

**Conference on Handling Child
Evidence within the Framework of a
Child-friendly Justice System
Ensuring probative value of
children statements: **Germany****

Thomas Meysen

German Institute for Youth Human Services and
Family Law (DIJuF), Heidelberg (Germany)

Tallinn, 19-20 February 2015

Criminal Justice Proceedings

Testimony of child witnesses in child (sexual) abuse cases: probative value is examined explicitly

- Supreme Court (30 July 1999, 1 StR 618/98):
 - besides a testimony as witness: **expert opinion about the child's trustworthiness** by a psychologist/psychiatrist is mandatory
 - (very) high threshold to declare trustworthiness
 - children are (almost) always considered as untrustworthy
 - under age of 6
 - with intellectual disability or mental disorder
 - if therapy/counselling has started prior to interrogation
 - declaration by authorised expert and court to be considered as „not trustworthy“ effects children negatively

Social Administrative/Social Child Protection Proceedings

not evidence but **participation of the Child**

- in all administrative proceedings that lead to decisions (sec. 8 Social Code, Book VIII)
- in all support planning conferences and processes (sec. 36 (2) Social Code, Book VIII)

Advice/Counselling of Child

- legal claim to low threshold advice/counselling (direct access) (sec. 8 (3) and 28 Social Code, Book VIII)
 - without knowledge/consent of parents only if case of an emergency or of conflict (currently under discussion)

Family Court Proceedings

Family Proceedings Act

■ sec. 163 FamFG

„(3) The child shall not be examined as a witness.”

- rational: burden of „true or not true“ shall not be imposed on children

■ sec. 159 FamFG

„(1) The court shall conduct an in-person hearing with the child when he has reached the age of 14. (...)

(2) If the child has not reached the age of 14, he shall be heard in-person when the preferences, relationships, or the desires of the child are significant to the decision or when an in-person hearing is otherwise indicated.

(...)”

Federal Constitutional Court

- constant jurisdiction: direct hearing of the child by family judge secures the child's subject status in court proceedings: **obligatory from age of 3/4 years on**
 - family court decisions are quashed, e.g. „The child not only would have described her real relation to her natural mother but also declared her will and would have told about her interests and attachment as well as her integration in the foster family.“ (BVerfG 14.08.2001.1 BvR 310/98; translation Meysen)

Family Court Proceedings

■ International comparison

(European Commission 2010 [Feasibility Study];
Meysen/Hagemann-White 2011)

Minimum Age for Duty to Hear the Child

only depending on child's capacity	7	10	12	14	15	no particular age limit	depending on child's capacity if under the defined minimum age
4: CZ, DK*, FR, LU * in practice 6-7	1: LV	4: AT, BG*, EE, RO * not by law but in practice	7: BE, EL*, ES, FI, IT, NL, SE* * not by law but in practice	5: DE, HU, IE, LT, PT	1: SI	5: CY, MT, PL, SK, UK	10: BE, DE*, DK**, ES, IT, LT, LV, NL, PT, RO * from age of 3 (very strict) ** from age of 6-7

Family Court Proceedings

■ Research on practice in Germany

(Karle/Gathmann/Kolsinski 2010)

- average age from which judges start to hear children 4.1 y. (34.9% state 3 y. as lowest age)
- from enrolment on 95.3% of judges hear the child (age limit in law 14 y.: 0.5%)
- 67% deem obligatory hearing of the child reasonable
- 87.8% rate hearing of the child as important or quite important
- 47.1% of the judges received training on hearing of the child (f: 47.1%, m: 46.9%)
- 83.9% of the judges deem training on hearing of the child necessary (f: 87.8%, m: 80.7%)
- **level of child's stress:** increased 1 week prior to hearing, high directly before, lowered directly after, (almost) leveled out 4 weeks after [based on interviewed child perception]

Family Court Proceedings

- **representation** in family court proceedings:
guardian ad litem (sec. 158 FamFG)
 - appointment
 - in every child protection cases
 - in all highly conflictuous separation and divorce cases
 - tasks
 - assess best interests of the child
 - inform child on cause, proceedings, potential outcomes
 - talk with parents and other persons of importance for child, if explicitly appointed by judge
 - support amicable solutions

Family Court Proceedings

- **family psychology expert** examines child, if appointed by court (sec. 163 FamFG)
- **youth welfare office** is party in each family court proceedings concerning children's interests (sec. 162 FamFG)
 - informs about offered and provided support services
 - brings in the parenting and social aspects concerning the development of the child
 - indicates potential for further support services

Family Court Proceedings

■ International comparison

(European Commission 2010; Meysen/Hagemann-White 2011)

Duty to Hear the Child – directly or indirectly

	duty to hear the child		court proceedings	
	in court proceedings	in administrative proceedings	direct hearing by judge	hearing only through representative
Bulgaria	X	X	X	
Estonia	X	X	X	
Germany	X	X	X	
Greece			X	
Netherlands	X	X	X	
Romania	X	X	X	
Sweden	X	X		X
Turkey	X	X	X	
UK (England and Wales)	X	X		X

Family Court Proceedings

- **polarisation in the implementation of article 12 CRC**
 - each legal and judicial system claims to be on the right path with their approach

Sweden, England & Wales	Germany
<ul style="list-style-type: none">• direct hearing by judge almost never takes place• highly qualified professionals who hear the child• continuous informing and supporting by person at the child's side• systematic inclusion of indirect hearing• strong informal status of person at child's side in proceedings	<ul style="list-style-type: none">• direct hearing by judge almost always takes place• developing qualification of professionals who hear the child• Several professional claim to represent the child's well understood best interests• additional indirect hearing• strong formal status of person at child's side in proceedings

Child's agency through hearing?

International comparison is thought-provoking

- Is restraint because of concerns about exposing child to stress when hearing directly justified?
- Is the punctual event of the hearing by the judge sufficient to capture the child's processing of the family conflicts? Or: Does the „To me, the child has told“ make emotionally corruptible?
- Are the well understood child's best interests taken into account best through direct hearing by the judge oder continuous professional support?
- Information, counseling and support of the child during family court proceedings or backup for the court's decision making?

contact

**German Institute for Youth Human
Services and Family Law /
Deutsches Institut für Jugendhilfe
und Familienrecht e.V. (DIJuF)**

Dr. Thomas Meysen

P.O. Box 10 20 20 Poststr. 17

D-69010 Heidelberg D-69115 Heidelberg

Tel. +49-6221-9818-11

thomas.meyesen@dijuf.de