures that, on request, these reasons can be judicially reviewed and the decision reversed if it

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[34] See: Ibid. Art. 7, 108; Art. 9, 127; Art. 18, 235; BVerfG 1 BvR 1620/04 of April 1, 2008, N 72, (judgment of the German Constitutional Court).
[35] Compare: Ibid. Art. 7, 109; Art. 9, 130; Art. 18, 237.
[36] Art. 9 CRC; Hodgkin/Newell (UNICEF 2007), Art. 9, 121; Art. 5, 75.
[37] Art. 9 CRC; Hodgkin/Newell (UNICEF 2007), Art. 9, 128.
[38] Hodgkin/Newell (UNICEF 2007), Art. 3, 36; Art. 9, 121; Art. 9, 130.
[39] Ibid. Art. 18, 237; Art. 9, 130.
[40] Art. 24 ICCPR.
[41] E.g. Art. 5 CRC; Art. 18 CRC; Art. 23 ICCPR; Art. 13 (1) Swiss Constitution; Hodgkin/Newell (UNICEF 2007), Art. 5, 75; Art. 7, 108.
[42] Art. 18 CRC.
[43] Art. 6 (2) German Constitution.
[44] Art. 18 CRC; Art. 23 ICCPR; HRI/GEN/1/Rev.9 (Vol. I), GC 19, N 8; Hodgkin/Newell (UNICEF 2007), Art. 3, 36; Art. 5, 76; Art. 18, 235-237.
[45] Art. 23 ICCPR; HRI/GEN/1/Rev.9 (Vol. I), GC 19, N 9.
[46] Art. 18 CRC; Hodgkin/Newell (UNICEF 2007), Art. 5, 76.
[47] See: Art. 7, 9 and 18 CRC; Hodgkin/Newell (UNICEF 2007), Art. 18, 237.
[48] Hodgkin/Newell (UNICEF 2007), Art. 5, 76.
[49] Art. 3, 5, 7, 9, 10, 18, 27 CRC; Hodgkin/Newell (UNICEF 2007), Art. 5, 75.
[50] E.g. Art. 9 CRC; Art. 8 § 2 ECHR; Art. 36 Swiss Constitution.

was arbitrary, disproportionate, etc. Nevertheless, if objective reasons for an intervention exist, the intervention can easily be justified.[51] In summary, this requirement contributes to a better quality of decisions, a fair trial, creates more transparency and reduces the risk of mistakes.

It occurs that the necessity-requirement is "dropped" or "replaced" by a rebuttable or irrebuttable legal presumption; e.g. a legal presumption may express the conviction that shared custody is impossible outside marriage and thus excludes it by law. If we prove that this is true, it might be conceivable to replace the requirement by the presumption. However, even if we can prove the correctness of the presumption, the alarming consequence is that all the benefits of the necessity-requirement will be lost, while no additional protection for others will be won. For these reasons mere legal presumptions replacing the necessity-requirement should be avoided.

D. Relevance of Human Rights in Legal Practice

Human rights bodies responsible to survey that the mentioned human rights treaties are being respected are usually quite reluctant to impose human rights upon their member states in a strict manner. Frequently, they follow a "minimal-harmonization-approach" and "accept" quite important interventions with human rights. So far, binding decisions in international and European law may encourage shared physical custody, but do not impose it.[52] Contracting states of UN human rights Conventions are usually quite free to decide how they want to implement concepts outlined by the conventions. This is illustrated e.g. by Art. 5 CRC which requests that the concept of common parental responsibility is reflected and defined in national law by rights and duties, which are needed to fulfil responsibilities.[53] At least we know that this responsibility goes beyond a mere obligation to pay money to support the child.[54] If however a state foresees that legal custody is a prerequisite and the only way a parent can take responsibility, i.e. take legally binding decisions for and in the interest of their children,[55] it seems strange if legal custody or child care is not protected by the convention.[56]

E. Interim Conclusion

Human rights support shared parenting; be it from the perspective of the child, or from the perspective of the child's parents. A strict application of the fundamental values and essential ideas expressed by human rights leads to the conclusion, that shared legal and physical custody should be the starting point and guiding principle for all care and custody decisions concerning children and their parents, unless the parents choose a different solution or another solution proves to be necessary. Single custody and single care solutions are contrary to these core values and ideas expressed by human rights, unless the child's parents choose these solutions or because these solutions prove to be necessary. Nevertheless, so far shared parenting has not been imposed yet by legally binding decisions of international human rights bodies.

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[51] To determine an appropriate degree of proof the child's and his/her parent's rights and the state's duty to protect the child (and his/her parents) has to be taken into consideration.
[52] For a detailed view see: NIKOLINA (2012).
[53] HODGKIN/NEWELL (UNICEF 2007), Art. 5, 76.
[54] HODGKIN/NEWELL (UNICEF 2007), Art. 18, 235.
[55] A visiting right may only confer the faculty to decide how the child is being cared for during the visit, which is merely equivalent to those rights usually attributed to any third person taking care of the child.
[56] The Swiss Supreme Court has not yet recognized that legal custody falls in the ambit of human rights of the child or the parents. However, it has recognized that the placement of the child at one parent's home is a severe intervention with the right of respect for family life (Swiss Supreme Court, judgment 5A_798/2009, 04.03.2010 (136 I 178), C. 5.2).

IV. Problematic Fields in Legal Practice

A. General Exclusion of Shared Physical Custody

The general exclusion of shared parenting is usually linked to the conviction that shared parenting is always contrary to the child's best interest. We have already seen that this conviction is wrong because many cases exist in which shared physical custody is in the child's best interest even when parents separate.[57] Ironically, if in a particular case shared physical custody happens to be the best care solution for the child, its general exclusion leads to the paradoxical situation, that the best care solution for the child is excluded by law.

