

Post-Separation/ -Divorce Parent-Child Relationship –
with a Focus on Contact between the Non-Residential/
Non-Custodial Parent and the Child

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Introduction

Different legal systems regulate the post-separation parent-child relationship differently. This can be observed, for example, in differing regulations of parental authority or custody following the separation or divorce of the parents (whether a legal system stipulates joint parental authority or custody, and so forth), but also in the way a legal system regulates post-separation contact between a child and a non-residential parent. This thesis is concerned with how different legal systems (more particularly, those of Germany and Japan) view and regulate the relationship between a child and a parent who is not residing with the child as a result of the separation (including legal divorce) of the parents, in the context of post-separation contact between the child and the parent.

The statutory and case law of Germany and Japan have adopted a very different approach to contact between a non-residential parent and the child. One easy-to-spot difference between the two legal systems is that German statutory law stipulates a clear (and legally enforceable) right to contact of a parent, and of a child. Japanese law, on the other hand, does not stipulate a statutory right of contact of either. A common denominator for German and Japanese law (and indeed for many jurisdictions) is that “the best interests of the child” are applied as a standard when deciding whether and to what extent contact between a child and a parent should be allowed. On closer inspection, it appears, that in spite of this common standard, German courts tend to be more generous with allowing contact, including in the scenario I have chosen to focus on in this paper, namely the scenario where the residential parent has remarried and the child is living in a step-family.

Why are German courts more generous with contact? Is it because contact is clearly stipulated as a statutory right? But the standard for deciding whether contact is appropriate, is the same, namely “the best interests of the child”. Are then the specific contents of the “best interests of the child”

understood differently? Indeed, “the best interests of the child” is a notoriously vague standard. So what is in the best interests of a child in the context of contact with the non-residential parent, how is this determined? Are there any hints in statutory law as to how to interpret what is in the best interests of the child in the context of post-separation contact? How have the courts in Japan and Germany applied this standard in specific cases?

In order to answer the above question, and to understand better how these two legal systems view the post-separation parent-child relationship, I have chosen the example of contact between a non-residential parent and a child living in a step-family. I have chosen this particular scenario for several reasons. First, it is simply a good general example, as it highlights all the potential sources of conflict, and all the conflicting interests, in a contact dispute. In addition, it presents a particularly good “test” for finding out the extent to which a particular legal system “values” a continued relationship between a child and its non-residential parent. After all, in the remarriage/step-family scenario, a potential “substitute” for the non-residential parent has appeared in the form of the step-parent, evoking questions such as which relationships of the child to the various adults should be considered as significant for the child (and hence merit the protection by the law and the courts), and which relationships might, in the case of a conflict of interests, possibly be “sacrificed”. Furthermore, the remarriage/step-family scenario allows a look at the question of the relevance of post-separation/divorce contact between parent and child from the point of view of how a particular legal system has regulated adoption, or more specifically step-child adoption. What sort of a message are these two legal systems, that of Japan and of Germany, sending concerning parent-child relationships, especially the relationship with a parent that no longer lives in the same household as the child?

Chapter 1 Contact in German Law

I General Principles

1 Introduction – Statutory Basis of Contact between Parent and Child

In Germany, contact between a child and its parents is regulated in § 1684 of the Civil Code (BGB)¹. § 1684 I stipulates that the child has a right to contact with each parent (Hs. 1), and that each parent has an obligation and a right to contact with the child (Hs. 2). By intentionally placing the right of the child before that of the parents, and by stressing the obligation of the parents before their rights, the Civil Code highlights the understanding that the child and its interests are in the foreground of any regulation of or judgment concerning contact (in detail below). Furthermore, § 1626 III sentence 1 of the Civil Code clarifies the general stance of the Civil Code towards the importance of contact to the child, by stating that the best interests of the child as a general rule include contact with both parents.

§ 1684 II obliges the parents to “refrain from everything that renders more difficult the relationship of the child to the other parent or the upbringing of the child”. § 1684 III 1 BGB grants the Family Court the right to rule on the scope of the right to contact and to make more detailed provisions on its exercise (including ordering custodianship for the implementation of

¹ A considerable amount has been written in Japanese concerning contact in German law. In addition to the papers and works cited in appropriate places in this thesis, there are for example the following: 鈴木博人「ドイツ法における交流権」比較法研究 6 7, 164 頁 (2006 年); (concerning procedural law and support for the exercise of contact, as well as substantive law) 岩志和一郎「子どもの権利の確保のための諸力の連携—ドイツ親権法の展開」早法 85 巻 2 号 23 頁、高橋由紀子「ドイツの交流権行使と支援制度」帝京法学 26 巻 2 号 81 頁以下 (2010 年)、稲垣朋子「面会交流援助の意義と発展的課題——ドイツ法の運用を視座として (1)・(2 完)」国際公共政策研究 17 巻 1 号 101 頁、同 17 巻 2 号 47 頁; 遠藤隆幸「ドイツにおける面会交流の第三者関与」比較法研究 7 5 号 3 0 6 頁 (2013 年) も参照されたい、佐々木健「ドイツ法における手続上の子どもの代理人」比較 73 号 126 頁、岩志和一郎「ドイツにおける『子どもの代弁人』」判タ 1208 号 40 頁などがある; (concerning the assertions of PA(S) in contact disputes and German law and practice) 佐々木健「ドイツ法における親子の交流と子の意思—P A S (片親疎外症候群) と子の福祉の観点から」立命館法学 3 2 7・3 2 8 (上) 3 4 7 頁; (concerning the wishes, especially the refusal of the child) ローツ・マイア「面会交流の立場—ドイツでの子供の交流拒否をめぐる議論を中心に—」法学第 77 巻第 3 号 150 頁 (2013 年), and more.

contact).

§ 1684 IV stipulates that the family court may restrict or exclude the right to contact (or the enforcement of earlier decisions on the right to contact) to the extent that this is necessary for the best interests of the child (sentence 1). A higher bar is set for restricting the right to contact “for a long period or permanently”. This is only allowable “if otherwise the best interests of the child would be endangered”. The Family Court may also order that contact may take place only if a third party is present (sentence 3).

In addition, § 1686 stipulates that a parent may, in case of justified interests, demand information from the other parent on the personal circumstances of the child, to the extent that this is not inconsistent with the best interests of the child

As a new development, since 2013, § 1686a² stipulates that a “biological but not legal” father can apply for contact with their child. Whereas § 1684 presupposes a legal father-child relationship, § 1686a I states that “as long as the paternity of another man exists, the biological father who has demonstrated a serious interest in the child has (1) a right of contact with the child if such contact is in the best interests of the child, and (2) a right to be provided with information from each parent regarding the personal circumstances of the child where he has a justified interest and this is not inconsistent with the best interests of the child”.

2 The (Legal) Nature of Contact

2.1 Constitutional Basis

As already stated above, German statutory law grants the child a right to contact and stipulates that each parent has an obligation and a right to contact with their child (§ 1684 I). The generally accepted understanding

² Introduced into the BGB with the Act to Strengthen the Rights of the Biological, not Legal Father (*das Gesetz zur Stärkung der Rechte des leiblichen, nicht rechtlichen Vaters*) of 4 July 2013 (BGBl. I S. 2176), in force since 13 July 2013.

today is that the right to contact (of a parent as well as the child) is guaranteed by § 6 II of the Basic Law³ (*Grundgesetz* or GG, hereafter referred to as GG).

Concerning the right to contact of a *parent*, the understanding that this right is derived from the parental rights (*Elternrecht*) stipulated in § 6 II GG, goes back to the October 21st 1964 ruling of the German Federal Supreme Court (*Bundesgerichtshof* or BGH, hereafter referred to as BGH)⁴. In this ruling the court stated that a parent's right to contact with their child was a right independent from the right to exercise custody for the person of the child (*Personensorgerecht*), and added that the right to contact with one's child was based on § 6 II, the same as a parent's right to exercise custody for the person of the child.

It has long been established through rulings of the Federal Constitutional Court (*Bundesverfassungsgericht* or BVerfG, hereafter referred to as BVerfG) that the parental rights stipulated in § 6 II GG are by nature rights entailing duties. As the Court has stated, in § 6 II sentence 1 GG *rights* are from the outset inextricably linked with *obligations*, these obligations being an essential part of parental rights (as stipulated in § 6 II), which could in this respect also be characterized as "parental responsibilities" (*Elternverantwortung*)⁵.

Concerning the right of the *child*, the BVerfG in its ruling of 1 April 2008⁶ (a ruling concerning the enforceability of the parental duty of contact in § 1684 I BGB) established that the right of a child to contact with each parent is also based on § 6 II GG. The court stated: "The legal obligation of a parent

³ Art. 6 II of the Basic Law states that "the care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them." (sentence 1) it goes on to state that "the state shall watch over them in the performance of this duty" (sentence 2).

⁴ BGHZ 42, 364.

⁵ Vgl. BVerfGE 10, 59; BVerfGE 24, 119; BVerfGE 31, 194.

⁶ FamRZ 2008, S. 845.

to contact with their child as stipulated in § 1684 I of the Civil Code substantiates the parental responsibilities of § 6 II sentence 1 of the Basic Law in a manner that is constitutionally unobjectionable. Corresponding with the parental responsibilities, the child has a right to care and upbringing by his or her parents under § 6 II sentence 1 of the Basic Law, which likewise finds its concretization by the legislator in the right of the child to contact with each parent under § 1684 I of the Civil Code.”⁷

2.2 The Child, Its Rights and Interests in the Foreground

2.2.1 § 1626 III Sentence 1 - the basic stance of the Civil Code towards contact between parent and child

§ 1626, the very first article of the subsection of the German Civil Code concerned with parental custody, which lays out the general principles of parental custody, stipulates, among other things, that “the best interests of the child as a general rule include contact with both parents” (§ 1626 III sentence 1). Although this provision does not form a basis for a legally enforceable right to contact for the child⁸, it makes clear the basic stance of the Civil Code towards parent-child contact.

Among German legal scholars and practitioners the understanding that having continued contact with the parent not living in the same household as the child is beneficial to the child and its development, has long had strong support⁹, and this principle was introduced into the Civil Code with the 1997

⁷ A. a. O. S. 848.

⁸ Vgl. BT-Drucks. 13/4899, S. 1, 93.

⁹ Already the Bill of the Federal Government for the Reform of Parental Rights Law (*Entwurf eines Gesetzes zur Neuregelung des Rechts der elterlichen Sorge*, BT-Drucks. 7/2060) from 1974 stated that „the right to have personal contact with one’s child is not only part of parental rights and does not only serve the interests of the parent who [no longer has parental custody]; the right to contact is at the same time as a rule also in the interest of the child (BT-Drucks. 7/2060, S. 1, similarly S. 23. See also BT-Drucks. 8/2788, S. 41 (contact described as “important for the development of the child”)). The BVerfG has also long expressed similar views on the importance of contact for the child, for example in the 15 June 1971 decision (FamRZ 1971, S. 421, 425): “There can be no

Act on the Reform of Parent and Child Law (*Gesetz zur Reform des Kindschaftsrechts*, hereafter referred to as KindRG)¹⁰, as the legislators found that in order to promote the rights and best interest of children, “it should be highlighted in statutory law that contact with persons who are significant to the development of the child” such as parents and important persons to whom the child relates (*Bezugspersonen*) “forms part of the welfare of the child”¹¹.

