

PROBLEM CHILD - CHILD CARE: ALTERNATING CUSTODY AS A RULE - A PARADIGM SHIFT IN FAMILY LAW

Settlement or divorce proceedings entail numerous factual and legal changes. The proceedings include decisions on separation, financial matters, custody and guardianship. This has far-reaching consequences for both parents and children. In many cases, the questions of custody and guardianship literally become a problem child. In the past, the model of alternating custody remained the exception. Does the latest case law of the Federal Supreme Court lead to a paradigm shift?

Modern Structures and Outdated Law

Modern family models and structures increasingly diverge with the outdated regulations of the Civil Code. In the last decade, adjustments to case law and legislation have become necessary in order to do justice to the reality of family life. For example, it has long since ceased to be the rule that one parent alone is responsible for a child's care and upbringing and that this shall continue to be the case, even after a divorce. With the amendment of the law in July 2014, the principle of joint parental custody was introduced. As a rule, the basic decision-making and upbringing rights regarding common children are left to both parents jointly, even following a divorce. A distinction must be made between care and parental custody. Custody regulates the authority to care for the children on a day-to-day basis. In the case of joint parental custody, a wide variety of care models can be applied. In 2017, Art. 298 para. 2ter CC was introduced, which refrained from the rule of sole custody of one parent and provides that in the case of joint custody, alternating custody should be ordered at the request of one parent or the child, taking into account the best interests of the child.

The Model of Alternating Custody

Alternating custody is when the child is cared for alternately by both parents and the child lives extensively with both parents (about 30% of care can already be considered extensive). The aim of alternative custody is to enable the parents to participate equally in the life of the child. The Federal Supreme Court has commented in more detail on the subject in its decisions BGer 5A_367/2020 of 19.10.2020, as well as 5A_629/2019 of 13th November 2020.

Summary of the Latest Case Law

According to federal court rulings, the highest priority when ordering alternating custody is the best interests of the child. The distance between the parents' homes, the wishes of the child concerned, his or her relationships with the mother and father, the siblings and the social environment as well as the stability of the educational structure to date are taken into account. In any case, both parents must be capable of raising the child. It is not a prerequisite that alternating care already existed before the divorce; however, for the sake of stability it is advisable to fall back on the model if this was already practiced before the parents' separation.

The individual criteria are weighted differently depending on the stage of development and circumstances, so the needs of an infant are different from those of a toddler (5A_629/2019, E. 4.2). If a parent is opposed to alternating custody, this is not a reason to refrain from it. The Federal Supreme Court sets the hurdle high here. A conflict between the parents and difficulties in contact is therefore not yet an obstacle, even mere written communication is considered sufficient (BGE 141 III 472). Also the necessity of guardianship does not exclude the order of alternating custody. Rather, the parental conflict would have to be so far-reaching that the best interests of the child could no longer be safeguarded in the implementation of the regulation (BGE 5A_629/2019, E. 4.2).

In summary, it can be stated that the federal judicial case law elevates alternating custody to the standard model in the case of mutual care that has been practiced until now and that the model should at least no longer take a back seat in comparison to sole custody. Alternating custody is ordered if it is in the best interests of the child and there are no concrete reasons against it. In view of the increasing departure from the model of sole custody, one can certainly speak of a paradigm shift.

Disadvantages and Advantages of the Case Law

Sole custody is now no longer the rule, at least from a legal perspective. However, alternating custody can also have its disadvantages. Burdens of both a physical and psychological nature as well as greater financial expenses can be consequences of this care model. This care model is not always the best for the child or the parents. It is encouraging that many parents can breathe a sigh of relief, as the development of laws and jurisprudence is leading to significantly more equality in terms of educational and care rights.

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