With this background, the general exclusion of shared physical custody outside marriage seems incompatible with most fundamental human rights principles for the following reasons; it is impossible for decision-making authorities to:

1. Take the child's best interest into consideration in the decision making process of a particular case, as requested by Art. 3 CRC,[58]
2. Review whether or not the intervention with the child's right to be cared for by both parents is justified, as requested by Art. 9 CRC,[59]
3. Review whether an intervention with the rights of the child's parents and their right to be treated equally with respect to their parental responsibilities and within the family in general is justified,[60]
4. Treat parents who live apart and are capable of making child-friendly decisions for their children together equally with married parents. These different standards for parents because of their status can also lead to less protection of the rights of their children, causing an indirect discrimination, prohibited by Art. 2 CRC.[61]

B. General Exclusion of Shared Physical Custody unless "both" Parents agree

The general exclusion of shared parenting unless both parents agree is usually linked to the conviction that in such situations shared parenting is always contrary to the child's best interest. We have already seen that this conviction is incorrect, because many cases exist, in which shared physical custody is in the child's best interest even when the parents oppose it.[62] It should be emphasized that such regulations lead to the paradoxical situation, that the veto of one parent becomes the only decisive criteria for care and custody arrangements. Unless both parents agree, the child's best interest cannot be taken into consideration (!).[63] If in a particular case shared physical custody happens to be the best care solution for the child, such regulations lead to the alarming consequence, that the best care solution for the child can be excluded by a sole parent's decision.

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[57] See chapters II.A.1. and II.A.3.
[58] CRC/C/GC/14, N. 6 and 17 ff.; The Committee on the Rights of the Child considered Germany's general exclusion of shared legal custody for unmarried or divorced parents as incompatible with Art. 3 CRC (CRC/C/2/REV.8, 22; HODGKIN/NEWELL (UNICEF 2007), Art. 18, 237).
[59] Art. 7 in conjunction with Art. 18 CRC.
[60] E.g. Art. 18 CRC; Art. 23 ICCPR.
[61] Even if in practice parents are not hindered by the authorities in making decisions concerning their children together or to establish shared physical custody without legal protection (compare: Swiss Supreme Court, judgment *K. contre dame K.* (117 II 523) of December 12, 1991) the lack of one parent's legal custody in these cases may affect children as well. E.g., in Switzerland, if the custodial parent dies, the other parent has no possibility to make decisions for the child. First, an authority has to attribute custody. The authority is free to attribute custody to third parties (Art. 297 (2) Swiss Civil Code).
[62] Chapter II.A.2.
[63] This is contrary to Art. 3 CRC.

With this background in mind, the general exclusion of shared physical custody if one parent opposes it seems incompatible with most fundamental human rights principles for the following reasons; unless both parents agree, it is impossible for decision making authorities to:

1. Take the child's best interest into consideration in the decision making process of a particular case, as requested by Art. 3 CRC,[64]
2. Review whether or not the intervention with the child's right to be cared for by both parents is justified, as requested by Art. 9 CRC,[65]
3. Review whether an intervention with the rights of the child's parents (notably their right to be treated equally with respect to their parental responsibilities and within the family in general) is justified.[66]

Furthermore, there is an inferior protection of the child's right to be cared for by both parents because of its parent's separation and it is a state's general *duty* to take measures *to protect* human rights from interventions by third parties, i.e. to protect the rights of the child and one parent from unjustified interventions by the other parent.[67] Considering that:

1. Parental responsibility implies, besides the privilege to make decisions, the duty to make decisions in the child's best interest,[68]
2. There is a high risk that many parents abuse their veto-power for personal reasons, contrary to the child's best interest,[69]
3. In many countries parents have a general obligation to act in good faith,[70]
4. If both parent's agree to shared physical custody, it usually is in the child's best interest,[71]

The attribution of the right to veto shared physical custody to one parent carries the alarming risk, that the state may

1. Protect a parent, in unjustified actions restricting the human rights of the child and the other parent and
2. Leave the decision-making authority with no means to intervene in order to protect the human rights of the child and the other parent.

States are largely free to decide how and to what extent they want to protect human rights. However, to protect unjustified actions of third parties that intervene with human rights of others (!) and to "prohibit" the authorities involved to intervene is contrary and seems highly incompatible with the states' general *duty to protect.*[72]

C. Interventions as general Rule by legal Presumptions

1. With The Child's Right to be Cared for by both Parents

[64] CRC/C/GC/14, N. 6 and 17 ff.; The Committee on the Rights of the Child considered Germany's general exclusion of shared legal custody for unmarried or divorced parents as incompatible with Art. 3 CRC (CRC/C/2/REV.8, 22; Hodgkin/Newell (UNICEF 2007), Art. 18, 237).
[65] Art. 7 applied together with Art. 18 CRC.
[66] E.g. Art. 18 CRC; Art. 23 ICCPR.
[67] Chapter III.A; Art. 24 ICCPR; Art. 35 Swiss Constitution; Biaggini (2007), Art. 35, N 7.
[68] Art. 18 CRC.
[69] E.g. BVerfG 1 BvR 420/09 of July 21, 2010, N 59 ff. (judgment of the German Constitutional Court); Hodgkin/Newell (UNICEF 2007), Art. 9, 130; Deutscher Bundestag (2008), 12 ff.
[70] Art. 5 (3) Swiss Constitution; see e.g. Art. 274 Swiss Civil Code.
[71] Chapter II.A.4.
[72] This might even raise questions with respect to the states' general duty to act in good faith (e.g. Art. 5 (3) Swiss Constitution) and the prohibition of arbitrary.

As we have seen in chapter III.B.1, each child has a *right to be cared for by both parents*. This right exists, whether parents live together or not. There may be an elevated need for intervention to protect the child when parents separate. This is expressed in Art. 9 CRC by explicitly mentioning that it *may* be necessary to separate a child from a parent when his/her parents separate. However, already the wording in itself suggests that even when parents separate, there are situations where it would be just as good or even better for the child to continue living with both parents, making an intervention with his/her rights dispensable. This view finds support with the presumption running through the CRC that the child is best cared for when it is cared for by both parents.[73] Further support is found in social science evidence[74] as well as the general interest in fair[75] and equal protection of the right to be cared for by both parents regardless of the status of the child's parents.[76] For these reasons, under normal conditions, the requirement to prove the necessity of an intervention with the child's right to be cared for by both parents, should remain the norm also when parents separate or divorce, unless parents agree to a different solution.[77]

2. With the Rights of the Child's Parents

The child's parents' family life (family bonds, company and contact) is protected by human rights.[78] Furthermore, parents have to be considered as equal and treated equally before, during and after marriage. Interventions with these rights require that they are necessary for objective reasons. The presumption that an intervention usually is necessary lacks scientific support,[79] leads to worsened protection of their family life as well as the right to be treated and considered equal because of the divorce or separation. For these reasons the standard requirement to prove the necessity of an intervention should remain the norm even when parents separate.