2.2.2 Contact as the Right of the Child

As is evident from the wording of § 1684 I, contact is first and foremost the right of the child. Until the 1997 KindRG, the Civil Code stipulated only the right to contact of the non-custodial parent. Although the right to contact of the non-custodial parent was not construed as an absolute right, as it could be restricted when this was necessary from the point of view of the best interests of the child (old § 1634 II sentence 2)¹², the critics still argued that the old § 1634 was too adult-centered. The fact that the law made no clear mention of the fact that contact also served the interests and development of

objections based on the Basic Law, when statutory law is interpreted to mean that despite the abovementioned problems [that the child will be caught between two fighting parents when contact is exercised], it is in principle in the interest of the child to foster a relationship to the non-custodial parent through personal access (*Verkehr*)...” and that “conversely, obstructing the relationship of the child to the non-custodial parent can have a damaging effect on the development of the child.”

¹⁰ BGBl. I S. 2942.

¹¹ BT-Drucks 13/4899, S. 1, 93. The Bundesregierung (Federal Government) and the Judiciary Committee of the Bundestag repeatedly stressed that contact with both parents was beneficial or even necessary for the development and the wellbeing of the child, see for example BT-Drucks. 13/8511, S. 68, 74. BT-Drucks. 13/4899, S. 46, 68, and so forth. Interestingly, the importance of contact to the child was used as the main justification for most of the regulatory changes concerning contact during the 1997 reform (as introduced in more detail further below), for example, for implementing a higher threshold for the restriction or exclusion of contact (BT-Drucks. 13/8511, S. 68), and stipulating a (statutory) obligation of the parents to contact (a. a. O.).

¹² And furthermore, it was generally accepted by the end of the 1990s among scholars and confirmed by the higher courts that the parental rights stipulated in § 6 II GG, including the right to contact, were by nature rights entailing duties, bestowed upon the parents to further the wellbeing of their child (as explained earlier).

the child was also criticized¹³.

2.2.2.1 KindRG of 1997

The general aim of the 1997 reform¹⁴ was to improve the protection of the rights of the child (including the elimination of the remaining differential treatment of children born to parents who were married to each other, and those whose parents were not, as far as possible) and ensure that the best interests of the child were promoted in the best possible manner¹⁵. Contact was one of the main points of focus of the 1997 reform, and, in view of the above general aims, the legislator also aspired to strengthen the position of the child in contact disputes and in statutory law concerning contact¹⁶.

As already mentioned above, in answer to the above-mentioned criticism that the law made no clear mention of the fact that contact also served the interests and development of the child, 1626 III sentence 1, which stipulates that the best interests of the child as a general rule include contact with both parents, was introduced into the BGB with the 1997 KindRG.

There was considerable debate at the time whether a statutory right of the child to contact should also be stipulated in the BGB, as opinions were divided. While the Bundestag, as well as for example the Deutsche Juristentag argued that contact should be construed as a right of the child (as well as the parent(s))¹⁷, the Bundesregierung argued against such suggestions, pointing to the various practical problems relating to the actual exercise of the child's right to contact, as well as problems with the enforceability of such a right¹⁸, and arguing that rather than construe

¹³ BT-Drucks. 13/4899, S. 46-47.

¹⁴ 1997 年改正に関する日本語の解説として、岩志和一郎「ドイツの新親子法(上)(中)(下)」戸時 493 号 2 頁、495 号 17 頁、496 号 26 頁がある。

¹⁵ A. a. O., S. 1-2, 46-47.

¹⁶ BT-Drucks. 13/4899, S. 68-69; BT-Drucks. 13/8511, S. 2.

¹⁷ BT-Drucks. 13/4899, S. 68, 153 (the Bundesrat referring to the UN Convention of the Rights of the Child).

¹⁸ A. a. O., S. 68-69, 153.

contact as a statutory right of the child, it was important to urge the parents to reach an agreement by explaining to them the significance of contact for the child (and stressing the role of the Jugendamt (the Youth Welfare Office) in such endeavors)¹⁹. Hence, the initial draft bill²⁰ of the KindRG, did not stipulate a right of the child to contact, although it included the new statutory stipulation that the best interests of the child as a general rule include contact with both parents (§ 1626 III sentence 1 of the draft bill), and a stipulation concerning support by the Jugendamt for the child in connection with the exercise of the right to contact of the adults (§ 18 III SGB VIII of the draft bill²¹).

The Judiciary Committee of the Bundestag found the above regulation insufficient, and argued that it was necessary to emphasize even stronger that the child was “not a mere object” of contact but that contact with the parents “fundamentally serves the need of the child to be able to build up and maintain relationships to both parents”²². Consequently, the Judiciary Committee argued that it was necessary to stipulate a child’s own right to contact, as well as clarify in statutory law that each parent not only had a right to contact, but also an obligation²³. In addition, the Judiciary Committee stated that the importance of contact for the child should be highlighted in statutory law by clearly stating in statutory law that contact “can only be restricted or excluded by the courts for a long time or permanently, if otherwise the best interests of the child would be endangered”²⁴.

Therefore, according to the current § 1684 I the child has a right to contact

¹⁹ A. a. O., S. 168-169.

²⁰ BT-Drucks. 13/4899, S. 5-28.

²¹ The current § 18 III SGB VIII (Book VIII of the Social Code – Child and Youth Services Act) stipulates that children and young persons can request advice and support (from the Jugendamt) with the exercise of the right contact.

²² BT-Drucks. 13/8511, S. 67-68.

²³ A. a. O., S. 68.

²⁴ A. a. O.

with both parents, and the child's right to contact comes before the obligation and right of the parents, stressing that it is the child and its interests that is in the center of any regulations of contact. Concerning the stricter two-tier standard for the restriction or exclusion of contact, I have explained in more detail further below.

2.2.2.2 The significance of the child's own right to contact in practice

At the time of the 1997 KindRG, the Judiciary Committee expected the principal practical effect of stipulating a statutory right of the child to contact to be a change in the perception of the parents regarding contact. That is to say, constituting contact as first and foremost the right of the child was meant to send a message to the parents (both the residential parent obstructing contact, and the non-residential parent avoiding contact with the child), to remind them that even after the separation or divorce of the parents, both parents remain responsible for the child, to make the parents more aware that maintaining a personal relationship to both parents is in the best interests of the child, and consequently to persuade them to cooperate in the exercise of contact²⁵.

Following the reform, some authors were skeptical as to the above-mentioned expected change in the attitude of the parents as a result of stipulating contact as a right of the child²⁶. However, stipulating the child's own statutory (and legally enforceable) right to contact had a somewhat surprising consequence in the form of a row of applications by children, requesting contact with an unwilling parent, and asserting their right to contact as stipulated in § 1684 1 Hs. 1, as well as the obligation to contact of

²⁵ BT-Drucks. 13/8511, S. 68; vgl. auch Schwab, Dieter / Wagenitz, Thomas, Einführung in das neue Kindschaftsrecht, FamRZ 1997, S. 1377, 1381.

²⁶ Rauscher, Thomas, Das Umgangsrecht im Kindschaftsrechtsreformgesetz, FamRZ 1998, S. 329, 332; vgl. auch Völker, Mallory / Clausius, Monika, Sorge und Umgangsrecht in der Praxis, 4. Aufl., Bonn 2011, § 2 Rn. 7.

the parent as stipulated in § 1684 I Hs. 2, following the 1997 KindRG²⁷. Most of the courts have confirmed the child's right to contact in such cases, and stressed that the corresponding obligation of the parent has its basis in § 6 II GG²⁸. However, the courts as well as scholars argue that the imposition of administrative means of coercion in such cases is as a rule not appropriate from the point of view of the best interests of the child (although a theoretical possibility, see also below) ²⁹.

2.3 § 1684 II and the Obligations of the Parents towards Each Other

As already mentioned, § 1684 II obliges the parents to “refrain from everything that renders more difficult the relationship of the child to the other parent or the upbringing of the child”. This obligation not only includes a passive obligation to “refrain”, but also an obligation to actively promote meaningful contact for a child³⁰. In the case of the residential parent, this means, for example, an obligation to convey to the child that contact with the other parent is something positive, in order to help the child overcome possible psychological barriers against contact, to prepare the child (clothes etc) for contact, to bring the child to a contact meeting, and so forth³¹. The non-residential parent is understood to be obliged to keep to the agreed-upon

²⁷ OLG Celle MDR 2001, S. 395; OLG Köln FamRZ 2001, S. 1023; OLG Köln FamRZ 2004, S. 52 ; OLG Nürnberg FamRZ 2002, S. 413; BGH FamRZ 2008, S. 1334 u.s.w.

²⁸ Vgl. OLG Celle MDR 2001, 395; OLG Köln FamRZ 2001, 1023. Also the BVerfG has stated, in just such a scenario, that “the legal obligation of a parent to contact with their child stipulated in § 1684 I BGB concretizes the parental responsibility of § 6 II sentence 1 in a way that cannot be constitutionally challenged. Corresponding with the parental responsibility, § 6 II sentence 1 grants the child a right to care and up-bringing by its parents, that has also found concretization by the legislator in § 1684 I BGB” (BVerfG a. a. O. (6), S. 849. 本判決の紹介として高橋大輔「子どもの交流権の強制執行—ドイツ連邦憲法裁判所 2008 年 4 月 1 日判決とその後—」筑波法政第 47 号 79 頁以下).

²⁹ BVerfG a. a. O. (6), S. 855 ff. Staudinger/Rauscher 2014, § 1684 Rn. 59 ff (“an extremely questionable option”); FamRefK (Familienrechtsreformkommentar, bearb. von D. Bäumel et al, Bielefeld 1998)/ Rogner, § 1684 BGB, Rn 4; Völker / Clausius, a. a. O. (26), § 2 Rn 7 ff; OLG Köln FamRZ 2004, S. 52. But differently OLG Celle MDR 2001, S. 395.

³⁰ Staudinger / Rauscher (2014), § 1684 Rn. 93.

³¹ A. a. O., Rn. 94 ff.

rules of contact (starting and finishing time and so forth) etc³².

2.4 The Right to Contact as a Legally Enforceable Right

The right of the child to contact, as well as that of the parent(s), is legally enforceable. During the reform discussion preceding the 1997 KindRG, the question of whether legal enforceability of the right to contact was justified from the point of view of the best interests of the child, was rather heavily debated³³. At present, it is generally accepted that the right of the parent as well as that of the child is legally enforceable (§ 89 I FamFG).

