



# EFFECTIVE LAW IN AN EFFECTIVE STATE

*Local conditions in the global context in the face  
of 21st century challenges of fighting crime.*

## **The child's rights in legal proceedings before the court in the Swiss legal system - an analysis of past experience**

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## 1. Legal basis

The rights of the child in legal proceedings are set forth in several legal acts. The most important of these is the Convention on the Rights of the Child<sup>2</sup> and, in particular, Art. 12 of the Convention which states that “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”. Switzerland is a federal state, the judiciary of each canton is independent of the Federation, so this provision is of key importance.

More provisions are found in Title 7 of the Swiss Code of Civil Procedure - schweizerische Zivilprozessordnung ZPO. Art. 295-301abis contain provisions that are important to upholding certain rights of the child in court proceedings. Art. 297 of the Swiss Code of Civil Procedure ZPO stipulates that if decisions concerning the child are to be made, the court shall hear the parents in person. The court may also ask the parents to attempt mediation<sup>3</sup>. The court is obliged to hear the child’s opinion under Art. 297 and 298 of the Swiss Civil Code (Zivilgesetzbuch - ZGB)<sup>4</sup>. The child must be heard by the adjudicating court in cases where the welfare of the child is at stake, in particular, when custody and visitation rights are being decided. Moreover, Swiss law provides for the institution of the child’s legal counsel (Vertretung des Kindes - Verfahrensbeistand), whose task is to represent the child’s rights before the adjudicating court regarding the aforementioned rights and support rights<sup>5</sup>.

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<sup>2</sup> CONVENTION ON THE RIGHTS OF THE CHILD adopted by the United Nations General Assembly on November 20, 1989 (Journal of Laws of December 23, 1991), <https://brpd.gov.pl/konwencja-o-prawach-dziecka/>, accessed on 28.08.2023.

<sup>3</sup> Art. 297 Sec. 1 and 2 of the Swiss Code of Civil Procedure ZPO: „Sind Anordnungen über ein Kind zu treffen, so hört das Gericht die Eltern persönlich an. Das Gericht kann die Eltern zu einem Mediationsversuch auffordern“, <https://www.fedlex.admin.ch/eli/cc/2010/262/de>, accessed on 28.08.2023.

<sup>4</sup> Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907 (Stand am 23. Januar 2023) Die Bundesversammlung der Schweizerischen Eidgenossenschaft, „Sind Anordnungen über ein Kind zu treffen, so hört das Gericht die Eltern persönlich an.“<https://www.fedlex.admin.ch/eli/cc/2010/262/de>, accessed on 28.08.2023.

<sup>5</sup> Art. 298 of the Swiss Code of Civil Procedure

## 2. Obligation of the adjudicating court to hear the child

Pursuant to Art. 298 of the Swiss Code of Civil Procedure (ZPO)<sup>6</sup>, a child is heard in person by the court or by an authorized third party in an appropriate manner unless their age or other important considerations militate against it. Only the results relevant to the court's decision shall be recorded in the minutes from the hearing. Parents and guardians of children are informed about the results<sup>7</sup>.

Moreover, pursuant to § 3 of this article, a child capable of understanding their circumstances may challenge the denial of a hearing by means of a complaint. The child may use the child's legal counsel while they are being heard by the court, pursuant to Art. 298 Sec. 1 of the Swiss Code of Civil Procedure (ZPO). While the child is being heard, the judge should form an understanding of the child's desires (will) and needs. The hearing has two main goals: it is to show respect for the child who is in a difficult situation during the parents' separation or divorce. It also helps the court assess the child's situation in the family.

Pursuant to Art. 298 of the Swiss Code of Civil Procedure (ZPO), a child is heard in all matrimonial proceedings. The child's right to be heard during proceedings before the court also derives from Switzerland's contractual obligations, namely Art. 12 of the Convention on the Rights of the Child of November 20, 1989 (Convention on the Rights of the Child), which entered into force in Swiss legislation on March 26, 1997<sup>8</sup>. Hearing the child is the rule, the absence of a hearing is an exception in pending proceedings. A child may be not heard only in the following situations: it is necessary because the children are too young, and also when other

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<sup>6</sup> Schweizerische Zivilprozessordnung (Zivilprozessordnung, ZPO) vom 19. Dezember 2008 (Stand am 1. Januar 2023), <https://www.fedlex.admin.ch/eli/cc/2010/262/de#a298>, accessed on 28.08.2023, „Das Kind wird durch das Gericht oder durch eine beauftragte Drittperson in geeigneter Weise persönlich angehört, sofern sein Alter oder andere wichtige Gründe nicht dagegen sprechen“.