V. Conclusion

This article is written with the background that in many societies shared parenting is normal when parents live together and single care the (frequently legally enforced) standard as soon as parents separate. Social realities before parental separation, the needs of children according to social science research and human rights by themselves or combined, clearly support a more open and flexible approach towards shared parenting. The general exclusion of shared physical custody after parental separation or its dependence of both parent's consent seems incompatible with most fundamental human rights concerning children as well as parents. The general interest in good and fair human rights protection and in an equal standard of human rights protection for children and parents independently of the parent's status or living arrangement clearly supports the view that the requirement to prove the necessity of human rights interventions should be the norm whether the child's parents live together or not. Shared parenting embodies the fundamental values and essential ideas expressed by human rights, which makes it an ideal guiding principle and starting point in care and custody decisions.

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[73] Chapter III.B.1.
[74] Chapter II.A.5.
[75] Chapter III.C.
[76] Art. 2 CRC.
[77] If parents can find an agreement themselves, there is no reason why they and their children should be treated differently than parents and children of parents that live together. In both cases the same standards for interventions should apply.
[78] E.g. Art. 5 and 18 CRC; Art. 23 and 17 ICCPR; Art. 8 ECHR; Art. 13 (1) Swiss Constitution; Swiss Supreme Court, judgment 5A_798/2009, 04.03.2010 (136 I 178), C. 5.2.
[79] Chapter II.A.5.

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SHARED PHYSICAL CUSTODY AND HUMAN RIGHTS (PART II)

THE MERITS OF THE "ZAUNEGGER-APPROACH" OF THE EUROPEAN COURT OF HUMAN RIGHTS

Martin Widrig[1]

Abstract:

The "*Zaunegger-Approach"* assures, by a minimal obligation for member-states of the European Convention on Human Rights, that in care or custody decisions the child's best interest can be taken into consideration and that at the request of the child or one of the parents interventions with the child's *right to respect for family life* have to be justified. The *right to respect for family life* (Art. 8 ECHR) protects custody and care decisions.

Content:

I. Introduction

We have seen in Part I that the automatic exclusion of shared parenting by law or because one parent opposes it may lead to the situation that the best care and custody solution for the child cannot be imposed by the authorities involved and that this situation stands in contradiction with most fundamental human rights standards. Notably, the child's best interest cannot be taken into consideration and it cannot be verified whether or not the intervention with the child's right to be cared for by both parents was justified.[2] In Part II we shall discuss an approach developed by the European Court of Human Rights in its *Zaunegger judgment* from December

[1] The author thanks Carolina Souviron and Swissbenefits (www.swissbenefits.com) for their generous and professional support in the elaboration and translation of this document.
[2] WIDRIG (2014), Chapter IV.

third, 2009.[3] By merely requesting the possibility of a judicial review at the request of the child or a parent these previously mentioned problems could largely be solved. Hence, with its "*Zaunegger-Approach"* the Court has created a powerful tool to save the interests and human rights of children as well as the parents by merely imposing a minimal obligation upon states. Additionally, in an excursus, we will see that a strict but coherent implementation of the principles developed by the Court leads to the conclusion that Shared Physical Custody is the ideal solution and starting point in care decisions.

II. The Court and the European Convention on Human Rights

The European Convention on Human Rights (ECHR, the Convention) is an international treaty under which the member States of the Council of Europe[4] promise to secure fundamental civil and political (human) rights to everyone within their jurisdiction. The treaty was signed on November 4, 1950 and entered into force in 1953.[5]

The European Court of Human Rights (ECtHR, the Court) is an international court based in Strasbourg, France. It was set up in 1959 and rules on individual or state applications alleging violations of the rights set out in the Convention. The ECtHR has delivered more than 10'000 judgments, which are binding for the countries concerned and have led to important changes in their legislation and administrative practice. The Court has consolidated the rule of law and democracy in Europe and makes the Convention a "living (evolving) instrument".[6]

III. The Court's *"Zaunegger-Approach"*

A. The *Zaunegger judgment* and "*the Approach"*

1. Circumstances of the case

Mr. Horst Zaunegger (the applicant), had lived with the child's mother for five years. Their child was born in 1995. In August 1998 they separated and the child lived with the applicant until January 2001, when the mother decided that the child would live with her. When in 2008 the mother wanted to move and their son clearly expressed the wish to live with his father, the latter started custody proceedings.[7]

According to German law, children born out of wedlock could, under normal conditions, only have a custodial father, when the mother agreed.[8] Unlike fathers that once held custody (because of marriage or a priori the mother of the child agreed), fathers of children born out of wedlock had no possibility to review whether or not this measure was necessary to protect the child.[9]

2. Applicability and content of Art. 14 ECHR

[3] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04).
[4] The Council of Europe is the leading Human Rights organization in Europe. It includes 47 member states (Council of Europe).
[5] ECtHR/Council of Europe.
[6] *Ibid*.
[7] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 7 ff.; BVerfG 1 BvR 420/09 of July 21, 2010, N 26 ff.
[8] § 1626a (1) aBGB (German Civil Code at the time of the *Zaunegger judgment*); BVerfG 1 BvR 420/09 of July 21, 2010, N 2 ff.
[9] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 44.

The Court considered that decisions with regard to custody fall into the ambit of the *right to respect for family life*, protected by Art. 8 ECHR.[10] For this reason Art. 14 ECHR (prohibition of discrimination) was applicable.[11]

The judges concluded that in Germany, with respect to the attribution of custody, different standards applied for fathers of children born out of wedlock compared with mothers and with fathers of children born during marriage.[12] Such differences in treatment are discriminatory, if they have no reasonable and objective justification. This means, a difference in treatment requires a legitimate aim and a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[13] Very weighty reasons have to be put forward, to justify a difference in treatment on the grounds of sex, birth out of or within wedlock and the marital status of fathers that share or shared the household of their children.[14]

3. Conviction and the Reasoning by the Court

The Court "accepted" that the view that different life situations of children born out of wedlock exist and that it was justified to attribute sole parental authority over the child *initially* only to the mother.[15] It further "accepted" that in a particular case valid reasons might exist, to deny an unmarried father participation in parental authority.[16] However, with regard to the specific circumstances of the present situation, the judges also made clear that "the Court cannot share the assumption that joint custody against the will of the mother is *prima facie* not to be in the child's best interests".[17] In its reasoning the Court pointed out that:

- Mother's objections to joint parental authority are not necessarily based on considerations related to the child's best interests,[18]
- "The applicant was excluded from the outset by force of law from seeking a judicial examination as to whether the attribution of joint parental authority would serve the child's best interests and from having a possible arbitrary objection of the mother to agree to joint custody replaced by a court order",[19]
- "The common point of departure in the majority of Member States appears to be that decisions regarding the attribution of custody are to be based on the child's best interests and that in the event of a conflict between parents such attribution should be subject to scrutiny by the national courts",[20] and finally
- The argument that under the circumstances of the present case, "it could not be ruled out that the ordering of joint custody by a court would cause conflict between the parents and would therefore be contrary to the child's best interests" is not persuasive and insufficient to justify a difference in treatment of the applicant compared with fathers who originally held parental authority, being given that "the domestic law provides for a

[10] Ibid., § 40.
[11] Ibid., § 40.
[12] Ibid., § 48.
[13] Ibid., § 49.
[14] Ibid., § 51.
[15] Ibid., § 55; BVerfG 1 BvR 420/09 of July 21, 2010, N 20.
[16] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 56; BVerfG 1 BvR 420/09 of July 21, 2010, N 21.
[17] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 59; Meier (2010) 249 f., N 8.
[18] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 58 and 57; BVerfG 1 BvR 420/09 of July 21, 2010, N 25; Deutscher Bundestag (2008), 12 ff.; Walper/Jurczyk (2010), 145 ff.
[19] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 57.
[20] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 26 f. and 60; Among the 27 countries of the European Union two thirds (18) treat unmarried parents completely or largely equally. Of the remaining nine countries, with the exception of Germany and Austria, seven provide a possibility for judicial review with respect to custody of the father (BVerfG 1 BvR 420/09 of July 21, 2010, N 23).

full judicial review of the attribution of parental authority and resolution of conflicts between separated parents in cases in which the father once held parental authority".[21]

For all these reasons the Court concluded, that there was no reasonable relationship of proportionality between the general exclusion of judicial review of the initial custody regulation and the aim pursued. Accordingly there has been a violation of Art. 8 taken together with Art. 14 and it was not necessary to determine whether there has been a breach of Art. 8 taken alone.[22]

4. Interpretations of the Judgment

The view has been expressed, that Germany's conviction was based (merely) in the difference in treatment between fathers.[23] However, the judgement seems to go beyond this discrimination,[24] which seemed to be only of "very subsidiary" importance in the reasoning of the Court.[25] The German Federal Constitutional Court, well-known scholars and the Swiss government and others share the view that the essence of the *Zaunegger judgment* lies in the consideration that "(...) **the general exclusion of a judicial review** of the initial attribution of custody to the mother **was disproportionate** with regard to the aim (...)" pursued to protect children born out of wedlock **and** that such a **judicial review has to be possible** in order to comply with the Convention.[26] This view has also been confirmed by subsequent judgments of the Court: Notably in the *Schneider judgment* the ECtHR pointed out that "The Court cannot but confirm (...) its **approach taken in the** (...) **case of *Zaunegger v. Germany*** (...) which concerned the general exclusion from judicial review of the attribution of sole custody to the mother of a child born out of wedlock ... (in which) the domestic courts, applying the relevant provisions of the civil code, also considered parental rights of a father *prima facie* not to be in the child's best interest".[27]

5. The "Zaunegger-Approach" (Definition)

When referring to the "Zaunegger-Approach" the author refers to the "***obligation of a state to provide at least a possibility for judicial review, in order to verify whether or not a restriction of parental rights was necessary with respect to the child's best interest***", established in the Court's *Zaunegger judgment*.[28]

B. Confirmations, Impact and Views of other Human Rights Bodies

1. Order of the German Federal Constitutional Court

In its Order of July 21, 2010 –1 BvR 420/09[29] after Germany's conviction by the *Zaunegger judgment*, the German Federal Constitutional Court shared the view of the ECtHR. It considered in particular that:

- Parental custody is an essential component of parental human rights,[30]

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[21] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 61 f.; Meier (2010), 249 f. N 8-10.
[22] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 63 ff.; With respect to the entire judgment: Meier (2010), 249 f. N 8-10 f.
[23] Schmidt/Eschelbach/Meysen in: Walper/Jurczyk (2010), 17.
[24] Rumo-Jungo (2010), N 15, suggesting that there is also discrimination between fathers and mothers.
[25] Meier (2010), 254.
[26] BVerfG 1 BvR 420/09 of July 21, 2010, Headnote; Swiss Government; Meier (2010), 254 ; Swiss Federal Council (2011), 9100; Wyttenbach/Grohsmann (2014), 152; Sünderhauf/Widrig (2014), 896 ff., Widrig (2013), 906.
[27] ECtHR, *Schneider v. Germany* (judgment), 15.09.2011 (17080/07), § 100.
[28] Compare e.g.: ECtHR, *Schneider v. Germany* (judgment), 15.09.2011 (17080/07), § 100.
[29] For an official English version of the Order "BVerfG 1 BvR 420/09 of July 21, 2010" see: <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100721_1bvr042009en.html;jsessionid=1A4329871C4E978C4BD82A421A2DA6AA.2_cid383> (14.07.2014).
[30] BVerfG 1 BvR 420/09 of July 21, 2010, N 47.