3 Restriction or Exclusion of the Right to Contact (§ 1684 IV S. 1, 2)

3.1 Changing Standards for the Restriction or Exclusion of Contact

The old § 1634 II (in effect until June 30 1998) had stated that the court could restrict or exclude the (non-residential parent`s) right to contact “when this is necessary for the best interests of the child” (sentence 2). The 1997 KindRG created a two-tier standard for the restriction or exclusion of contact, with the current § 1684 IV stipulating first that the family court may restrict or exclude the right to contact (or the enforcement of earlier decisions on the right to contact) “to the extent that this is *necessary for the best interests of the child*” (sentence 1), adding that “a decision that restricts or excludes the right to contact or its enforcement *for a long period or permanently* may only be made *if otherwise the best interests of the child would be endangered*.”

Below, I will introduce how this two-tier standard came to be. In the next section, I will show how the standard has been applied in practice, in the scenario of contact between a child living in a step-family and the external parent.

3.1.1 The KindRG and the Creation of the Two-Tier Standard

³² A. a. O., Rn. 96 ff.

³³ Vgl. BT-Drucks. 13/4899, S. 69; BT-Drucks. 13/8511, S. 67-69 u.s.w.

The KindRG raised the legal threshold for the exclusion and restriction of the right to contact for a longer period of time or permanently. The Judiciary Committee of the Bundestag (*Rechtsausschuß*) pointed out that, although the Civil Code at the time permitted the restriction or exclusion of the right to contact when “this is necessary for the best interests of the child” (old § 1634 II S 2), the Federal Supreme Court and Federal Constitutional Court had long set stricter conditions for the *exclusion* of the right to contact³⁴.

The Committee referred specifically to three decisions: the 15 June 1971 decision of the BVerfG³⁵, and the 12 July 1984 and 23 March 1988 decision of the BGH³⁶. In its abovementioned 15 June 1971 decision, the BVerfG, after pointing out that the right of the non-custodial parent is under the protection of § 6 II GG³⁷, and also stressing the importance of contact to the child (that in spite of the inherent problems of contact regulations (i.e. the child being caught between the two fighting parents), “it is in general in the interest of the child to foster bonds to the non-custodial parent through personal access (*Verkehr*)³⁸”), went on to remark that “a restriction or exclusion of access is only called for when, based on the circumstances of an individual case, a restriction or exclusion of access is required for the protection of the child, in order to avert a threat to the child’s physical or mental development”³⁹. The BGH, in its abovementioned 12 July 1984 decision, built on this understanding and added, concerning a *complete exclusion* of contact: “The complete exclusion of contact, being the most drastic measure, can only be ordered, when a threat to the child cannot be sufficiently averted by means

³⁴ BT-Drucks. 13/8511, S. 74.

³⁵ A. a. O. (9) (*after the divorce of the parents, the parent with parental custody (mother) remarried and thereafter refused contact, claiming that there was no place for the non-residential father in the new family*).

³⁶ FamRZ 1984, S. 1084 (*incarcerated father*), and FamRZ 1988, S. 711 (*contact with father who contested the legitimacy of the child in question*) respectively.

³⁷ A. a. O. (9), S. 424.

³⁸ What is now termed “contact” (*Umgang*), was then called “access” (*Verkehr*).

³⁹ A. a. O. (9), S. 425.

of a mere restriction and proper arrangement of the right to contact.”⁴⁰ The BGH again reiterated this understanding and elaborated it further in its abovementioned 23 March 1988 decision by stating: “It is generally in the interest of the child to foster the bonds to the non-custodial parent through personal contact. A complete or temporary exclusion of contact, which deeply encroaches upon the personal relationship of a child to the parent (whose right to contact has been excluded), which is protected by the Basic Law, can therefore only be ordered when this is absolutely necessary in order to avert a threat to the physical or mental development of the child, and when this threat cannot be sufficiently averted through other means.”⁴¹ The higher courts had therefore already laid the foundations for a higher threshold for the restriction and especially the exclusion of contact, referring to the constitutionally guaranteed rights of the (non-custodial) parent, as well as the importance of a continued relationship to both parents for the child concerned. Especially the exclusion of the right to contact, the courts stated, could therefore only be ordered as a last resort, when other milder means to avert a threat to the best interests of the child were insufficient.

Referring to these decisions, the Judiciary Committee of the Bundestag argued that it should also be stated more clearly in statutory law that an exclusion of the right to contact is only justified “when, based on the circumstances of an individual case [an exclusion of the right to contact] is necessary for the protection of the child, to avert a threat to the child’s physical and mental development⁴².”

As already stated above, the Civil Code presently stipulates a two-tier standard for the restriction or exclusion of the right to contact. The conditions for a restriction (or exclusion) of the right to contact in the case of a temporary or slight threat to the best interests of the child according to §

⁴⁰ A. a. O. (36), S. 1084.

⁴¹ A. a. O. (36), S. 711.

⁴² BT-Drucks. 13/8511, S. 74.

1684 IV sentence 1 are presumably less strict compared to the conditions set in § 1684 IV sentence 2. However, even the threshold in § 1684 IV sentence 1 is by no means low⁴³. For a short-term restriction of the right to contact, “concrete, sound and currently existing grounds, which affect the best interests of the child in a lasting manner”, should exist⁴⁴. These grounds must be “of such gravity that they would make a restriction of the right to contact appear necessary (even) when giving just consideration to the basic significance of the right to contact for the child”⁴⁵.

Furthermore, the border between the two standards is, not necessarily clear. The BVerfG has stated that a “threat to the mental or physical development of the child” was a condition already for the (mere) restriction (presumably of any length or type) of the right to contact⁴⁶. Also, for example Rauscher argues that the stricter standard (that of § 1684 IV sentence 2) should apply for an *exclusion* of *any* duration⁴⁷.

There is also the question of how long exactly is “a long period” in the sense of § 1684 IV sentence 2. Legal scholars and judges seem to agree that what is to be considered “a long period” of time, depends on the individual child and its sense of time⁴⁸.

⁴³ Staudinger/Rauscher (2014), § 1684 BGB Rn. 264.

⁴⁴ Johannsen/Henrich/Jaeger, Familienrecht: Scheidung, Unterhalt, Verfahren: Kommentar (2010), § 1684 Rn. 34; OLG Brandenburg, FamRZ 2000, S. 1106, 1106 (Case 6 in section II of this Chapter); OLG Karlsruhe, FamRZ 1999, S. 184, 184 (Case 5 in section II of this Chapter).

⁴⁵ Staudinger/Rauscher (2014), § 1684 BGB Rn. 269. Rauscher also argues that it should be kept in mind that the restriction of contact itself is not without an effect to the child. Rauscher argues that in cases where the unwillingness of the parent living with the child to allow contact between the other parent and the child, is the main reason for a possible restriction of the right to contact, even a short-term restriction of contact could in effect mean investing the reluctant parent with power to decide whether contact is (ever) to take place, possibly resulting in the child losing a parent (something that Rauscher deems to be a highly undesirable result for the child and its best interests) (A. a. O., Rn. 270).

⁴⁶ BVerfG, FamRZ 2008, S. 494, 494; BVerfG, FuR 2008, S. 338, para. 24.

⁴⁷ Staudinger/Rauscher (2014), § 1684 BGB Rn. 265.

⁴⁸ Johannsen/Henrich/Jaeger (2010), § 1684 Rn. 34. Some disagreement among scholars: Johannsen/Henrich/Jaeger (2010), § 1684 Rn. 34 suggest half a year for

As to when exactly “the best interests of the child” are “endangered” (1684 IV 2), the courts have stated that “only in exceptional cases, i.e. when conditions exist that deviate considerably from difficulties that typically arise [in connection with contact], can, according to the law currently in force, contact between a non-custodial parent and a child be understood as endangering the best interests of the child. Difficulties that appear time and again, such as the unwillingness of the custodial parent, the wish of that parent that the child would accept the parent’s new partner as a substitute of the absent parent, and difficulties on the side of the child by readapting [to contact] after a longer separation, do not suffice, according to current law, to exclude contact. The above are difficulties that are encountered frequently, and the legislator, who was fully aware of this, nevertheless embedded in the law that contact with the non-custodial parent as a rule promoted the best interests of the child”⁴⁹.

3.2 Other Basic Principles Concerning the Restriction and Exclusion of Contact

3.2.1 The Balancing of the Various Interests of the Parents and the Child

It is commonly accepted in German today that any restriction of contact (including its exclusion) constitutes a very serious encroachment upon the parental rights guaranteed by § 6 II GG of the parent who is entitled to contact⁵⁰. However, as the legislator and the higher courts have also repeatedly pointed out, it is important to keep in mind that contact also

children between the ages of 7 and 12, and 1 year for children over 1 as constitution “a long period” in the sense of § 1684 IV, Rauscher argues that already a shorter period of time should be considered as “a long period” in the sense of § 1684 IV sentence 2 (Staudinger/Rauscher (2014), § 1684 BGB Rn. 266).

⁴⁹ OLG Bamberg, FamRZ 2000, S. 46, 46 (Case 6 in section II of this Chapter); ähnlich z. B. OLG Köln, FamRZ 2003, S. 952, 952 (Case 8 in section II of this Chapter).

⁵⁰ Staudinger/Rauscher (2014), § 1684 BGB Rn. 265 („The *exclusion* of contact constitutes the most serious encroachment upon the right to contact, and is permissible as a last resort only when there is a threat to the best interests of the child”); Völker / Clausius, a. a. O. (26), § 2 Rn. 108.

touches upon the interests of the parent residing with the child (equally protected by § 6 II GG), as well as the interests of the child. Therefore, the interests of both parents as well as the interests of the child are to be taken into consideration and weighed against each other⁵¹. As the BVerfG has stated, when the courts are making a decision concerning contact, they are to make “a decision which takes into consideration the constitutional positions of both parents as well as the best interests of the child and its identity as a subject of basic rights. The courts shall endeavor to seek a concordance between the various basic rights in an individual case.”⁵²

That said, “the best interests of the child” is to be the central standard when deciding whether a restriction or an exclusion of contact is called for, as is apparent already from the text of § 1684 IV. This is also clear from § 1697a of the Civil Code, which stipulates that in proceedings concerning contact the courts shall make “a decision which, taking into account the actual circumstances and possibilities and the justified interests of those involved, is most conducive to the best interests of the child”.

Here, naturally, the question of what exactly is “conducive to the best interests of the child”, arises. The notion of “the best interest of the child” is an abstract one, but, as already stated above, in German law, § 1626 III sentence 1 gives a definitive clue as to what the starting-point of any deliberation concerning contact should be, namely that “the best interests of the child as a general rule include contact with both parents”.

3.2.2 The Principle of Proportionality

Already the pre-KindRG case law introduced above made clear that under the principle of proportionality the right to contact could only be restricted or excluded, when other milder means to avert a threat to the best interests of

⁵¹ Völker / Clausius a. a. O.

