1. Introduction

Statutory Measures

a) An informal agreement can be made by the parents out of court. This determines that the child can only move abroad with the permission of both parents and should be made in writing for reasons of proof.

b) If there is no agreement, an application to the Family Court has to be brought in.

   As to whether the child can move abroad with one parent, the question of residence must be determined as a sub-point of the right of custody/care. Local jurisdiction is designated in § 152 Gesetz über das Verfahren in Familiensachen und in Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG)/Law concerning the proceedings in family law cases and cases of non-contentions matters. If a matrimonial matter (divorce) is pending in court, then this court will have jurisdiction over the child relocation proceeding. Otherwise the court at the child's habitual residence has jurisdiction. It must be noted here that the habitual residence is not necessarily the same as domicile.

   It is also conceivable that several courts could have jurisdiction, in which case it would be decisive to know which court was the first to deal with the case.

2. The Legal Test

At this point, the decision of the Bundesgerichtshof (BGH)/Federal Supreme Court of Justice (BGH 28.04.2010, XII ZB 81/09) is very instructive. The court had to decide on the custody/care for a nine year old child. The mother wanted to leave Germany with her child to live in Mexico with her new partner and had applied for the sole custody/care.

The well-being of the child plays a decisive role in the decision on custody/care (§ 1671 I Bürgerliches Gesetzbuch (BGB)/German Civil Code).

In the case of emigration to another/a foreign country it is, however, questionable as to which importance should be given to the particular aspects regarding the well-being of the child, how much influence should the decision put on the parental rights of both parents as well as the general freedom of action for the parent wishing to emigrate.

According to decisions of the Federal Supreme Court of Justice, the most significant aspects for the well-being of the child are the suitability of the parents to bring up the child, the child's family ties, the principles of encouragement and continuity as well as consideration for the child's wishes. However, these criteria are not assessed cumulatively but can be considered individually and may be of greater or lesser significance to the decision, which should be in the best interest of the child.

Furthermore, the parental rights of both parents are to be considered, as ensured in Article 6 § 2 (1) of the Grundgesetz (GG)/German Constitution.

Initially, there is only an indirect effect on the general freedom of action of the parent wishing to emigrate, in so much that there is an infringement on the parent's freedom to emigrate as well as on the use of the parental rights to the previous extent. Thus the decision is not made on the weighing of the general freedom of action of the parent wishing to emigrate against the parental rights of the parent staying at home, but on the mutual parental rights.

However, the general freedom of action of the parent wishing to emigrate is nonetheless of great relevance as this determines the actual initiation of the weighing. For the decision in the interest of the well-being of the child and the weighing of the mutual parental rights it cannot be assumed that the main parent caring for the child will stay at home with the child, even if this were the best possibility in the interest of the child's well-being. The actual initiation point must in fact be the implementation of the parent's wish to emigrate.

The family court does not, in principle, examine the parent's motives on the decision to emigrate. In this respect it is not important for the parent to give valid reasons for this decision. Accordingly, the family court has no possibility to restrict the general freedom of action of the parent and cannot prohibit the departure of the parent in a permissible manner. The competence of the family court is in fact confined to the child and the decision is aimed principally at the effect of the emigration on the child's well-being. Accordingly, the question as to whether the parent has solid reasons for emigration is only taken into consideration with the decision on the child's well-being. If it is, for example, the objective of the parent relocating to terminate all contact between the child and the other parent, then the tolerance of commitment and consequently the suitability to bring up the child will be questioned in the parent caring for the child. Should emigration be of any damaging consequences for the child, then the suitability to custody/care for the child will be doubted in the parent caring for the child and this can even lead to the withdrawal of custody/care.

Such unreasonable intentions involving unacceptable risks for the child would in any case result in disadvantageous consequences for the parent with custody/care with regard to continuity and the quality of the parental bond. This, in turn, would be an argument against the parent's suitability to bring up the child and therefore determine whether custody/care of the child should be granted to the other parent currently with this right.

Emigration with a child will not necessarily be impeded when, as a rule for the well-being of the child, the child has access to both parents. Even if emigration were to endanger this access heavily, this would not result in either general or suspected harm to the well-being of the child.

The need of intensive access to both parents is one element of the child's needs for a decision according to § 1671 BGB or amendment under § 1696 BGB and should be considered here. This must be stayed and weighed in the decision of the family court. It is a question in every individual case, whether emigration would have disadvantageous consequences for the child and the parent remaining behind. (BGH-decision of 28.04.2010, XII ZB 81/09)

Significance of the child's wishes

Under § 159 FamFG a child which has reached the age of 14 has to be heard in person by the court. If the child is younger, the judge decides whether there will be a personal hearing. Should he refrain, he must provide detailed reasons for this decision. If not, the decision can be reversed for giving no reasons not to hear the child. It should be noted that the child will not make a statement in an oral proceeding in the presence of the parents and lawyers, but speak with the judge alone. If necessary, a guardian ad litem will be present during this conversation (see below).