<sup>7</sup> Art. 297 Sec. 1 and 2 of the Swiss Code of Civil Procedure ZPO: Das Kind wird durch das Gericht oder durch eine beauftragte Drittperson in geeigneter Weise persönlich angehört, sofern sein Alter oder andere wichtige Gründe nicht dagegen sprechen. Im Protokoll der Anhörung werden nur die für den Entscheid wesentlichen Ergebnisse festgehalten. Die Eltern und die Beiständin oder der Beistand werden über diese Ergebnisse informiert. Das urteilsfähige Kind kann die Verweigerung der Anhörung mit Beschwerde anfechten, <https://www.fedlex.admin.ch/eli/cc/2010/262/de>, accessed on 28.08.2023.

<sup>8</sup> Übereinkommen über die Rechte des Kindes Abgeschlossen in New York am 20. November 1989 von der Bundesversammlung genehmigt am 13. Dezember 1996<sup>1</sup> Ratifikationsurkunde durch die Schweiz hinterlegt am 24. Februar 1997 in Kraft getreten für die Schweiz am 26. März 1997 AS 1998 2055; BBl 1994 V 1, [https://www.fedlex.admin.ch/eli/cc/1998/2055\\_2055\\_2055/de#a12](https://www.fedlex.admin.ch/eli/cc/1998/2055_2055_2055/de#a12), accessed on 28.08.2023.

important considerations speak against a hearing (Art. 12 of the Convention on the Rights of the Child; Art. 298 Sec. 1 of the Swiss Code of Civil Procedure ZPO). An example of a situation when a family court waives a child's hearing may be the case where the hearing places a significant burden on the child, or the child is unable to assess the relationship with the parent at all, as they had no contact with them<sup>9</sup>.

The court decides whether a child will be heard in a particular case in ongoing proceedings based on the circumstances and after interviewing the parents. According to the Federal Supreme Court, a child may be heard, in principle, from the age of six<sup>10</sup>. Children younger than six often do not fully understand the importance of parental conflict. As a result, the burden of being heard by a person they do not know is greater for them, especially if the parents do not agree on the arrangements concerning children. On the other hand, it is important, especially in controversial cases, to determine the needs of a child under the age of six. In cases where expertise is required to evaluate the children's testimony, the court often appoints experts in contentious cases<sup>11</sup>. When deciding whether the court will hear the child's opinion, the adjudicating court also takes into account whether the child wants to be heard or not.

The results of the child's hearing are confidential. Parents usually receive only a summary of the child's statements<sup>12</sup>. At the request of the child, portions of the content of their hearing by the court may be omitted. The family court tries to conduct the hearing so that that the child's wishes and needs, but also concerns, are clearly stated. Experience of family courts shows that the agreements entered and decisions made are better for all of the persons concerned if they also take into account the children's point of view, for example, with regard to the establishment of child custody and frequency of contact<sup>13</sup>.

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<sup>9</sup> Judgement of the Federal Supreme Court BGE 124 III 90.

<sup>10</sup> Judgement of the Federal Supreme Court BGE 131 III 553.

<sup>11</sup> Judgement of the Federal Supreme Court BGE 127 III 295.

<sup>12</sup> Art. 298 Sec. 1 of the Swiss Code of Civil Procedure.

<sup>13</sup> Website of the Swiss courts – Zuercher Zivil- und Strafgerichte, <https://www.gerichte-zh.ch/themen/ehe-und-familie/kinder/kinderanhoerung.html>, accessed on 28.08.2023.

### 3. The significance of child's hearing and the child's opinion in court proceedings - the principle of the child's welfare

The jurisprudence of the Swiss courts stresses that the child's opinion is important for the protection of the child's welfare, however, it is only one of many criteria. According to the Federal Supreme Court, the child's opinion should be one of several criteria. Otherwise, the child's will and the child's welfare would be equal which, however, is not always the reality. If the will and the welfare of the child were equal, according to the Supreme Court, it would also allow for the possibility of manipulating the child or exerting pressure on the child<sup>14</sup>. Only in the jurisprudence on the right to personal contact, the opinion of the child has a special weight for the adjudicating court<sup>15</sup>.

In determining the child's will, the adjudicating court must take into account the constancy in the will expressed by the child. In doing so, the child's ability to make independent decisions and their age must be considered. A child's decision is considered to show sufficient maturity when the child forms their own view and demonstrates an understanding of the problem. The jurisprudence of the Federal Supreme Court<sup>16</sup> assumes that only a child who is about twelve years of age has adequate capacity to make an independent decision, although it may vary depending on the individual characteristics of the child<sup>17</sup>.