⁵² BverfG B. v. 8.3.2005, FamRZ 2005, 1057, 1057; BverfG B. v. 29.11.2007, FamRZ 2008, 494, 494.

the child (“a mere restriction” or “proper arrangement”⁵³ of the right to contact as opposed to an exclusion of contact) were insufficient. For example, in a case where the Higher Regional Court (Oberlandesgericht or OLG, hereafter OLG) excluded the right to contact of a father presumably on the grounds that the child (at the time 8 years old) refused contact with the father, the BVerfG ruled that the OLG “had failed to understand correctly the constitutional requirements arising from § 6 II GG, as it had not considered, under the principle of proportionality, whether supervised contact (*begleiteter Umgang*)⁵⁴ between the child and [the father] would be possible, especially as such contact had already stood the test, as determined by the AmtsG⁵⁵.”⁵⁶

Summary

From the reasoning of the Judiciary Committee and the case law of the BVerfG and the BGH, it is clear that the high standard for the exclusion and restriction of the right to contact is justified not only by the fundamental understanding that the right to contact is protected under the Basic Law, but also the understanding that contact is in the best interests of the child and should therefore be carried out for the benefit of the child, except if there are exceptional circumstances that create a concrete threat to the welfare of the child. Importantly, the (constitutional) position/standing of the parent residing with the child, and the interests of this parent are not to be overlooked, but are also to be weighed against the position and interests of the other

⁵³ BVerfG a. a. O. (36), S. 1084.

⁵⁴ According to § 1684 IV sentence 3, the court may “order that contact may take place only if a third party who is prepared to cooperate is present”. This is the so-called supervised contact (*begleiteter Umgang*). (§ 1684 IV sentence 4 goes on to state that “the third party may also be an agency of the youth welfare service or an association; the latter then determines in each case which individual carries out the task”.)

⁵⁵ *Amtsgericht* or Local Court, abbreviated as AmtsG or AG, this paper will use the abbreviation “AmtsG” unless the source has used “AG”.

⁵⁶ BVerfG FamRZ 2005, S. 1057, 1058. Vgl. auch BVerfG (decision of 23 Jan. 2008) FuR 2008, S. 338 (para 24 ff) (*possibility of supervised contact with currently incarcerated father*).

parent and the child. In addition, the principle of proportionality is to be strictly followed.

The best interests of the child are to be in the center, but at the same time, the rights and interests of the parents are to be given due consideration and protection.

II Contact with Child Living in a Step-Family

Introduction

Below I will show how the standard for the restriction or complete exclusion of contact has been applied in practice, in the scenario of contact between a child living in a step-family and the external parent. This scenario highlights all the conflicting interests and potential sources of conflict in a contact dispute on the one hand, serving as a good example for contact in general. The scenario of contact with a child living in a step-family also poses some additional difficulties, as the best interests of the child also call for the protection of the new household and the relationship between the child and the new spouse of the residential parent, as well as the stability of the new household in general. The case law introduced below will illustrate how German courts have assessed the potential harm to the child from contact with the non-residential parent, as well as how the interests of the residential parent (including the stability of the new-household) and the interests of the non-residential parent, have been assessed and weighed against the above-mentioned interests of the child.

1 Case Law

Case Law from the 1980s

Case 1 OLG Stuttgart, decision of 24. 10. 1980⁵⁷

Facts of the case: AS⁵⁸ (the father) and AG⁵⁹ (the mother) separated shortly before the birth of their son T (2 years old at the time of the OLG Stuttgart ruling), and divorced shortly after T's birth. Parental custody was transferred to the AG. Contact between the AS and the child was carried out following the separation of AG and AS, and agreed upon at the time of divorce (visitation (*Besuchsrecht*) every second Saturday between 10:00 and

⁵⁷ NJW 1981, S. 404.

⁵⁸ Short for Antragssteller (petitioner).

⁵⁹ Short for Antragsgegner (opponent).

18:00). Approximately half a year after the divorce, the AG married M and began to refuse contact between the AG and T. The AS requested that he be granted more extensive rights to visitation.

Court of the first instance (AmtsG) excluded the AS's right to visitation for a period of one year.

OLG Stuttgart points out that “[t]he right to contact with the child of the parent without parental custody exists without restrictions also in relation to a toddler the age of T“, and that the AS exercised his right to contact after the birth of T in a way that led to the building up of a sound relationship between father and son⁶⁰. The AG (as well as the expert involved) also accepts that the exercise of the AS's right to contact in the past did not lead to any disturbances or strain on the part of T. “This development essentially solely indicates that contact between father and son should be resumed. It is precisely the successful integration of T into the family M, that makes it necessary for T to be able to form, through the exercise of the right to contact, even a child's image of his father, and to keep this image alive.”⁶¹

The OLG expressed the opinion that „[i]t is not that the AG is afraid, because she fears some negative effect to the welfare of the child during the time T is absent on account of contact.“ Rather, what the AG wants to achieve by refusing visitation contact (*Besuchskontakte*) between father and son, is that T would see the AG's third husband as his father, and that the family-life of the family M would proceed undisturbed by any consequences of contact between the AS and T“ (this is also clear from previous statements made by the AG).⁶²

“It is therefore clear that the AG objects to contact between the AS and T not because of fear for T, but because of the reasons described above. The legislator foresaw the possibility of such an attitude on the side of a divorced

⁶⁰ A. a. O. (57), S. 404.

⁶¹ A. a. O. (57), S. 404.

⁶² A. a. O. (57), S. 404.

parent, with all the consequences to the child involved, and gave the following assessment to the revised version of § 1634 BGB (BT-Dr 8/2788, S. 53):

“ . . . This draft bill will not follow proposals that call for an exclusion of the right to contact already in cases where this *serves the best interests of the child*⁶³. This would lead to inappropriate outcome in cases where a divorced parent, to whom parental custody was transferred, enters into a new marriage, and the undisturbed integration of a child [into the new family] is seen as taking precedence over the right to contact of the other parent. An exclusion of the right to contact in such cases would constitute an inadmissible hardship to the parent without parental custody, and would, as a result, also not serve the interests of the child, especially if parental custody were, under certain circumstances, to be transferred to the other parent. For the above reasons this draft bill will also not include a provision that would make it contingent on the circumstances and the best interest of the child in each case whether there is a right to contact. Such a provision would not give due consideration to parental rights (*Elternrecht*)⁶⁴ from which the right to contact is derived.”

The court stated that it was clear “that the intention of the legislator, as objectified in the wording of § 1634 BGB, is to preclude any arbitrary influence by the parent with custody on the exercise of the right to contact, and to make the exclusion of the right to contact dependent strictly on a concrete threat to the interests of the child.”

The OLG also pointed out that “the conduct of the AG has led, over time, to the AS becoming ‘a stranger’ to T“, and added that the expert involved

⁶³ The italics are mine.

⁶⁴ Referring to the rights under § 6 II GG.

suggested that there might be disturbances for the child in the future, due to the fears of the mother and her refusing contact between the AS and T. The OLG, however, found that this should be construed as nothing more than a mere possibility. As the AG herself also allows, her fears might be expected to lessen as time goes by (she has also told the court that she would allow contact when T becomes 3 years old). Thereby, even the mere possibility of a threat to T would disappear. It is therefore clear, the OLG stated, that the AS has a right to contact.⁶⁵

Case 2 AG Kamen, decision of 2. 11. 1982⁶⁶

Facts of the Case: M (the mother) and V (the father) of D (5 years old at the time of the ruling) and J (4 years old at the time of the ruling) divorce when the children are 2 and 1 years old, respectively (parental custody is transferred to M). There are fierce disputes between M and V. Two years later, M marries Y, her former brother-in-law (V remarries as well.) Reportedly there has been no contact between V and the children since the remarriage of M, or possible since as early as the divorce of M and V. V applied to the AmtsG for the court to make provisions about contact between him and the children. The AmtsG excluded V's right to contact for two years, pursuant to § 1634 II S. 2 BGB.

AG Kamen: "Having heard the children, and in conjunction with the uncontested assertions of both parents, the judge of the AG is convinced that [D] and [J] no longer have a relationship to their father. This is, on the one hand, evident from the record of the hearing, which shows that the two children could no longer count their father among people familiar to them; on the other hand, this outcome results from an age-appropriate connection to their step-father as a father-figure."

⁶⁵ A. a. O. (57), S. 405.

⁶⁶ DAVorm 1983, S. 228 (the wording in DAVorm leaves room for speculation that what is published is a summary of the decision. Same applies for Case 3 below).

“The judge of the AG therefore proceeds on the assumption that a legally substantial father-child-relationship exists [between the children and the stepfather]. Hence, from the point of view of the children there is no necessity to establish a connection to their father; all their needs for identification and attachment will be fulfilled through their factual father-relationship. From the perspective of the best interests of the children, who are at this time 5 and 4 years old, contact cannot be granted to the biological father.”

“On the other hand, it cannot be assumed that particularly the difference in the [family] names of the children⁶⁷ could lead to certain ill effects in the children`s lives at present, especially in the case of the eldest of the children, [D], when she is enrolled in a school under her birth name next year. However, neither this point, nor considerations concerning a biological (blood-) relationship justify a right to contact for the father. Difficulties concerning the family name can be solved through the application of § 3 of the Change of Surnames Act⁶⁸.”

“To be sure, the allusion of the father that the children should be told about their actual parentage is correct; this truth belongs to the lives of the children and should not be concealed from them. However, this point cannot lead to the confirmation of the father`s right to contact either, as contact between father and children is only meaningful, when the latter also find the visits of the father agreeable. This is however not the case here, first and foremost because there are strong feelings of complete exclusion and hostility on the side of both of the parents and they have not yet built a neutral relationship between themselves. [D] and [J] would in turn sense this emotional antagonism and contradiction, and this must be expected – considering the age of the children – to lead to intense loyalty conflicts, that

⁶⁷ Following the divorce of M and V, a child was born to M and her new spouse Y, who (the child) supposedly has a different family name from D and J.

⁶⁸ *Namensänderungsgesetz*.

would be unbearable in the end. This should not be forced on the children – irrespective of their otherwise stable mental state –, at least not during their development during the pre-school years, during which period they still need care that is consistent and as unambiguous as possible. The judge of the AG therefore deemed it appropriate to exclude the right to contact of the father for a period of two years.”⁶⁹

Case 3 LG⁷⁰ Paderborn, decision of 29. 5. 1984⁷¹

Facts of the case: The daughter (9 months old at the time of the decision of LG Paderborn) was born to V (the father) and M (the mother) who were not married to each other. The child lives with M who exercises custody for the person of the child (*Personensorge*). V applied for the court to determine his right to visitation (*Besuchsrecht*). (M is in a relationship with K, they intend to get engaged in the near future).