- The general exclusion of the attribution of sole custody to the mother because of the mother's decision from a judicial review violates paternal human rights, since it excludes that the child's best interests can be taken into consideration in each particular case,[31]
- This general exclusion is a far reaching intervention with parental human rights,[32]
- This dependence of paternal custody on the mother's "dominant will" discriminates fathers compared with mothers,[33]
- Only the child's best interests may justify the exclusion from paternal custody,[34]
- This regulation discriminates fathers that never have had custody as opposed to fathers that once held custody,[35]
- The dependence of the attribution of sole custody to the father on solely the mother's will violates paternal human rights.[36]

2. Subsequent Judgments of the European Court of Human Rights

The *Zaunegger judgment* and the *Zaunegger-Approach* were confirmed by the *Sporer judgment* and several other decisions. As in Germany, the Austrian jurisdiction provided full judicial review of attribution of parental authority in cases in which fathers once held parental authority, but did not do so for fathers of a child born out of wedlock that assumed his role as a father since his child was born.[37]

Also in other cases the *Zaunegger-Approach* has been applied and references have been made to the judgment:

- In the *Anayo judgment*, the Court found a violation of private life. The authorities refused the natural father to have contact with his twins that lived with their mother and their legal father. An examination of the question whether contact would have been in the children's best interest was excluded by a mere legal assumption. Referring to the *Zaunegger judgment*, the Court concluded that the domestic courts failed to provide the applicant appropriate protection of his private life.[38]
- There has been a violation of private life in the *Schneider judgment* because the authorities refused a putative biological father a right to *contact* and *information* on the development of his child (living with the mother and legal father) without any consideration to whether or not this right would have been in the child's best interest or overriding the interests of the child's mother and legal father. Again the Court referred to and confirmed the approach of the *Zaunegger judgment*.[39]
- In the *Ahrens* and *Kautzor judgments* there has been no violation of *private life*, even though in proceedings started by the (putative) biological father concerning 1.) the establishment of legal paternity, 2.) the challenge of the legal paternity of a legal and social (but not necessarily biological) father or 3.) the clarification of a child's descent by genetic testing without changing the child's legal status, it had not been determined whether the impugned measures served the child's best interests.[40] However, the Court

[31] Ibid., N 54.
[32] Ibid., N 55.
[33] Ibid., N 56 and 62; Rumo-Jungo (2010), N 15.
[34] BVerfG 1 BvR 420/09 of July 21, 2010, N 56.
[35] Ibid., N 57.
[36] Ibid., N 63.
[37] ECtHR, *Sporer v. Austria* (judgment), 03.02.2011 (35637/03), § 88 ff.; ECtHR, *Sude v. Germany* (decision), 07.10.2010 (38102/04); ECtHR, *Döring v. Germany* (decision), 21.2.2012 (50216/09).
[38] ECtHR, *Anayo v. Germany* (judgment), 21.12.2010 (20578/07), § 67 ff.
[39] ECtHR, *Schneider v. Germany* (judgment), 15.09.2011 (17080/07), § 104.
[40] ECtHR, *Ahrens v. Germany* (judgment), 22.03.2012 (45071/09), § 75; ECtHR, *Kautzor v. Germany* (judgment), 22.03.2012 (23338/09), §§ 68 and 78 f.

> confirmed, by referring to its *Anayo* and *Schneider judgments* (and for this reason implicitly also the *Zaunegger judgment*), that Art. 8 ECHR imposes "on the Member States an obligation to examine whether it is in the child's best interest to allow the biological father to establish a relationship with his child", for example by granting contact rights and that this may even imply the establishment of biological paternity. Furthermore the complete exclusion of the biological father from his child's life requires that there are relevant reasons relating to the child's best interests.[41]

In the *X and others judgment* the Grand Chamber of the Court decided, by referring to the *Zaunegger* and the *Sporer judgments*, that same sex couples are discriminated in comparison to heterosexual couples, because they had no possibility to request a judicial review to verify whether or not it would be in the child's best interest to legally force a father, who has regular contact with his child, to give up his child for adoption, in order to enable the stepparent to adopt the child.[42] However, in this last judgment the Court focused on the discrimination and did not refer to the *Zaunegger-Approach*.

3. The View of the UN-Committee on the Rights of the Child

The *Zaunegger-Approach* is in line with the recommendations of the *UN Committee on the Rights of the Child* to Liechtenstein in 2006: The Committee expressed its concern that the fathers of children born out of wedlock had no standing to claim custody while custody was automatically given to the mother. It recommended Liechtenstein to amend its legislation and to provide fathers the opportunity to request custody of their children, when possible joint custody with the mother.[43]

Similarly, already in 1999, the Committee on the Rights of the Child considered Germany's general exclusion of shared legal custody for unmarried or divorced parents as incompatible with Art. 3 CRC, since the child's best interests could not be taken into consideration in custody and care decisions.[44]

4. Impact onto Swiss Jurisdiction

The judgments mentioned above took place during a revision of the Swiss custody legislation, which entered into force on July 1, 2014.[45] Before this day, after divorce, shared legal and physical custody was only possible when both parents agreed and shared legal and physical custody for the parents born out of wedlock was only possible when the mother agreed and the fathers signed a convention in which they were frequently forced by the authorities to agree to a minimal contact right and maintenance payments for the child to the mother.[46] Furthermore, in its jurisprudence the Swiss Supreme Court had created a special right to determine where the child lives that belonged to the primarily care taking parent alone. The care taking parent had the right to move to any country and there was no possibility to review whether or not to stay with the other parent would have been in the child's best interests.[47]

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[41] ECtHR, *Ahrens v. Germany* (judgment), 22.03.2012 (45071/09), § 74; ECtHR, *Kautzor v. Germany* (judgment), 22.03.2012 (23338/09), § 76.
[42] ECtHR, *X and others v. Austria* (grand chamber judgment), 19.02.2013 (19010/07), § 151 ff.
[43] CRC/C/LIE/CO/2, Nr. 18 f.
[44] CRC/C/2/REV.8, 22; HODGKIN/NEWELL (UNICEF 2007), Art. 18, 237; for Art. 3 CRC in general see: CRC/C/GC/14, N. 6 and 17 ff.
[45] Federal Decree modifying the Swiss Civil Code from June 21, 2013 (AS 2014 357).
[46] Former Art. 298a of the Swiss Civil Code [see: Federal Decree modifying the Swiss Civil Code from June 26, 1998 (AS 1999 1118)].
[47] Swiss Supreme Court, judgment 5D_171/2009 of June 1, 2010 (BGE 136 III 353) C. 3.2 f.