A child's will may be distorted by a serious conflict of loyalty to their parents. Such situations are observed daily by the courts deciding family cases. Courts are required to understand the welfare of the child as the child's right to dignity and their own personality<sup>18</sup>. Therefore, the child has every right, because of their own experiences, to definitely reject

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<sup>14</sup> BGE 142 III 612, E. 4.3; BGE 142 III 617, E. 3.2.3; BGer 5A\_52/2015 of December 17, 2015, E. 5.2.4; BGer 5A\_985/2014 of June 25, 2015.

<sup>15</sup> Michelle Cottier, Eric D. Widmer, Sandrine Tornare und Myriam Girardin, Interdisziplinäre Studie zur alternierenden Obhut, Université Genf, Faculté de droit, Genf, 2017, p. 41.

<sup>16</sup> BGE 131 III 334, E. 5.1.

<sup>17</sup> BGer 5A\_459/2015 of August 13, 2015, E. 6.2.2; BGer 5A\_719/2013 of October 17, 2014, E. 4.4; BGer 5A\_107/2007 of November 16, 2007, E. 3.2., Michelle Cottier, Eric D. Widmer, Sandrine Tornare und Myriam Girardin, Interdisziplinäre Studie zur alternierenden Obhut, Université Genf, Faculté de droit, Genf, 2017, p. 41.

<sup>18</sup> Revital Ludewig Moraldilemmata in der Tätigkeit von Familienrichtern: Kindeswohl zwischen Recht und Psychologie FamPra.ch 4/20, p. 920 et seq.

contact with one of their parents. In one case, the Federal Supreme Court<sup>19</sup> confirmed that the expressed will of children (aged 12, almost 16 and 18) not to contact the father who has not sought this contact with the children for at least four years should be respected<sup>20</sup>.

“In Switzerland, the welfare of the child matters in a general and comprehensive sense. In particular, the goal of the child’s welfare is to ensure that the child has the opportunity to develop in an age-appropriate manner - psychologically, physically and socially, and the adjudicating court obligatorily takes into account all specific circumstances and seeks the best possible solution for the child (...)”<sup>21</sup>.

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<sup>19</sup> BGer 5A\_459/2015 of August 13, 2015, E. 6.2.2.; BGer 5C.250/2005 of January 3, 2006, E. 3.2.1; BGE 126 III 219, E. 2b.

<sup>20</sup> BGer 5A\_265/2015 of September 22, 2015, E. 2.2.2.

<sup>21</sup> BGE 129 III 255, BGE 129 III 255 «In der Schweiz gilt der Vorrang des Kindeswohls in einem umfassenden Sinne. Angestrebt wird namentlich eine altersgerechte Entfaltungsmöglichkeit des Kindes in geistig-psychischer, körperlicher und sozialer Hinsicht, wobei in Beachtung aller konkreten Umstände nach der für das Kind bestmöglichen Lösung zu suchen ist (...).».



#### 4. Child's legal counsel – child's attorney (Verfahrensbeistand)

In all proceedings concerning the division of parental custody and childcare, the child's legal counsel may be appointed to represent the child in the proceedings in the role of an attorney and representative of the child<sup>22</sup>. This representation of the child is set forth in Art. 299 Sec. 1 of the Swiss Code of Civil Procedure ZPO. If necessary, the court appoints a person to represent the child who has the necessary experience in custody and legal matters<sup>23</sup>. The court or the child protection body appoints, if necessary, the child's legal counsel, who must be experienced in social and legal matters<sup>24</sup>. Art. 299 Sec. 1 of the Swiss Code of Civil Procedure ZPO, Art. 314abis Sec. 1 of the Swiss Civil Code ZGB enumerate the grounds in which the involvement of the child's legal counsel is obligatory. They include situations when the subject of the proceedings is the placement of a child in an institution; and when the parties file various motions with regard to the regulation of parental custody or important issues of personal contact with the child. Pursuant to Art. 299 Sec. 2 of the Swiss Code of Civil Procedure, these are also cases in which the issues of granting or revoking parental custody, childcare rights or child support are decided. The child's legal counsel may file motions and use all measures provided for by law<sup>25</sup>.

In proceedings before the court concerning matrimonial matters, the powers of the child's legal counsel are limited to the following matters: awarding parental custody or childcare, arranging child contact and child protection<sup>26</sup>. After the new act on the award of support entered into force on January 1, 2017, these powers have been expanded to include support cases<sup>27</sup>.

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<sup>22</sup> Cf. Art. 314abis of the Swiss Civil Code ZGB, and Art. 299 f of the Swiss Code of Civil Procedure ZPO.