Court of the first instance (AG Paderborn, B. v. 26. 3. 1984) granted V a right to visitation. M appealed the decision.

LG Paderborn pointed out that the Jugendamt (both at the time of the decisions of the AG and the LG) is of the opinion that granting visitation to the father would not serve the best interests of the child. The court referred to (the old) § 1711 (which at the time regulated contact between a father who had not been married to the mother, and the child), stating that it was in principle up to the parent who has custody whether she will allow contact or not, but the court can decide that the father has a right to contact with the child, “if this serves the best interests of the child”⁷². LG Paderborn found

⁶⁹ A. a. O. (66), S. 229.

⁷⁰ *Landesgericht* or Regional Court.

⁷¹ DAVorm 1984, S. 1030.

⁷² § 1711 (version of 24 March 1981 - 1 July 1998, abolished by the KindRG as of 1 July 1998): (1) The person who has custody for the person of the child, makes determinations concerning contact of the child with its father. § 1634 I sentence 2 applies with the necessary modifications. (2) If personal contact with the father serves the best interests of the child, the Guardianship Court can decide that the father has a right to personal contact. § 1634 II applies with the necessary modifications. [3] The Guardianship Court

that this condition was not filled in the current case. “The court is of the opinion that contact with the father in principle regularly serves the best interests of the child, as such contact enables him – as far as this is even possible under the circumstances of the case – to develop in a way that is as normal as possible, and facilitates the child’s self-image concerning its person and origin. This court is also convinced, that [V] seeks contact due to the affection he feels for the child and not due to inappropriate considerations, such as the wish to approach [M].”^{73 74}

“In spite of the not insignificant facts listed above, the court, having weighed all the circumstances against each other as is required, has reached the conclusion that personal contact between [V] and the child would, at any rate at present, not serve the best interests of the child.”⁷⁵

The court states that in reaching this conclusion, the following two points are of particular weight:

1) “Considerable tensions“ that exist between V and M. The court argues that it is „not to be ignored that the [nature of the] relationship between the parents can inevitably have an indirect effect on the welfare of the child, when the disagreement between the parents has reached an extent where regular contact between them would put the mother, with whom the child resides, under psychological pressure. Such tension on the side of the mother will regularly have a negative effect on the entire psychological equilibrium of the family in which the child resides, and will therefore be harmful for the welfare of the child. It can be expected that such a situation exists in the case

can amend its decisions at any time. (3) § 1634 II stipulates concerning the right to demand information on the personal circumstances of the child. (4) In suitable cases, the Jugendamt must mediate between the father and the person who has custody of the person of the child.

⁷³ Based on the personal hearing of V as well as the fact that he had acknowledged paternity of the child from the beginning, regularly pays maintenance etc.

⁷⁴ A. a. O. (71), S. 1031.

⁷⁵ A. a. O. (71), S. 1031.

at hand”.⁷⁶ The court also pointed out that M expresses her opposition to contact between V and the child “in a fierce and emotionally accentuated manner”, and that it was to be assumed that she will not be able to view the past from a distance, which would otherwise make it possible for contact between V and the child to take place without psychological harm being caused, and contact would as a result have a negative impact for the family atmosphere and consequently also for the child. The court stated that it was not important whether there were justified reasons to M’s attitude or who was to be blamed for the past.

“Rather, it is of crucial importance, whether contact between [V] and the child would trigger tensions on the side of [M] to the extent that negative impact for the family and especially for the child could be expected, and without it being possible to prevent such impact through reasonable effort on the side of [M]. As stated above, the court is convinced that such is the situation in the present case.”⁷⁷

2) In the meantime, M has developed a new relationship with K. The current state of the relationship “appears stable and shows promise to last”. M and K intend to get engaged in the foreseeable future and eventually also to marry. “At the same time . . . [K] has built up a good relationship to the child, and when he is with [M], he shares in the tasks of providing and caring for the child. Subsequently, there is reason to hope that the child will obtain an opportunity to grow into an intact family that would offer her social relationships which would be more secure and undisturbed than what contact with [V] would be able to offer the child under the present circumstances. This is all the more so, considering that if the relationship between [M] and [K] proceeds on the same track, an adoption of the child by [K] is on the table Regular contact between [V] and the child would not

⁷⁶ A. a. O. (71), S. 1031.

⁷⁷ A. a. O. (71), S. 1032.

be beneficial to such integration of the child into a new family; rather it is to be expected that such contact would, even with the good intentions of all persons involved, obstruct such integration.”⁷⁸

„In light of the foregoing, the contested decision (of the AG) must be changed and the application of [V] for personal contact with the child is to be dismissed. In doing so, this court does not fail to see that this decision will burden [V] unilaterally and not insignificantly, as this court, as already stated, is convinced of [V]’s sincere affection towards the child. This fact can, however, not change anything in the decision at hand, since the legislator – as was decided in a permissible manner under constitutional law in the decision of the BverfG DAVorm 1981/351 = NJW 1981, 1201 – set the best interests of the child as the sole determining factor and let the interests of the other persons involved step back before the best interests of the child.”⁷⁹

Case Law from 1998 to the present

Case 4 OLG Köln, decision of 1. 9. 1998⁸⁰

Facts of the case: The AS (the father, Moroccan) has applied for contact with his 5-year-old daughter. The AG (the mother) desires a complete exclusion of contact.

Court of the first instance (Family Court from March 1998) allowed that the AS had a restricted right to contact with his daughter (once a month (the first Friday of the month) in the rooms of the *Kinderschutzbund* (Child Protection League) in B. between 14:00 and 17:00. The Family Court also ordered that during the first three contact visits a representative of the Jugendamt be present. The AG appealed.

OLG Köln judges that the arrangement proposed by the court of the first

⁷⁸ A. a. O. (71), S. 1032.

⁷⁹ A. a. O. (71), S. 1033.

⁸⁰ 4 UF 87/98 (OLGR 1999, S. 178), retrieved from <http://openjur.de/u/153897.html> (last accessed 20 Nov. 2014).

instance is appropriate. The court refers to §1684 I and the right of the child to contact, the obligation and right of parents, and the grounds for restricting or excluding the right of contact, reconfirming the intent of the legislator that the right to contact may be excluded completely or for a long period only if ““it is inevitable in the given circumstances, in order to avert a threat to the physical or psychological development of the child, and when this threat cannot be averted via other means in a sufficiently secure manner” (BT-Drucksache 13/8511 Seite 74 . . . ⁸¹).“⁸²

“The AG could not in her appeal bring forward grounds that could justify a complete exclusion of the right to contact. Such grounds are also not evident from the report of the JA [Jugendamt] of B city of 05.08.1998.⁸³

Notably, the exclusion of the right to contact cannot be justified by claiming that the child is very well integrated in the new civil partnership of the AG and regards the AG’s current common law spouse as her “father”. It might seem to the mother that leaving the child under such a misconception would be the easier way out. However, by doing this, the necessity of making the growing child one day acquainted with the actual facts will only be postponed to the future, and will at that point – the later it happens – probably lead to far more serious annoyances and problems on the side of the child. It is known to the *Senat* from expert consultations in numerous other cases, that it is in principle not in the child’s best interest to shift confronting the child with the facts of its origin into the (far) future. . . .“⁸⁴ (the court also stated, that although the mother claimed that making contact with the father would unsettle the child in a way that could harm the child’s health, the mother had not provided further proof for this. The court stated

⁸¹ Literature reference omitted (in this paper, reference by the rulings introduced to other rulings will be retained, but literature references (textbooks, *Kommentars*) will be omitted).

⁸² Para. 5.

⁸³ Para. 6.

⁸⁴ Para. 7.

that “a mere reference to the “particular sensitivity” of the child was not sufficient⁸⁵.)

“Neither can, in light of the prevailing legal norms as described above, an exclusion of the right to contact be justified by the evident anxiety of the mother (which are also highlighted in the report of the JA [Jugendamt]) concerning the establishing of contact. It was already acknowledged under the old statutes, that lasting conflicts or even enmity between the parents do not justify an exclusion (of contact).”⁸⁶

Case 5 OLG Karlsruhe, decision of 23. 9. 1998⁸⁷

Facts of the case: The child M (2 or 3 years old at the time of the OLG ruling) was born to the parents AS (the father) and AG (the mother), who separated when the child was 1 year old. AS had (irregular) contact with the child for approximately the first half a year following the separation of the parents. After the separation, the AG entered into a new relationship and is now living with the new partner. AS seeks that the court determine his right to contact with M.

The court of the first instance decided that the father has the right to have contact with M every 14 days for one and a half hours in the premises of the Association for Family Help (*Verein für Familienhilfe*) in K. The AG appealed the decision. She argues that at present contact would be harmful to M. She argues that a father-son relationship is being built up between M. and her current partner, and that M. is still too little to understand that the new partner of the mother is not his biological father. If a right to contact would be granted and thereby “another” father would surface, M. would be confused and unsettled, which would lead to endangering the welfare of the child.

⁸⁵ Para. 7.

⁸⁶ Para. 8.

⁸⁷ FamRZ 1999, S. 184.

OLG Karlsruhe decided that the court of the first instance was right in acknowledging the father's right to contact with M. "According to § 1684 I S. 1 BGB effective since January 7th 1998, every child (both marital and non-marital) has the right to contact with each parent; each parent has a duty and a right of contact with the child. The legal provisions indicate that it is in principle also in the best interest of a non-marital child to have personal contact with their father. Exclusion of the right to contact is only permissible to the extent that this is necessary for the best interest of the child (§ 1684 IV S. 1 BGB), or in case of an exclusion for a long period or permanently, this is only permissible if otherwise the best interest of the child would be endangered (§ 1684 IV S. 2 BGB). For an exclusion of the right to contact for a shorter period of time, in accordance with § 1684 IV S.1 BGB, it is already sufficient when convincing reasons that affect the best interest of the child in a lasting manner, exist, which give cause for concern that not excluding the right to contact would lead to a disadvantageous development of the child" In this case the court finds no such circumstances that would justify an exclusion of the right to contact already according to § 1684 IV S.1 BGB.⁸⁸

Neither "the young age of M. alone" nor the fact that contact between father and son has been disrupted since the middle of 1997, preclude a right to contact. "The argument of the mother, that a father-son-relationship is being built between M. and the mother's new partner, so that the appearing of "another" father in the course of the exercise of the right to contact would lead to unsettlement on the side of the child, is also not applicable for excluding the [father's] right to contact. The exercise of the right to contact by the natural father takes precedence over an "undisturbed" integration of the child into a new family unit, as intended by the mother (OLG Stuttgart,

⁸⁸ A. a. O. (87), S. 184.