Well known Scholars and the Swiss government share the view that a general exclusion of shared custody because of missing consent of both parents does not comply with the case law of the Court to Art. 8 ECHR and/or that the Swiss custody legislation was contrary to the ECHR.[48] Notably it has been argued convincingly, that the general exclusion of shared legal custody because of the "veto" of one parent after a divorce, does not comply with the reasoning of the Court's *Zaunegger judgment*.[49] Probably, the Courts case law has substantially influenced the Swiss Custody revision and the doctrine: On December 16, 2009 (which was only 13 days after the *Zaunegger judgment*) the government had published its decision that custody of the father of children born out of wedlock should depend upon the agreement of the mother.[50] However, subsequently this view has changed and the new custody legislation which entered into force on July 1, 2014 gives fathers of children born out of wedlock a possibility for judicial review if mothers deny shared custody.[51] Since July 2014 shared legal custody remains the rule after divorce, sole custody is the exception that has to be justified.[52] Furthermore, with respect to physical care, the Swiss government and doctrine share the view that shared physical custody is now possible if only one parent requests it.[53] In addition, according to the government there is no longer a hierarchy between different care models. Hence, shared physical custody is being recognized as much as single care and the child's best interests shall be the determining factor for care solutions.[54] Last but not least, the right to determine where the child lives belongs now to both parents. If they cannot agree, a court or child protection authority will decide and the child's best interests, other competing interests and the special circumstances of the case can now be taken into consideration.[55]

C. Significance from a Human Rights Perspective

In the cases mentioned above, the impugned measures interfered with rights of parents and children. Because of general exclusions by irrefutable legal assumptions, the decision-making authorities were neither allowed to take the child's best interests into consideration, nor able to verify whether or not the interferences were necessary, nor able to create a faire balance of the competing interests involved. As has been demonstrated in Part I, such general exclusions by legal assumptions are highly problematic from a human rights perspective.[56]

By merely requesting **a possibility for a judicial review**, the Court and the UN Committee on the Rights of the Child have found an efficient way to assure that **on request** the child's best interests can be taken into consideration and respected in legal practice as requested by Art. 3 CRC in every decision concerning children.[57] Furthermore it can be verified whether or not a measure is necessary and a faire balance of the competing interests involved can be made.[58]

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[48] MEIER (2010), 254 ff.; RUMO-JUNGO (2010), N 15; WIDRIG (2012), N 16; WIDRIG (2013), 906; SÜNDERHAUF/WIDRIG (2014), 899; SWISS FEDERAL COUNCIL (2011), 9100; SWISS PARLIAMENT (2012), 1627 1632; SWISS PARLIAMENT (2013), 6.
[49] MEIER (2010), 254.
[50] EJPD (2009).
[51] Art. 298b Swiss Civil Code.
[52] Art. 133 Swiss Civil Code.
[53] SWISS FEDERAL COUNCIL (2013), 565; SÜNDERHAUF/WIDRIG (2014), 893; BERNARD/MEYER LÖHRER (2014), N 17 ff.; GLOOR/SCHWEIGHAUSER (2014), 10; WIDRIG (2013), 906.
[54] SWISS FEDERAL COUNCIL (2011), 9094.
[55] Art. 301a Swiss Civil Code.
[56] WIDRIG (2014), Chapter IV.
[57] Art. 3 CRC; CRC/C/GC/14, N. 6 and 17 ff.; CRC/GC/2003/5, N. 12; HODGKIN/NEWELL (UNICEF 2007), Art. 3, 36 f.; ZERMATTEN (2014), 324 f.; compare further: BVerfG 1 BvR 420/09, N 54.
[58] "Art. 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that in the balancing process, particular importance should be attached to the best interest of the child which, depending on their nature and seriousness, may override those of the parents" [ECtHR, *Görgülü v. Germany* (judgment), 26.05.2004 (74969/01), § 43].

Finally, presuming that many parents are responsible and act in their children's best interests, the request of a judicial review might be the only way to assure that the child's best interests are being taken into consideration by a decision making authority and for this reason contributes to the protection of the child.[59] These are the merits of the ***"Zaunegger-Approach"***,[60] which for the reasons mentioned above seems to be an **appropriate** (and necessary) **minimal human rights-standard for decisions concerning children** of a certain importance.

D. "*Zaunegger-Approach*" and Shared Physical Custody?

One relevant aspect of this "*Zaunegger-Approach"* is that it has been developed by an international Court whose judgments have binding force in many states. For this reason the question whether or not the Court would apply its approach also in a case in which extended contact rights or shared physical custody[61] depends only upon the will of one parent is of considerable interest.

It has been shown in Part I that many cases exist in which shared physical custody against the will of one parent is in the child's best interests.[62] Empirical research "clearly indicates" that limited contact schedules with one parent are not in the children's best interests, and an every other week-end parenting arrangement is associated with "a weakening of (parent)-child relationships and diminished closeness over time".[63] Furthermore, sufficient time with each parent is essential for the quality of a child-parent relationship and their family bond.[64] The German Federal Constitutional Court pointed out, based upon reliable research, that the dominant position due to a veto-power has often been used by the privileged parent for personal reasons, not related to the best interests of the child.[65] It is recognized that too often, children lose the chance to maintain contact with a non-residential parent because of the needs of the residential parent.[66] For children as well as for parents, physical care and the corresponding child-parent bonds are substantially more important than legal bonds. Coherently, also the Court has attributed substantially more importance to contact and care than to legal bonds, as we have seen e.g. in the different outcomes of the *Ahrens* and *Anayo judgments*.[67] To enjoy each other's company is a fundamental aspect of *family life* and decisions on care are also protected by Art. 8 of the Convention.[68] While the Court has given member states a wider margin of appreciation with respect to custody decisions, it has steadily pointed out that stricter scrutiny is necessary with respect to access. There is even a positive obligation imposed by Art. 8 to unite children and their parents. To unite children and their parents has to be, if possible, the ultimate aim of all actions by the state, and that a state must act in a manner calculated to enable family ties to be developed.[69] These reasons and the circumstance that the difference between contact and care is

[59] This could be the case especially in those situations, where a parent has no custody.
[60] The approach may not be the finest way to ensure the respect of human rights. Nevertheless, unless the fact that a person requests a review is interpreted to her/his disadvantage (e.g. if the request is generally being considered as a mere attempt to strain the other parent, as it is sometimes being pretended, notably by those people that risk to lose advantages), the approach assures that fundamental human rights principles can be respected on request, while only a minimal obligation is imposed upon Member States.
[61] Understood as a care arrangement in which the child lives to at least 30-35% with each parent.
[62] WIDRIG (2014), Chapter II.A.2.
[63] KELLY (2014), 16 f.; LAMB/KELLY (2009).
[64] SÜNDERHAUF/WIDRIG (2014), 886 f. and SÜNDERHAUF (2013), 237 for further information and references.
[65] BVerfG 1 BVR 420/09 of July 21, 2010, N. 25; Footnote 18.
[66] HODKING/NEWELL (2007), Art. 9, 130.
[67] See Chapter III.B.2.
[68] ECtHR, *Kutzner v. Germany* (judgment), 26.02.2002 (46544/99), § 58; ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 40.
[69] ECtHR, *Görgülü v. Germany* (judgment), 26.05.2004 (74969/01), § 42, 45 and 49 ff.

fluent[70] speak in favour of an application of the "*Zaunegger-Approach*" if decisions of sufficient contact or care depend exclusively of the will of one parent.

