



**LEUPHANA**

UNIVERSITÄT LÜNEBURG



## Panel: Parental Alienation in International Courts

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Third International Conference of the Parental Alienation Study Group (12-14.09.19)

Philadelphia, Pennsylvania USA, Sa 14th September 2019, 13:30-14:30 h



# Programme

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## Parental Alienation in German Courts

I Introduction: PA and the German Legal System

II PA and the German Constitutional Court - and the ECHR

III Conclusions

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# Programme

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## Parental Alienation in German Courts

*I Introduction: PA and the German Legal System*

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# Parental Alienation in German Courts

## I Introduction : PA and the German Legal System





## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

**Would you entrust your own family problems to your  
Family Law System?**

**Decision v Solution**



## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

**Judges are the heroes**

Cochem – GAL – Access Custodians

**But concerning PA(S)... well...**



# Parental Alienation in German Courts

## I Introduction : PA and the German Legal System





## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

#### PA v PA(S) - Process v End of the process

#### Parental Alienation

Induced child rejection of contact with (usually) one of his/her parents that leads to a durable contact suspension (normally) ordered by a Family Court

#### Parental Alienation... Syndrome

Irrespective if there is such a „syndrome“ or not  
the way to it is contrary to Law

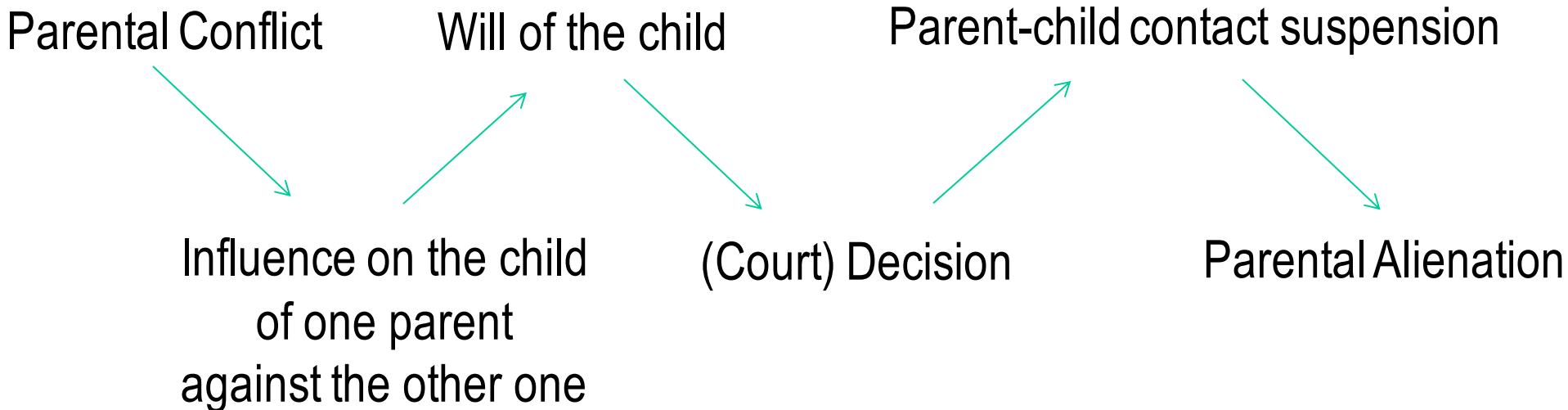




## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

## The Chain to PA





## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

#### **Article 6 Basic Law for the Federal Republic of Germany**

[Marriage – Family – Children]

(1) Marriage and the family shall enjoy the special protection of the State.

(2) *The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.*



## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

#### **Article 1 GG** [Human dignity]

(1) *Human dignity shall be inviolable.* To respect and protect it shall be the duty of all state authority

#### **Article 2 GG** [Personal freedoms]

(1) *Every person shall have the right to free development of his personality* insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (s. *BVerfGE* 1.4.2008; 29.7.1968)



## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

#### **Section 1626 BGB (Civil Code) Parental custody, principles**

*(3) The best interests of the child as a general rule include contact with both parents. The same applies to contact with other persons to whom the child has ties, if maintaining these ties is beneficial for its development.*



## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

In general

Concerning Family Courts

**§ 1666a BGB** Principle of proportionality

*(1) Measures which entail a separation of the child from its parental family are admissible only if the danger cannot be countered in another way, not even through public support measures. This also applies if one parent is temporarily or for an indefinite period to be refused use of the family home. (...)*



## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

#### § 89 FamFG (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction)

##### *Administrative Means of Coercion*

- (1) In cases of non-compliance with an enforcement instrument requiring the surrender of a person and rules governing contact, the court may impose an administrative fine on the obligated person and, in the event this cannot be recovered, administrative detention. If an order for an administrative fine is likely to be unsuccessful, the court may order administrative detention. The orders shall be made by way of an order.
- (2) The order issued to order the surrender of persons or the rules governing contact shall refer to the consequences of non-compliance with the instrument of enforcement.
- (3) The amount of a single administrative fine shall not exceed EUR 25,000. As to the enforcement of administrative detention, section 802g (1) sentence 2 and (2) and sections 802h and 802j (1) of the Code of Civil Procedure shall apply mutatis mutandis.



## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

(Result offence)

#### **§ 223 StGB (Criminal Code) Causing bodily harm**

- (1) Whosoever physically assaults *or damages the health* of another person, shall be liable to imprisonment not exceeding five years or a fine.
- (2) The attempt shall be punishable.



## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

(Endangerment offence)

#### **§ 171 StGB Violation of duties of care (...)**

*Whosoever grossly neglects his duty to provide care (...) for a person under the age of sixteen and thereby creates a danger that the person's physical or mental development could be seriously damaged (...), shall be liable to imprisonment not exceeding three years or a fine.*





Geschäftsnummer (bitte stets angeben)

NZS 1301 AR 907/19

Ihr Zeichen, Ihre Nachricht vom  
ohne

Durchwahl  
04131 202-375

Datum  
17.07.2019

**Ihre Anfrage vom 30.06.2019**

Sehr geehrter Herr Dr. González,

soweit es aus Ihrer Anfrage zu entnehmen ist, könnte nach hiesiger Einschätzung allein § 171 Strafgesetzbuch einschlägig sein, da die Instrumentalisierung eines Kindes gegen einen anderen Elternteil eine schwere seelische Fehlentwicklung mit sich bringen könnte. Im Übrigen wird jedoch angenommen, dass eher eine Lösung im Rahmen der familienrechtlichen Vorschriften zu finden sein dürfte.

Mit freundlichen Grüßen

Wolters  
Staatsanwalt

Beglaubigt

Schulze  
Justizangestellte



## Parental Alienation in German Courts

### I Introduction : PA and the German Legal System

(Endangerment offence)

#### **§ 235 StGB Abduction of minors from the care of their parents etc**

1) *Whosoever removes from the custody of one or both of his parents or his guardian or denies them access to*

*1. a person under eighteen years of age by force, threat of serious harm or deception; (...)*

shall be liable to imprisonment not exceeding five years or a fine.



# Programme

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## Parental Alienation in German Courts

I Introduction: PA and the German Legal System

*II PA and the German Constitutional Court - and the ECHR*

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## Parental Alienation in German Courts

### II PA and the German Constitutional Court - and the ECHR

#### BVerfG 1 BvR 3326/14

You have to consider the will of the child, *even if it has been influenced*

Only if this influence do not correspond to the child's attachments can be left unconsidered (17)



## Parental Alienation in German Courts

### II PA and the German Constitutional Court - and the ECHR

#### BVerfG 1 BvR 3326/14

...If you do not follow the will of the child, it may experience loss of control and reduce his/her self-efficacy, which could lead to psychical disturbances or behavioural disorders (22)



## Parental Alienation in German Courts

### II PA and the German Constitutional Court - and the ECHR

#### BVerfG 1 BvR 3326/14

Under these circumstances the child *experiences himself/herself* coercive measures against the mother in order to fulfil the right of access of the father.

Besides it will make worse the loyalty conflict in favour of the mother and the negative image of the father (25).



## Parental Alienation in German Courts

### II PA and the German Constitutional Court - and the ECHR

## BVerfG 1 BvR 3326/14

### Lessons

- *PA - It is a sure win!*: Keep calm and do not give up... you will alienate the other parent if you really want (!?)
- *Do not be a troublemaker! The non-resident partner makes by claiming everything worse* – he/she does not respect the child's will, even jeopardises the child, disturbs the family peace
- Maybe it is not that right to exert influence on a child (against the other parent)... *but what can we do against?*



## Parental Alienation in German Courts

### II PA and the German Constitutional Court - and the ECHR

## **Moog v Germany 06.10.2016**

23280-08 (Judgment (Merits and Just Satisfaction) - Court  
(Fifth Section)) [2016] ECHR 839

## **Zaunegger v Germany (03.12.2009)**

## **Anayo v Germany (21.12.2010)**





## Parental Alienation in German Courts

### II PA and the German Constitutional Court - and the ECHR

#### ***Background***

#### ***Article 8 ECHR – Right to respect for private and family life***

- 1. Everyone has the right to respect for his private and family life, (...).*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society (...), for the protection of health or morals, or for the protection of the rights and freedoms of others.*



## Parental Alienation in German Courts

### II PA and the German Constitutional Court - and the ECHR

## Moog v Germany 6.10.2016

### *Judgment*

*53. The Court notes that where the existence of a family tie has been established, the State must in principle act in a manner calculated to enable that tie to be maintained. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life*



## Parental Alienation in German Courts

### II PA and the German Constitutional Court - and the ECHR

## Moog v Germany 6.10.2016

### Breach of Art . 8 (Third aspect: conduct of contact proceedings)

91. The Court also notes that throughout the proceedings the applicant had *no contact with his son*, despite the two interim orders issued by the Family Court.

92. In the light of the foregoing, and having regard to the considerable impact on the applicant's family life, the Court concludes that the German authorities failed to meet their positive obligations arising from Article 8 of the Convention, as a result of which the applicant's contact with his son was curtailed for the duration of more than four years.