NJW 1981, 405 . . .).”⁸⁹

In respect to M.’s age, the court stated: “In the face of possible burdens [to the child], which, in the opinion of this court, could, considering the child’s stage of development, by no means be of a serious nature, these [burdens] are heavily outweighed by disadvantages which the child would suffer through a further disruption of contact with his natural father. The alienation of father and son will become more pronounced. It will be increasingly difficult to resume and deepen a personal relationship between them. It is of significance for the development of a child’s personality to get to know their biological father as early on as possible, and to maintain and develop the relationship to him by fostering contact, the more so since it is by no means possible to foresee in the long run if and how the child’s relationship to the new partner of the mother will be formed and maintained.”⁹⁰

Case 6 OLG Bamberg, decision of 24. 3. 1999⁹¹

Facts of the case: The child P (9 years old at the time of the OLG ruling) was born to the unmarried parents AG (the mother) and AS (the father, Italian). The AS lived together with the AG for the first 5 years of P’s life.

The court of the first instance granted the AS a right to contact with P.

The AG seeks the exclusion of any rights to contact by the father, giving as reasons (among other things) the refusal of the child to have contact with the father. She claims contact with the AS would hurt the best interests of P, which could already be witnessed in P’s falling grades at school and P having started stammering again. Also, the escort designated by the court – Mr. Z – is not prepared to fulfill the task assigned to him. The mother is strongly against contact between the AS and P and believes that the AS’s sole object

⁸⁹ A. a. O. (87), S. 184.

⁹⁰ A. a. O. (87), S. 184.

⁹¹ FamRZ 2000, S. 46.

in seeking contact is to harass her and to demonstrate his own paternal power. The AG claims that the AS does not care about P, which (in her opinion) is evident from him showing no interest in the child for years.

OLG Bamberg: The appeal of the AG is unsuccessful. The court states the following: “As the judge of the court of the first instance has already stated, it is usually in the interest of a child’s self-identification and psychologically stable development to know both parents. For this reason, a right of the child to contact, together with a corresponding obligation of the respective parent, has been incorporated into current legislation. Only by way of exception, that is, if conditions exist that considerably deviate from difficulties that typically arise in such cases, can thus, according to the law currently in force, the right to contact of a parent, who does not have parental custody, with their child, be understood as endangering the child’s best interests. The unwillingness of the custodial parent, appearing time and time again, the wish of that parent that the child would embrace the present partner of the parent as the missing parent, and the difficulties on the side of the child to readapt after a separation of some length, do not suffice, according to the current law, for excluding the other parent from having contact to with the child. The aforementioned circumstances fall under difficulties that appear frequently (in this type of cases), and the legislator, who was fully aware of this, embodied into the law, that a child having contact also with the parent who does not have custody, as a rule promotes the best interests of the child (ähnlich OLG Karlsruhe, FamRZ 1999, 184 f; OLG Braunschweig, FamRZ 1999, 185 f., jeweils m.w.N.).“⁹²

“For the case at hand, this means the following: The current opposition of P, which has been depicted [by the AS] as adamant – neither the JA [Jugendamt] nor the judge of the first instance detected that clear of a rejection on the side of P – can only be regarded as significant, if the child’s

⁹² A. a. O. (91), S. 46.

refusal to meet with his natural father could, when taking into consideration the criteria described above, be considered as, at the very least, compatible with the wellbeing of the child.” That is however not the case. “The difficulties of P., as described . . . should be understood as transition difficulties after a longer separation. It could not be said that the AS cares only about himself and not about P, as the AG claims.” (eg the AS had in the past tried to gain access to the child etc.)⁹³

...

“Also P’s wish to regard the current partner of his mother as his father cannot be considered as serving his best interests. Indeed, it might be beneficial to P to broaden his horizons through Mr. Z concerning the European-Christian cultural sphere. However, this can also occur without the boy, having a biological Italian father and a typical Italian first name, having to suspend his relationship to his father for the benefit of fatherly sentiments towards a man from a different cultural sphere, with whom his mother is (possibly only temporarily) living together. The wishes of P – which in the opinion of the *Senat* are merely passing – are consequently not compatible with his best interest and therefore not substantial.”⁹⁴

Case 7 OLG Brandenburg, decision of 21. 6. 1999⁹⁵

Facts of the case: The child M (14 years old at the time of the OLG ruling) was born to AS (the father) and AG (the mother) who were not married to each other. There was contact between M and AS until M was 8 years old.

Court of the first instance (AmtsG) granted the AS a right to contact with M. The AG appealed.

OLG Brandenburg: “According to § 1684 I S. 1 BGB effective since January 7th 1998, every child (both marital and non-marital) has the right to contact

⁹³ A. a. O. (91), S. 46-47.

⁹⁴ A. a. O. (91), S. 47.

⁹⁵ FamRZ 2000, S. 1106.

with each parent; each parent has a duty and a right of contact with the child. The legal provisions indicate that it is in principle also in the best interest of a non-marital child to have personal contact with their father. Exclusion of the right to contact is only permissible, to the extent that this is necessary for the best interest of the child (§ 1684 IV S. 1 BGB), or in case of an exclusion for a long period or permanently, this is only permissible if otherwise the best interest of the child would be endangered (§ 1684 IV S. 2 BGB). For an exclusion of the right to contact for a shorter period of time, in accordance with § 1684 IV S.1 BGB, it is already sufficient when convincing reasons that affect the best interest of the child in a lasting manner, exist, which give cause for concern that not excluding the right to contact would lead to a disadvantageous development of the child” This court finds no such circumstances that would justify an exclusion of the right to contact already according to § 1684 IV S.1 BGB.⁹⁶

The court considered whether M could offer justified reasons for refusing contact with his father, finding that the only complaint of M concerning contact was that it was not varied enough. “Neither are the reasons given by M, namely that he regards the new partner of the mother as his father, that he has in addition to this got a little brother and feels that he has been integrated very well and completely in the new family of the mother, applicable suitable for excluding the [father`s] right to contact. The exercise of the right to contact by the biological father takes precedence over an ”undisturbed“ integration of the child into a new family unit, as intended by the mother (OLG Stuttgart, NJW 1981, 404, OLG Karlsruhe 1999, 184).”⁹⁷

The OLG pointed out that the AmtsG had given due consideration to the child’s age and the fact that contact had been cut off over an extended period

⁹⁶ A. a. O. (95), S. 1106.

⁹⁷ A. a. O. (95), S. 1106-1107.

of time, when deciding in what form contact is to take place. The OLG also stressed that the mother was obliged to prepare the child for contact and to communicate a positive image of the AG (as someone who is sincerely interested in the child) to the child.⁹⁸

Case 8 OLG Köln, decision of 5. 12. 2002⁹⁹

Facts of the case: Not clear from FamRZ (The AG (the mother) has parental custody. The AG has remarried. The age of the child is not given.)

OLG Köln: “The Family Court was right in saying that excluding the AS’s right to contact for the time being would not be compatible with the best interests of the child. **Exclusion of the right to contact** of a parent constitutes the most serious intervention into the parental rights (*Elternrecht*) of that parent. Exclusion of the right to contact is called for, when the best interests of the child are endangered in a lasting manner, that is, there is a concrete imminent danger that the development of the child might enter an unfavourable track. Due to reasons of legal clarity, in such cases, a time frame must be set for such an exclusion. At the same time, according to § 1684 IV S. 2 BGB the right to contact can be restricted or excluded “for a long period” or “permanently”. However, one must bear in mind that even a **temporary exclusion** of the right to contact already constitutes a serious intervention into parental rights which are under the protection of § 6 II GG.

⁹⁸ A. a. O. (95), S. 1107. The court also stated that in addition to granting the AS the right for direct personal contact, there was no reason to deny the AS a right to demand information from the other parent on the personal circumstances of the child (§ 1686 BGB), arguing that this right can be granted as an alternative to direct contact, in cases where direct contact is not appropriate. However, the OLG stated that in addition to being an alternative option, the right to demand information about the child can supplement the right to direct contact (for example, in the current case, providing the father with the child’s football schedule would not only allow the father to visit the games, but would also inform him about his child’s interests and help make personal contact more meaningful) (a. a. O).

⁹⁹ FamRZ 2003, S. 952.

Furthermore, it is generally in the best interests of, and serves the welfare of a child, to foster a relationship to a parent through personal contact. Therefore, the exclusion of personal contact with a parent can only be ordered by the court to avert a concrete, currently existing danger to the physical and mental development of the child (OLG Köln B. v. 26. 6. 2002 – 4 UF 22/02 . . . ¹⁰⁰). It is usually in the interest of a child's self-identification and its psychological and stable development to know both parents. For this reason, a right of the child to contact, together with a corresponding obligation of the respective parent, has been incorporated into current legislation. Only by way of exception, that is, if conditions exist that considerably deviate from difficulties that typically arise in such cases, can thus, according to the law currently in force, the right to contact of a parent, who does not have parental custody, with their child, be understood as endangering the child's best interests. The unwillingness of the custodial parent to allow contact, appearing time and time again, and the wish of that parent that the child would embrace the present partner of the parent as the missing parent, and the difficulties on the side of the child to (re)adapt during initial contact meetings or after a separation of some length, do not suffice, according to the current law, for excluding the other parent from having contact with the child. The aforementioned circumstances fall under difficulties that appear frequently (in this type of cases), and the legislator, who was fully aware of this, embodied into the law, that a child having contact also with the parent who does not have custody, as a rule promotes the best interests of the child (OLG Bamberg, FamRZ 2000, 46, m. w. N.)¹⁰¹. Based on these principles not even a temporary exclusion of contact between the AS and his daughter is justifiable.”¹⁰¹

“Rather, the evidence accumulated by the AmtsG leaves no doubt that it

¹⁰⁰ Refers to *Oelkers*, FuR 2002, 492, 494 for further case law references.

¹⁰¹ A. a. O. (99), S. 952.

would in fact serve the best interests of the child, if provisions concerning contact between K. and her biological father were made as soon as possible. The expert report also clearly indicates, that it is of great importance to K.'s emotional and intellectual development (as would be commonly accepted in the usual case scenario) to get to know her natural father and to discover over a natural development process that she has the AS as a natural father in addition to the present spouse of the AG, the latter of whom definitely can and should be the closest person to whom the child relates (*Bezugsperson*) after the AG. . . .”¹⁰²

“The best interests of the child cannot be weighed against what is reasonable for the parent with custody. Animosity between parents and the negative attitude [towards contact between father and child] of the custodial parent, which results from this animosity, these alone do not justify the exclusion of the right to contact, even when there is a possibility that the tensions between the parents are transferred to the child”. The OLG argued that current law does not allow the parent exercising parental custody alone to obstruct contact between the other parent and the child merely by adamantly refusing such contact (vgl OLG Bamberg, a. a. O., S. 47).¹⁰³

Case 9 OLG Brandenburg, decision of 28. 9. 2006¹⁰⁴

Facts of the case: The maternal grandmother (AG) has parental custody as guardian of the child V (approximately 6 years old at the time of the OLG ruling). The AS (the father) and the mother of the child lived together in the same household as V for approximately the first 2 years of the child's life. The parents separate and soon afterwards the child is taken into the household of the AG to whom parental custody as guardian is transferred after parental custody has been withdrawn from the mother. Since the

¹⁰² A. a. O. (99), S. 953.