Nevertheless, this does not necessarily mean, that the Court would apply its approach in such situations. Many other factors will be considered. One relevant factor in the Court's jurisprudence is whether or not or to what extent a consensus exists among member states with respect to a certain question. While all member states to the Convention have ratified the UN Convention on the Rights of the Child and are bound by its art. 3, still some states exist in which contact or care decisions depend exclusively upon the will of one parent. Furthermore, in the *Ahrens judgment*, in which a biological father challenged the paternity of the social father, in order to establish legal paternity, the Court has not imposed its "*Zaunegger-Approach*", even though a considerable majority of 18 out of 26 Member States (69%) allow for a judicial review in equivalent circumstances.[71] Interestingly, in the *X and others judgment*, in which a second-parent challenged paternity of a legal and social (but non-residential) father in order to require a second-parent adoption, the Court decided that there was discrimination, even though only eleven Member States out of 39 (28%) allow second-parent adoptions for unmarried parents and of these eleven merely six (55% and 15% with respect to all 39 Member States) allow it for same-sex couples.[72] It seems that the Court still attributes more importance to non-discrimination than to the possibility that the child's best interests can be taken into consideration in decisions concerning children. Last but not least, the Court does not consider the domestic legislation in the abstract. It only has to examine how the legislation has been applied to the applicant in the particular circumstances of a case,[73] what might lead to the conclusion that the violation of the Convention (by a decision) lies not in a mistake made by the decision making authority, but in a legal norm imposing the decision making authority to decide contrary to the Convention (if this is the case, the legal norm is contrary to the Convention).[74]

IV. Excursus: Shared Parenting and the *Right to Respect for Family Life*

A. The *Right to Respect for Family Life* in General

The *Right to respect for Family Life (family life)* is protected by Art. 8 ECHR. The mutual enjoyment by a parent and child of each other's company is a fundamental element of *family life*, even when the relationship between parents is no longer intact. Each measure restricting such enjoyment amounts to an interference with the *right to respect for family life*.[75]

The Protection by the *right to respect for family life* usually requires that family life – understood as close personal ties between the parties – exists.[76] *Family life* is a *matter of fact* and not confined solely to marriage-based (or otherwise legally recognized) relationships. If there is no legal recognition and/or protection of a family relationship, the recognition of *de facto* family

[70] Compare also: NIKOLINA (2012), 123.
[71] The Court made a mistake in its comparative law research: Contrary to the Court's allegations, in Switzerland, according to Art. 260a (1) Swiss Civil Code any interested party can challenge a fatherhood established by recognition; ECtHR, *Ahrens v. Germany* (judgment), 22.03.2012 (45071/09), § 26 f.
[72] ECtHR, *X and others v. Austria* (grand chamber judgment), 19.02.2013 (19010/07), § 56 f.
[73] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 45; ECtHR, *Sommerfeld v. Germany* (grand chamber judgement), 08.07.2003 (31971/96), § 86.
[74] Compare with respect to Swiss law : HÄFELIN/HALLER/KELLER (2012), N 1929b; TSCHANNEN (2011), 179.
[75] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 38; ECtHR, *Kutzner v. Germany* (judgment), 26.02.2002 (46544/99), § 58.
[76] KILKELLY (2003), 16.

ties usually requires that the family members live together. However, especially when relationships between children and their (biological) parents are concerned, even the existence of an *intended* or *potential family life* may be sufficient to attract the protection of art. 8 ECHR.[77] If a close or a merely intended relationship is short of *family life*, it may still fall within the scope of *private life*, which is also protected by Art. 8 ECHR.[78]

B. Protection of Shared Parenting by *Family Life*

1. Decisions on Custody as Part of the Ambit of "Family Life"

In the *Zaunegger judgment* the ECtHR concluded, that German Family Law discriminated fathers with respect to decisions concerning custody (custody decisions) on behalf of their children (Art. 14 taken together with Art. 8 ECHR).[79] To get to this conclusion, the Court had to make an important presumption: Custody decisions fall into the ambit of the *right to respect for family life* and are therefore protected by the Convention.[80] Discrimination in the sense of Art. 14 ECHR is only possible when another right protected by the Convention is being restricted.[81] In the *Zaunegger judgment* the Court ruled that there was discrimination with respect to custody decisions.[82] This implies that custody decisions fall into the ambit of *family life*. The Court has approved its jurisprudence in the *Sporer judgment* and other decisions. In the *Döring decision* it even mentioned explicitly that custody decisions fall into the ambit of *family life*.[83]

2. Decisions Care as Part of the Ambit of "Family Life"

In the *Zaunegger judgment* the Court pointed out that "custody decisions" also include decisions on care and where the child lives when the Court concluded: "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 an interference with the applicant's right to respect for his *family life* as guaranteed by paragraph 1 of Article 8 of the

[77] A child born out of a not legally recognized relationship is part of its «de facto-family» by the very fact of its birth. A potential *family life* may be protected, where one parent has prevented the development of family ties between the child and the other parent. This was the case, when a child was the fruit of mutual decision of two cohabiting parents that had planned to get married. The relationship of the parents came to an end before the child was born and the mother place the child for adoption without knowledge and consent of the father. The Court decided, that a bond existed amounting to *family life* between the daughter and his father from the moment of the child's birth (ECtHR, *Keegan v. Ireland* (judgment), 26.05.1994 (16969/90), § 44 f.; in a similar case 10 years later both parties agreed that there was an interference with *family life*: ECtHR, *Görgülü v. Germany* (judgment), 26.05.2004 (74969/01), § 35; for further information see: *ibid*., 17). A relevant factor which may determine the existence of family ties between a child born out of wedlock and his/her natural parents is the demonstrable interest in and the commitment by the father to the child before and after birth (ECtHR, *Schneider v. Germany* (judgment), 15.09.2011 (17080/07), § 81; ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 37).