<sup>23</sup> Art. 299 Sec. 1 of the Swiss Code of Civil Procedure ZPO „Das Gericht ordnet wenn nötig die Vertretung des Kindes an und bezeichnet als Beiständin oder Beistand eine in fürsorgerischen und rechtlichen Fragen erfahrene Person“.

<sup>24</sup> Art. 299 Sec. 1 of the Swiss Code of Civil Procedure ZPO, Art. 314abis Sec. 1 of the Swiss Civil Code ZGB.

<sup>25</sup> Art. 314abis Sec. 2 of the Swiss Civil Code ZGB.

<sup>26</sup> Art. 300 of the Swiss Code of Civil Procedure ZPO.

<sup>27</sup> Art. 300 Item d and e of the Swiss Code of Civil Procedure ZPO.

The child's legal counsel (the child's attorney) is appointed at the request of the parents, of the child protection body (child protection office)<sup>28</sup> or the child themselves<sup>29</sup>. The court cannot refuse to appoint the child's legal counsel when such request is made by the child<sup>30</sup>. If the child's legal counsel is not appointed by the court despite the child's request, the child may file a complaint<sup>31</sup>.

Studies conducted by the Swiss Competence Center for Human Rights (Schweizerische Kompetenzzentrum für Menschenrechte (SKMR) in 2014 suggest that child protection authorities do not appoint a child's legal counsel often enough and do not always fully understand either the role of the counsel and their own role in appointing such counsel. The Center stresses the need to raise awareness and clarify the role of bodies appointed to represent children<sup>32</sup>. Since the Code of Civil Procedure entered into force in 2010, the statistics of appointing a child's legal counsel in matrimonial court proceedings have risen. The statistics showed large differences in judicial practice in different cantons<sup>33</sup>.

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<sup>28</sup> Art. 299 Sec. 2 Item b „die Kindesschutzbehörde oder ein Elternteil eine Vertretung beantragen“

<sup>29</sup> Art. 300 Item d and e of the Swiss Code of Civil Procedure ZPO „die Kindesschutzbehörde oder ein Elternteil eine Vertretung beantragen“.

<sup>29</sup> Art. 299 Sec. 3 of the Swiss Code of Civil Procedure ZPO „Stellt das urteilsfähige Kind Antrag auf eine Vertretung, so ist diese anzuordnen“.

<sup>30</sup> Ibidem.

<sup>31</sup> Art. 299 Sec. 3 of the Swiss Code of Civil Procedure ZPO „Das Kind kann die Nichtanordnung mit Beschwerde anfechten“.

<sup>32</sup> Michelle Cottier, Eric D. Widmer, Sandrine Tornare und Myriam Girardin, Interdisziplinäre Studie zur alternierenden Obhut, Université Genf, Faculté de droit, Genf, 2017

<sup>33</sup> Schweizerische Statistik der Massnahmen im Kindes- und Erwachsenenschutz 2010, ZKE 2011, 414, 420 (Statistiken zu den alten Art. 146 und 147 ZGB).

## Summary

As regards respecting the rights of the child in legal proceedings, Swiss law is based primarily on the provision of Art. 12 of the Convention on the Rights of the Child. Additionally, the provisions of the Swiss Code of Civil Procedure (ZPO) and the Swiss Civil Code (ZGB) are fundamental for the rights of the child. The main rights of the child in the proceedings are the right to be heard by the court and the right to have a child's legal counsel (Verfahrensbeistand) appointed to protect the child's rights.

The jurisprudence of Swiss courts understands the rights of the child in court proceedings primarily as protecting the child's welfare and its status after the decision made by the court. Thus, hearing of the child, right to contact with a parent or the right to refuse such contact, movement of the child between homes of the parents, award of custody and childcare to both parents or one of them, as well as termination of parental custody of one of the parents are the issues that are most important for the courts in their decision making process.

As a rule, custody of the child is granted to both parents. However, there are exceptions to this rule. If the parents cannot agree on child custody at the time of separation or divorce, the decision is made by the court based on the best interests of the child. If the court finds that the interests of the child are at risk, the judge may decide to transfer parental custody to only one of the parents, thus granting such parent full custody of the child. If there is no risk to the child's welfare, however, the judge may grant the non-custodial parent a special right to contact the child pursuant to Art. 133 and 273 of the Swiss Civil Code ZGB.

The suggestions for the Polish legislator are clear: the institution of the child's legal counsel, well-known in German-speaking legal systems, would certainly prove useful in the Polish judicial system as well. The welfare of the child is an extremely important value, and no effort should be spared to ensure the child's welfare. Establishing an institution of a child's legal counsel is an important step toward achieving this goal.

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