¹⁰³ A. a. O. (99), S. 953.

¹⁰⁴ 9 UF 133/06, retrieved from <http://openjur.de/u/273728.html> (last accessed 20 Nov. 2014).

moving of the child to the household of the grandmother, no contact between the father and the child has taken place. V considers the AG and the AG's husband to be her parents; she is not aware of the existence of her natural parents.

The AS argues that it should be explained to V that the AS is her father, and he seeks contact with his child. The AG is of the opinion that V could not, at the present time, cope with the truth about her parents. She argues that telling V the truth about her parents would threaten the results of the therapy the child has been receiving due to mental problems. The AG refers to the supposed violence of the AS towards (at least) V's mother in the past.

Court of the first instance (AmtsG Oranienburg B. v. 14.7.2006) ruled that starting from January 2007 supervised contact should take place (in the beginning 2 hours per month, then 2 hours every 14 days), arguing that V should be told about her natural parents. The initial transitional period foreseen by the court was meant to protect the child from psychological harm.

The AG appealed the decision of the AmtsG. She continues to refuse contact and stresses even more that it is not yet the right time for explanations concerning the child's parentage.

OLG Brandenburg argues that the AmtsG was right to grant the AS a right to contact with his daughter. The OLG argues that the grounds for extensive restriction or exclusion of contact as stipulated in § 1684 Abs 4 are not present (no obvious concrete danger to the welfare of the child). "Neither does the AG's argument that it is not yet the right time to inform V about her natural parents help her succeed in her appeal. In this respect, it could be asked: when is it ever a really good time to inform children about such important things. On the other hand, there is no evident or substantial evidence that V could not cope with the information at present. Rather, V has completed formal therapy by now and it is to be assumed that V is

developing normally, which is also evidenced by her starting school this year. The responsible JA [Jugendamt] is also in favor of informing the child [concerning her biological parents].¹⁰⁵ And finally, considering that contact between father and child will start in January of 2007, as chosen by the AmtsG, sufficient consideration has been given to the sensibilities of V. The remaining 3 month or so should suffice for acquainting the child, gently and with professional help, with the reality. Therefore, there is no need to be concerned about any danger to the welfare of the child through contact with the father, . . . “¹⁰⁶

1.1 Overview

Up to the 1980s

Literature confirms the past tendency of German courts, illustrated by the case law introduced above (AG Kamen (1982) and LG Paderborn (1984)¹⁰⁷ ¹⁰⁸, but different: OLG Stuttgart (1980)), to prioritize the uninterrupted integration of the child into the new household, and the relationship between the child and the “new parent”, over contact between the external biological parent and the child in cases concerning contact between a biological parent and a child living in a household with the other parent and the new spouse/partner of that parent¹⁰⁹.

Interestingly, already in the 1970s, during the legislative debate that led to the 1979 Parental Rights Reform Act, the legislator referred to the problem scenario of contact in cases where the parent with whom the child resided,

¹⁰⁵ Para. 20.

¹⁰⁶ Para. 21-22.

¹⁰⁷ Incidentally, the court of the first instance in this case had granted the father a right to visitation.

¹⁰⁸ Literature also often refers to LG Berlin DAVorm 1980, S. 936 in this context, however, the subject matter if the decision in fact differs considerably from the other cases introduced here (it does not concern contact with children living in a step-family), hence I have not included this case here.

¹⁰⁹ Staudinger/Rauscher (2014), § 1684 BGB Rn. 361.

remarried or entered into a new relationship. The legislator argued that allowing the exclusion of a parent's right to contact already where this *served the best interests of the child*, "would lead to an inappropriate outcome in cases where a divorced parent, to whom parental custody was transferred, enters into a new marriage, and the undisturbed integration of a child [into the new family] is seen as taking precedence over the right to contact of the other parent. An exclusion of the right to contact in such cases would constitute an inadmissible hardship to the parent without parental custody, and would, in the long run, also not serve the interests of the child, especially if parental custody were, under certain circumstances, to be transferred to the other parent"¹¹⁰. Although acknowledging the inherent difficulties of the scenario of contact with a child living in a step-family (the assumed need to secure an "undisturbed integration" of a child into the new family, the rights and interests of the external parent, and the (possibly heavily influenced) wishes of the child as well as the long-term interests of the child in relation to contact with the other biological parent), the legislator by no means laid out clear guidelines to how the courts were to decide in such cases.

OLG Stuttgart (1980) (introduced above) appears to have interpreted the above (directly quoted in the decision itself) to mean that the fact that the child was living in the same household with the new spouse/partner of the other parent was not sufficient grounds to exclude contact between the child and the external non-custodial parent, arguing that the intention of the legislator was "to preclude any arbitrary influence by the parent with custody on the exercise of the right to contact, and to make the exclusion of the right to contact dependent strictly on a concrete threat to the interests of the child"¹¹¹. However, the majority of court decisions in the 1980s appear to

¹¹⁰ BT-Drucks. 8/2788, S. 53.

¹¹¹ OLG Stuttgart (1980) S. 405.

have followed a different path, and OLG Stuttgart (1980) and the approach it took, was frequently criticised, as introduced further below.

The AG Kamen (1982) and LG Paderborn (1984) decisions introduced above represent the main-stream approach of the time, pointing out that contact with the non-custodial external parent was unnecessary from the point of view of the children in question, or even harmful, as (especially younger) children were said to need “consistent and unambiguous care” under the custodial parent and the step-parent, without interference from the external non-custodial parent¹¹². Continued contact with the external parent, after a step-parent had entered the scene, was deemed to disturb the atmosphere of the new household, and to obstruct the integration of the child into the new family¹¹³.

Two critics of the OLG Stuttgart (1980) approach and supporters of the above-mentioned main-stream were the influential German child and youth psychiatrist and scholar Dr. Reinhart Lempp¹¹⁴ and the then judge of AmtsG Kamen Franz Dickmeis¹¹⁵. On the one hand, Lempp and Dickmeis both agreed that a continued relationship with both parents, even after the parents had separated or divorced, was naturally beneficial to the child in cases where both parents were positively minded towards contact (Dickmeis specifically refers to the child’s need for identification with the parent not living with the child)¹¹⁶. They argued, however, that in cases where the parents could not see eye to eye on contact (and here it is important to keep in mind that in the step-family scenario (especially in cases that have made it all the way to the courts), it is usually the wish of the custodial parent to

¹¹² AG Kamen (1982) S. 229.

¹¹³ LG Paderborn (1984) S. 1032-33.

¹¹⁴ Lempp, Reinhart, Braucht der sorgeberechtigte oder der nichtsorgeberechtigte Elternteil einen besonderen Schutz? – Kinderpsychiatrische Gedanken zu zwei Urteilen nach § 1634 BGB -, Zentralblatt für Jugendrecht und Jugendwohlfahrt, 1981 S. 283 ff.

¹¹⁵ Dickmeis, Franz, Die Umgangsbezugnis im Spiegel elterlicher Verantwortung – Versuch einer interdisziplinären Betrachtung -, ZblJugR 1982 (69), S. 271 ff.

¹¹⁶ Dickmeis, a. a. O. (115), S. 278 ff; Lempp, a. a. O. (114) S. 285 ff.

exclude the non-custodial parent from her/his new family by refusing contact), psychological harm to the child would arise from the emotional conflicts (including a loyalty conflict) that he/she would experience, and therefore contact should be refrained from completely¹¹⁷.

In addition, Dickmeis argued that in the case scenario where a “substitute parent” (a step- or foster-parent) had entered the scene, there was, as a rule, no need for establishing contact between the child and the non-custodial parent, as the “(psychological or factual) substitute parent already fulfills the need of the child for identification”¹¹⁸. Lempp even referred to possible harm to the child from contact, pointing out that for children living in a “new family”, possibly with step-siblings, contact with the other biological parent would mean that the child would carry on a dual relationship which other members of the child’s current family did not share. He argued that carrying on such a relationship would harm the psychological development of a small child (possibly even a child in primary school)¹¹⁹.¹²⁰

The 1990s and onward

As is apparent from the case law introduced above, by the end of the 1990s the general tendency was (and continues to be) that “the exercise of the right to contact by the biological father takes precedence over an “undisturbed” integration of the child into a new family unit”¹²¹. With the courts stressing that for children knowledge of and contact with both (biological) parents is in

¹¹⁷ Lempp, a. a. O. (114), S. 285 ff; Dickmeis, a. a. O. (115), S. 278 ff, 281. Both Lempp and Dickmeis understood the best interest of the child to be closely tied to the interests and wishes of the custodial parent (especially clearly in Lempp, a. a. O. S. 287). Dickmeis viewed any contact that was ordered or carried out against the wishes of the custodial parent (specifically including cases where the custodial parent had remarried) as “forced on” the child (and therefore not acceptable from the point of view of the child) (Dickmeis, a. a. O. S. 281, 282).

¹¹⁸ Dickmeis, a. a. O. (115), S. 278, 282. Also AG Kamen (1982) S. 229.

¹¹⁹ Lempp, a. a. O. (114), S. 286.

¹²⁰ AG Kamen (1982) S. 229 also refers to the works of child-psychiatrist Michael Rutter (Bindung und Trennung in der frühen Kindheit, 1978, S. 33 ff), but also to the writing of Gisela Zenz, a jurist and psychologist.

¹²¹ As OLG Karlsruhe (1998) S. 184 and OLG Brandenburg (1999) S. 1106.

the interest of the child's "self-identification and psychologically stable development"¹²², and pointing out that keeping the child in the dark about its other biological parent and letting it live with the mistaken belief that the new spouse/partner of the parent is its "real" father/mother will only postpone the shock to the child into the future when it will hurt the child more¹²³, it is generally accepted that "the unwillingness of the custodial parent to allow contact, appearing time and again, and the wish of that parent that the child would embrace the present partner of the parent as the missing parent, [and the difficulties on the side of the child to readapt after a separation of some length] do not suffice, according to the current law, for excluding the other parent from having contact to with the child"¹²⁴.

1.2 Why the Change in Case Law?

a. Consensus Concerning the Significance of Contact for the Child

The general backdrop to this shift in case law, from restricting contact between a child living in a step-family and the external biological parent, to promoting such contact, is the tendency (gradually increasing over the years) in case law and scholarly literature concerning contact as a whole, to promote contact between the child and the parent not living with the child, as contact with both (biological) parents is argued to be, as a rule, in the best interests of the child and its development. As introduced earlier, this principle was also introduced into the BGB in the form of a clear provision (§ 1626 III sentence 1) in 1997.

It should be noted that over the years there has been continuous debate

¹²² OLG Bamberg (1999) S. 46-47; OLG Köln (2002) S. 952.

¹²³ OLG Köln (1998) para. 7; OLG Brandenburg (2006) para. 20.