The function of the guardian ad litem is designated under § 158 FamFG. The guardian ad litem determines the interests of the child and accentuates these during the court proceedings. After a discussion with the child, the guardian ad litem passes on the wishes of the child either in the oral proceeding or in written form. It is therefore the task

of the guardian ad litem to represent the interests of the child during the proceedings and to make sure that the wishes of the child are heard.

The guardian ad litem is appointed by the judge at the beginning of the proceedings. Social workers, social education workers or lawyers with an additional qualification can support him.

The court appoints an expert (child psychologist) for very complex matters. His decision is made purely in the best interest of the child and attaches great importance to the child's wishes. It is also the task of the expert to recognize whether and to what extent the child's wishes have been manipulated.

Considerable importance is being given to these different ways of establishing the child's wishes, as, for example, indicated in the decision by the Oberlandesgericht (OLG)/Regional Court of Appeal Köln (OLG Köln, 25.07.2011, 4 UF 18/11). The court was unable to detect any distinct differences between the parents on their suitability to bring up the child, in which case the right to determine residence was transferred to the mother, according to the wishes of the 4 year old child.

The OLG Hamm (OLG Hamm, 26.01.2011, II 8 UF 228/10) transferred the right to determine residence to the father, a dedicated member of the Jehovah's Witness, according to the wishes of the child of almost 11. Due to the separation and finding a new partner, the mother had been rejected from this religious community.

In another case the OLG Brandenburg did not direct itself towards the wishes of a 9 year old child as it believed that the statements made had been manipulated.

Therefore, the wishes of the child can be of crucial importance if the court considers the wishes of the child to be plausible and not manipulated by those surrounding him.

3. Relocation applications where a child is cared for by a primary carer

A parent is allowed, in principle, to leave the country with the child after receiving the right to determine residence.

Therefore, in as much as a parent is entitled to the sole right to determine the child's residence, he or she is not forced to obtain a court decision before moving abroad.

4. Applications to determine residence in the case of joint custody/care / shared child custody/care.

In such cases, the parent who would like to move abroad should apply for the right to determine the child's residence to be transferred to him or herself at the local competent court. There is no procedural difference in the court proceedings for cases involving joint or shared child custody/care, as called the Wechselmodell (alternative).

The transferal of the right to determine the child's residence is the initiation point for both cases. However, it will be more difficult to determine the well-being of the child in the case of shared child custody/care, in so much that the continuity and the child's bond with the reference person are not of crucial importance.

In this respect the parents' suitability to bring up the child, to promote the child and the child's wishes are the criteria which are given more judgement. Thus particular

importance will be given to whether the country can offer the child further support as well as the language barrier problem.

As mentioned in the above, the family court does not, in principle, examine the parent's motives for the intended emigration, provided that the court does not gain the impression that such an emigration will be used to diminish the contact between the child and the other parent.

5. Mirror Orders

There is no possibility of entering into Orders in Germany which mirror the final Orders made by the Family Court.

But there is a possibility for the parties to conclude an agreement which is closest to the Court Order and ask the German Court for consent to this agreement.

This would mean that the parties apply to the German Court in a new proceeding for a German Court Order.

The Court language in Germany is only German. Both parties and, if represented by lawyers, also their lawyers would have to appear before the Court. They have to prepare the agreement on all topics to be dealt with. The Court would then minute the agreement and afterwards give consent to it.

In principle it cannot be indicated that a move by parents to countries in which the enforcement of the rights of access and rights of co-determination would be endangered or impossible, would be rejected.

When reviewing such cases, the court will focus in particular on the tolerance of commitment of the parent wishing to move abroad, for if this parent had already in the past diminished the contact between the child and the other parent, the court will examine whether the move abroad is aimed at worsening the contact between child and other parent.

6. Other potential areas of interest

In principle, there is no opposition from German courts to minor children moving abroad with one parent. Every case is individual, thereby orientated on the well-being of the child.

In Germany the Federal Office of Justice has the Central Authority. This authority acts as a contact and coordination centre for the entry of applications and requests regarding the return to Germany of abducted children from other states. This Central Authority also forwards child abduction applications to the respective authorities in the contract member states abroad.

Current information from the Central Authority on the child abduction cases (abductions from Germany to foreign countries), shows the following development in the last five years:

2008: 208
2009: 176
2010: 168
2011: 186

2012: 187

7. Future developments

In view of the fact that provisions on access, both in Germany and abroad, are now enforceable more easily due to contractual agreements, it can be assumed that the courts will continue to be open-minded towards moving abroad. The courts will make decisions in each individual case, focused soley on the well-being of the child. It is also to be noted, that parents should assume more often that children who have been taken abroad illegally, will be returned promptly to their country of origin, according to the various agreements, especially that of the Hague Child Abduction Convention and Brussels II bis Regulation. Consequently, parents will be more inclined to obtain a court ruling before a move abroad. If not, they will have to fear the child's imminent return to Germany, and having taken such an illegal course of action, thereby putting themselves into a bad starting position in a custody/care proceeding.