[78] E.g. this has been the case when a biological or putative biological father took legal action to establish paternity or challenge the paternity of the *legal father* of her/his (putative) child [ECtHR, *Kautzor v. Germany* (judgment), 22.03.2012 (23338/09), § 63; ECtHR, *Schneider v. Germany* (judgment), 15.09.2011 (17080/07), § 82].

[79] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 63 f.

[80] See also: ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 40.

[81] Art. 14 ECHR.

[82] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 63 f.

[83] ECtHR, *Sporer v. Austria* (judgment), 03.02.2011 (35637/03), § 72 und 90; ECtHR, *Sude v. Germany* (decision), 07.10.2010 (38102/04); ECtHR, *Döring v. Germany* (decision), 21.2.2012 (50216/09), "THE LAW", § 2.

Convention".[84] Consequently the *right to respect for family life* protects decisions on care and where the child lives.[85] The Swiss Supreme Court had already reached the same conclusion.[86]

C. Requirements necessary for Restrictions of *Family Life*

1. Requirements in General

Human rights are not absolute and can be restricted. However it should be borne in mind, that the respect of a human right is the general rule and the restriction the exception.[87] The Requirements for a restriction of *family life* are set out in Art. 8 § 2 ECHR. To restrict the *right to respect for family life* the interference has to be *in accordance with the law*, *pursue a legitimate aim* and be *necessary in a democratic society*.[88] An interference is in accordance with the law when it has a *legal basis* and is *foreseeable*. This means that "the quality of the law in question, (has to) (...) be accessible to the persons concerned and formulated with sufficient precision to enable them - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[89] Art. 8 § 2 ECHR enumerates as legitimate aims to restrict *family life* national security, public safety or economic wellbeing of the country, prevention of disorder or crime, protection of health or morals or the protection of the rights and freedoms of others. An interference is necessary in a democratic society when it corresponds to a *pressing social need* and is *proportionate* to the legitimate aim pursued.[90] It is the duty of the individual concerned to demonstrate that there has been an interference with his *family life*. It is sufficient when the individual demonstrates the likelihood that the interference has occurred. Once the existence of interference has been established, it is the duty of the state to demonstrate that the interference was justified.[91]

2. Application to Shared Parenting in Particular

We have seen that the *right to respect for family life* encloses the right to participate in custody and care decisions. If we consider parents as equal and that they have to be treated equally,[92] parental rights and duties have to belong to both parents. A difference in treatment has to be justified.[93]

Equal participation in custody and care decisions necessarily requires an equal "right" to custody and care for both parents. Restrictions of these "rights" of each parent have to be justified. To intervene with these "rights" most jurisdictions have a sufficient legal basis. A legitimate aim justifying an intervention could be seen in "health and morals" or the "rights and freedoms of others".[94] However, bearing in mind the positive results of shared parenting for children and that the child's best interests is of paramount consideration in all child-concerning

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[84] ECtHR, *Zaunegger v. Germany* (judgment), 03.12.2009 (22028/04), § 40.
[85] Widrig (2013), 904 f.
[86] Swiss Supreme Court, judgment 5A_798/2009, 04.03.2010 (136 I 178), C. 5.2.
[87] Guerra González (2012), 17.
[88] Kilkelly (2003), 25.
[89] ECtHR, *Margareta and Roger Andersson v. Sweden* (judgment), 25.02.1992 (12963/87), § 75; Kilkelly (2003), 26.
[90] ECtHR, *Olsson v. Sweden No. 1* (judgment), 24.03.1988 (10465/83), § 67; Kilkelly (2003), 31.
[91] Kilkelly (2003), 23 ff.
[92] As requested by the principle of non-discrimination and equality of women and men; e.g. Art. 8 Swiss Constitution.
[93] Art. 14 ECHR.
[94] Kilkelly (2003), 30.

decisions, there seem to be many cases in which an intervention is unnecessary in a democratic society or disproportionate and for this reason violate the Convention.[95]

3. THE RIGHTS OF THE CHILD

In its case law the Court usually has to deal with the protection of the rights of parents. For this reason the child's best interests usually finds only an "indirect" protection when parents start proceedings and have to invoke their own rights. However, this cannot mean that children are excluded from the direct protection of the ECHR. The *right to respect for family life* has to protect children as much as the parents. For this reason it seems that the CRC's *rights of the child to be cared for by its parents* and to be under the *common responsibility of both parents* could also be deduced from Art. 8 ECHR, especially when we bear in mind that restrictions of parental responsibility or care affect no one more than the children.

V. Conclusion

Convincing arguments were mentioned by the Swiss doctrine and acknowledged by the Swiss government that according to the Courts repeatedly confirmed reasoning in the *Zaunegger judgment* the general exclusion of shared legal custody or its dependence of the will of one parent does comply with Art. 8 of the Convention. Bearing in mind the importance the Court awards to the protection and establishment of family bonds, a relationship and contact between children and parents, the even higher relevance of shared physical compared to shared legal custody to protect and establish such relationships and bonds as well as the strikingly positive results for children living in shared care arrangements according to social science research, the expectation that shared physical custody has to be possible if only one parent or the child requests it, seems reasonable and logical. Nevertheless, this does not necessarily mean that the Court would impose its "Zaunegger-Approach" if care decisions depended exclusively on a parent's will.

However, independently of whatever the Court will decide in the future, the usefulness and brilliance of the "*Zaunegger-Approach*" will remain. With this approach, the Court has developed a powerful and convincing concept to assure that in all decisions concerning children the child's best interests can be taken into consideration, as requested by Art. 3 CRC. In addition, the approach assures that it can be judicially reviewed whether or not interventions with children's or parents' human rights are necessary. This is not the case, if e.g. shared physical custody is excluded by law or impossible if vetoed by one parent. For these reasons the Court's "*Zaunegger-Approach*" seems to be an appropriate minimal human rights standard for every jurisdiction in all decisions of a certain importance concerning children.

[95] Sharing this view: BERNARD/MEYER LÖHRER, Footnote 29; There may exist other pertinent reasons than the best interests of the child that justify interventions.

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