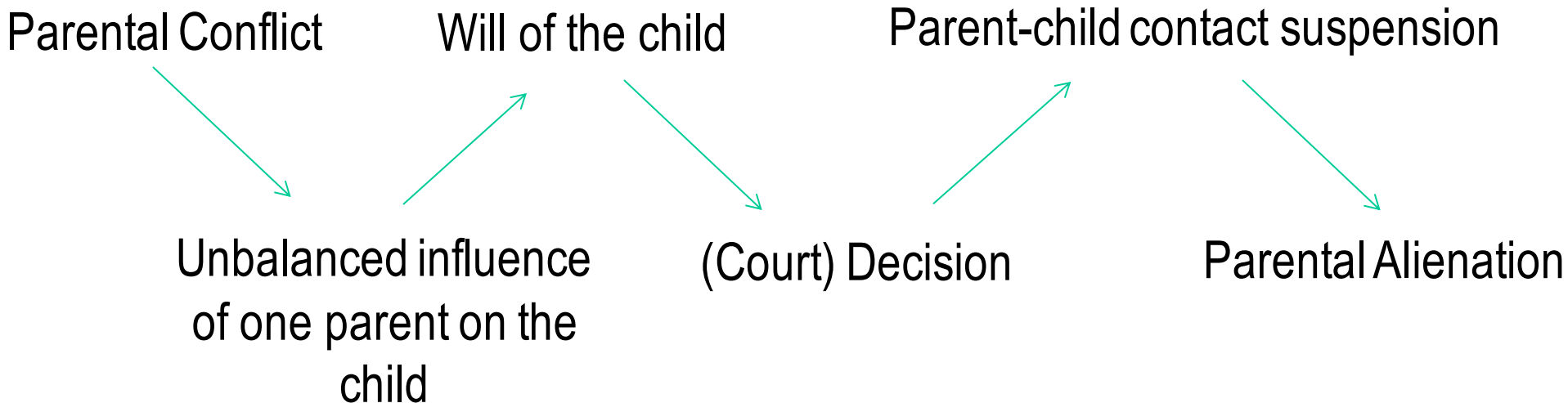
93. There has, accordingly, been a **violation of Article 8** of the Convention in the contact proceedings.



## Parental Alienation in German Courts

### III Conclusions

## The Chain to PA





## Parental Alienation in German Courts

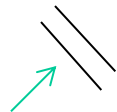
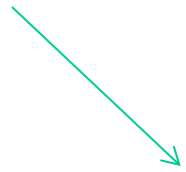
### III Conclusions

## The Chain to PA

Parental Conflict

Will of the child

Parent-child contact suspension



Unbalanced influence  
of one parent on the  
child

(Court) Decision

Parental Alienation



## Parental Alienation in German Courts

### III Conclusions

#### Preventing Parental Alienation

- 1) Apply the Law: PA is a crime! At least a breach of custodial duties
- 2) Prevention: Equal rights for parents (Joint parental custody)
- 3) Re-evaluation: will/words of the child



## Parental Alienation in German Courts

### III Conclusions

#### Preventing Parental Alienation

From my experience as guardian ad litem/Access custodian

#### Reevaluating the will of the child

##### **§ 104 BGB Incapacity to contract**

A person is incapable of contracting if 1.he is not yet seven years old (...),

##### **§ 105 BGB Voidness of declaration of intent**

(1) The declaration of intent of a person incapable of contracting is void.

##### **§ 106 BGB Limited capacity for minors to contract**

A minor who has reached the age of seven has limited capacity to contract under sections 107 to 113



## Parental Alienation in German Courts

### III Conclusions

#### Preventing Parental Alienation

#### Reevaluating the will of the child

- Child is Subject of Law – but not ripe enough – Right of custody to guide and to protect them
- Will of the child... and a influenced child can eliminate one of his/her custodians?
- *... what do a child know at 8, 10, 12, 14... 16 in order to decide on his/her custodians?*
- RIGHT BALANCE: Wrong form of respect children as subject of Law... may mean their instrumentalisation





## Parental Alienation in German Courts

### III Conclusions

#### Preventing Parental Alienation Reevaluating the words of the child

- The clearer the words the more probable they are not their own
- Impression of adult words – not belonging to their world and perspective
- Constellation? (normally the non-resident parent is the rejected one)
- Not logical: the less contact, the stronger the rejection?
- Inconsistencies? Long-term memories of children under 4-5?
- Inconsistencies? Children refer about fear... without physical reaction of fear
  
- *Nature: Children want to remain with their both parents – even long after separation*
- *(especially) Children that are really being abused do not reject their abuser, they have to be separated from them*



## Parental Alienation in German Courts

### III Conclusions

#### Bonus Track

#### *Limits of Law*

between respect for the children... *and* our duty to protect them

between decision/judgment *and* solution



## Parental Alienation in German Courts

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*Darkness cannot drive out darkness: only light can do that. Hate cannot drive out hate:  
only love can do that*

Martin Luther King Jr.,

A Testament of Hope: The Essential Writings and Speeches

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***Thank you!***