

FAMILY LAW

The Welfare of Children in Germany's Legal System

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The term “welfare of the child” is vague. It is deliberately value-neutral and thus expresses the lack of any State-prescribed ideal for raising children. As a guiding principle, the welfare of the child as a legal term at the heart of the system of child and youth care is in need of fleshing out and has to be constantly recalibrated on an individual case-by-case basis.

What common family circumstances can cause challenges when discharging the office entrusted?

Despite many attempts having been made at a casuistic structural system, the challenges faced by the professionals in the youth welfare offices are extremely demanding, as they always have to take individual family circumstances into consideration when discharging the office entrusted to them by the State as guardians of child protection. The basis in law for examinations and interventions in the fundamental rights of parents is formed where there is a specific and urgent threat to the welfare of the child by Section 8a and Section 42 of Book VIII of the Social Code (SGB VIII).

What is classed as a ‘threat’ in such instances?

Under Section 8a Undersection 1 Social Code Book VIII every professional involved in a case must work with at least one other team member in assessing risk. Central, in both Section 8a and Section 42 Social Code Book VIII, to assessing the situation of the child or adolescent is a professional understanding of the situation, since a threat to the welfare of the child cannot as a rule be easily spotted. This requires that the professional's own values, convictions, world views et cetera, need to be

neutralised as well as any so-called “middle class view”.

In your opinion, what is the best way to remain neutral in such emotional cases?

The Social Code does not forge its own path in its use and structuring of the idea of the welfare of the child, but refers rather to Section 1666 of the Civil Code (BGB). This is appropriate, for if there is a risk, this can result in intervention under Sections 8a Undersection 2 and 42 Undersection 1 No. 2 Social Code Book VIII and Section 1666 of the Civil Code in parental custody rights where the family court is called upon to adjudicate. The central yardstick of assessment by the family court is then Section 1666 of the Civil Code. Family court judges do not possess the professional expertise of social workers and social education workers. The way the law is applied is thus affected to a high degree by the way results of team-based professional assessments are submitted to the family court in child welfare proceedings. In assessing the (at-risk) welfare of the child, the family court largely relies on the assessment made by the youth welfare office and trusts in its special expertise.

What problems can occur during the process when professionals need to provide assessments for a particular legal case?

Thus, the family court and the youth welfare office

together form a community of responsibility which is unique in the German legal system and means that the guiding principle of child welfare in the child and youth support system has its own particular (yet symmetrical) structure.

Is there anything you would change about this unique system, if you had the power to?

In view of the constant problems occurring in the interaction between the Family Court and the Youth Welfare Office a structural improvement is necessary. The Federal Constitutional Court has repeatedly stressed, most recently through its Decision of 07.12.2017 (Federal Constitutional Court Decision of 07.12.2017, ref. 1 BvR 1914/17), the need in all decisions affecting a child's welfare to establish the child's current needs and the consequences, depending on the envisaged decision. However, such determinations are not possible or are only possible to an extremely basic extent if the person in question lacks expertise outside the legal profession. Family judges and lawyers in child custody cases should therefore also be trained in the central principles of child developmental psychology and possess special socio-educational expertise. Without this, the actual and legal requirements faced by lawyers working on child custody cases can no longer be met in the long term. **LM**



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Dr. iur Marko Oldenburger, attorney and certificate family law and medical law attorney, is the owner of the law firm Artvocati | Rechtsanwaltskanzlei in Hanover. After studying law and social science he was admitted to the bar in 1998 and focuses since then on the entire area of family law. He was a long-term member of a research project at the university of Hanover (International demands of family law reforms) and publishes, beneath a monography, regularly articles and essays in specialised law magazines. His, mostly prominent, clients include executive employees, doctors, personalities from industry, politics and professional sports. With his European and international family law focus he is not only mandated in cases of international child abductions, but in delicate and challenging maintenance lawsuits and, of course, divorce proceedings.

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