¹²⁴ OLG Bamberg (1999) S. 46; OLG Köln (2002) S. 952. The tendency to order contact in step-family case scenarios pointed out in literature: Weinreich / Klein, *Fachanwalts-Kommentar Familienrecht*, 5. Aufl (Köln, 2013), § 1684 Rn. 103; Johannsen/Henrich/Jaeger (2010), § 1684 Rn. 29; vgl auch Völker / Clausius, a. a. O. (26), § 2 Rn. 135.

concerning the merits and demerits of contact with the non-residential parent for the child. Over the years, various assertions have been made concerning the significance of contact for the child, as well as the parent¹²⁵. In 1964, the BGH argued that contact was to enable the non-custodial parent to personally and directly keep abreast of the physical and mental condition and development of the child, to maintain a close familial relationship to the child and prevent estrangement, as well as to “take account of a mutual need for affection”¹²⁶, a view that was frequently reiterated in later case law and literature¹²⁷, and that stressed the importance of contact to both the non-residential parent and the child.

Another argument that appears time and again in case law and literature is that continued contact between the external parent and the child is meaningful when keeping in mind that the external parent may in the future once again become the primary caregiver of the child if for example a court decision concerning parental custody is changed in favor of the formerly non-custodial parent (§ 1696), when the other parent is deprived of parental custody (§ 1680 III) or dies (§ 1680 I, II). It has been argued that in such a case, continued (personal) contact to the formerly non-custodial parent would make it easier for the child and the formerly external parent to adjust to the changed situation¹²⁸.

As the focus moved away from the parent and more towards the child, case law and scholars stressed the importance of continued contact with the external parent for the child, by arguing that it was important for the child

¹²⁵ A detailed overview with copious references in Staudinger/Rauscher (2014), § 1684 BGB Rn. 29 ff, also Schultze, Natascha, *Das Umgangsrecht – die deutsche Reform im Kontext europäischer Rechtsentwicklung*, (2001), S. 34ff.

¹²⁶ BGHZ 42, S. 364, also Staudinger/Schworer (1966), § 1634 BGB Anm. 10.

¹²⁷ For example in BGH FamRZ 1984, S. 778, 779; BVerfG FamRZ 1995, S. 86, 87; in recent case law for example OLG Brandenburg FamRZ 2009, S. 1688; in literature Johannsen/Henrich/Jaeger (2010), § 1684 Rn. 3.

¹²⁸ As also pointed out by BVerfG FamRZ 1983, S. 872, 873; BGH FamRZ 1984, S. 778, 779.

to have a continued close relationship to both parents in order to secure its successful emotional development, and to help the child to handle the separation of the parents and the loss of the continued presence of one parent from the household¹²⁹.

The opportunity for the child to attain a realistic image of the other parent through personal contact (as opposed to the negative image possibly created by the parent living with the child, or an idealized image that the child has created him/herself) has also been suggested as a positive result of contact¹³⁰. In addition, some case law has stressed that it is important for the personality development of the child to know their (other) biological parent, even if a possible substitute “social” parent lives in the same household as the child¹³¹.

Accordingly, there has been an increasing consensus among legal scholars and practitioners since at least as early as the 1970s that contact with both parents is generally beneficial to the child¹³². As introduced above, this basic understanding of the importance of contact for the child was introduced into the BGB in 1997 in the form of § 1626 III sentence 1.

Nevertheless, there has never been absolute unity in Germany among legal scholars and also experts from other fields as to the extent to which contact should be promoted and exercised in specific cases. Although the Civil Code appears to take the stance that contact with both parents is in general in the best interests of the child (§ 1626 III sentence 1), there has always been criticism towards a general “presumption of contact”¹³³, and it has been

¹²⁹ Johannsen/Henrich/Jaeger (2010), § 1684 Rn. 3.

¹³⁰ From a psychological viewpoint Mackscheidt, Elisabeth, *Loyalitätsproblematik bei Trennung und Scheidung – Überlegungen zum Kindeswohl aus familientherapeutischer Sicht*, FamRZ 1993, S. 254, 257. But critically Schultze, a. a. O. (125) S. 45 m. w. N.

¹³¹ OLG Karlsruhe (1998) S. 184.

¹³² Staudinger/Rauscher (2014), § 1684 BGB Rn. 5.

¹³³ Noticeably throughout the years Lempp (argued that contact was only beneficial to the child if there was a relatively low degree of animosity between the parents and the parents were able to agree on contact. However, in cases where there remained a high degree of animosity between the parents, it was argued that contact should be restricted,

pointed out that the various arguments introduced above concerning the benefits of contact for the child, are not always necessarily based on clear scientific evidence¹³⁴. Consequently, opinions differ somewhat as to how to strike a balance between promoting contact despite a deep conflict between the parents (based on the understanding that in the long run the importance of maintaining ties/contact to the other parent for the development and socialization of the child outweighs any temporary discomfort to the child) on the one hand¹³⁵, and protecting the child from the negative effects caused by parental animosity (including a loyalty conflict)¹³⁶ on the other.

Notably, in order to clarify what the child needs and what is harmful to its development, various studies have been conducted and numerous academic articles have been published in Germany over the years, which have attempted to look at contact (or the lack of it) and the effects it has on the child from the point of view of different fields such as child psychology, psychiatry and medicine¹³⁷.

as it would cause a loyalty conflict and other harmful effects to the child), a. a. O. (114), ders., Die Rechtstellung des Kindes aus geschiedener Ehe aus kinder- und jugendpsychiatrischer Sicht, NJW 1972, S. 315 ff; vgl. auch ders., Die Bindungen des Kindes und ihre Bedeutung für das Wohl des Kindes gemäß § 1671 BGB, FamRZ 1984, S. 741.

¹³⁴ See Staudinger/Rauscher (2014), § 1684 BGB Rn. 33 for further references.

¹³⁵ From a psychology viewpoint Klenner, Wolfgang, Rituale der Umgangsvereitelung bei getrenntlebenden oder geschiedenen Eltern – Eine psychologische Studie zur elterlichen Verantwortung, FamRZ 1995, S. 1529; Mackscheidt, a. a. O. (130); Ell, Ernst, Psychologische Kriterien zur Umgangsregelung, DAVorm1986, S. 750.

¹³⁶ In addition to Lempp a. a. O. (114), (133), Haffter, B., Kinder aus geschiedenen Ehen, 2. Aufl., (1960), S. 74 ff., 117 ff (the latter is even cited by (the otherwise extremely pro-contact) decision of the BVerfG of 15 June 1971 (a. a. O. (9), S. 425) which argued as follows: “... the best interests of the child [must] constitute the point of reference for the decisions of the [court]. In this respect, it cannot be left out of consideration that regulation of access through decisions of the courts and the enforcement of such decisions not infrequently result in the multiplication of the difficulties that children experience as a result of the separation of the parents, so that many doctors, educators and adolescent psychologists express their concerns concerning [such regulation and enforcement of contact] in the interest of an undisturbed development of the child.”

u.s.w.

¹³⁷ In addition to the articles already referred to above, Kölch, Michael / Fegert, Jörg, Die umgangsrechtliche Praxis aus Sicht der Kinder- und Jugendpsychiatrie, FamRZ 2008, S. 1573; Röcker, D., Sorgerecht und Verkehrsrecht, Pädiatrische Praxis 1975/6, S.

Although it has been pointed out again in recent years that there is no irrefutable evidence that contact necessarily always has a positive effect on the child¹³⁸, the current dominant stance among legal scholars is that § 1626 III S. 1, which states that the best interests of the child as a general rule include contact with both parents, is, as a *general* rule, justified¹³⁹ (therefore allowing for exceptions when the particulars of a case suggest that contact might not be beneficial, or indeed is harmful to the child).

This general attitude is also apparent in the case law introduced above concerning contact with a child living in a step-family, with the judges pointing out that it is “of significance for the development of a child’s personality”¹⁴⁰ or “usually in the interest of a child’s self-identification and psychologically stable development”¹⁴¹ to get to know both biological parents and maintain a relationship to each. The scenario where the child is living with one biological parent and one (potential) social parent (the new partner/spouse of the parent), is not considered an exception to this general rule. Indeed, as already mentioned above, the courts have stressed that a step-child should not be kept in the dark about their biological parentage, and should in fact be made aware of the external parent as early as possible, to minimize any possible harm to the child’s emotional development¹⁴².

557, usw.

¹³⁸ Staudinger/Rauscher (2014), § 1684 BGB Rn. 33, 35. Kindler, Heinz / Reinhold, Claudia, Umgangskontakte - Wohl und Wille des Kindes, FPR 2007, S. 291.

¹³⁹ Staudinger/Rauscher (2014), § 1684 BGB Rn. 33 ff; Völker / Clausius, a. a. O. (26), § 2 Rn. 119 usw.

¹⁴⁰ OLG Karlsruhe (1998) S. 184.

¹⁴¹ OLG Bamberg (1999) S. 46; OLG Köln (2002) S. 952.

¹⁴² As OLG Köln (1998), introduced above, stated in a case where the child in question believed the step-parent to be its biological father: “It might seem to the [residential natural parent] that leaving the child under such a misconception would be the easier way out. However, by doing this, the necessity of making the growing child one day acquainted with the actual facts will only be postponed to the future, and will at that point – the later it happens – probably lead to far more serious annoyances and problems on the side of the child. It is known to the *Senat*, from expert consultations in numerous other cases, that it is in principle not in the child’s best interest to shift confronting the child with the facts of its origin into the (far) future. ...”, similarly OLG Karlsruhe 1998 (the mother had argued that the child, who was at the time 2 or 3 years

b. The Stability of the “Ideal” New Family

As to the arguments (usually put forth by the biological parent who has personal custody of the child in question) that contact with the external biological parent would have a harmful effect on the child in question, as such contact would confuse the child or hinder its smooth integration into the new family, these arguments are no longer considered as valid by neither the courts nor the majority of scholars¹⁴³. Indeed, nowadays scholars and judges alike are quick to point out that the residential custodial parent of a child is likely to oppose contact between the child and the external parent *not* due to actual concerns for the well-being or the best interests of the *child*, but because that parent wishes to push aside the former spouse or partner, as he/she wishes no (from his/her point of view) unwelcome interruptions to what *that parent hopes* will be(come) the new ideal family, where the child will embrace the new spouse of the parent as a substitute for the external parent¹⁴⁴.

In recent years German judges and scholars alike have become more aware of the fact (acknowledged by social scientists in Germany since as early as the 1930s¹⁴⁵) that a step-family might not turn out to be as “ideal” as the

old, was too young to be confronted with the fact that the new partner of the mother was not his biological father. This argument dismissed by the court based on the above logic), also OLG Köln (2002) (the maternal grandmother argued that it was not yet the right time to tell the child (5 or 6 years old) about her biological parents. The court dismissed the argument by posing the question “when is it ever a really good time to inform children about such important things?”, ordering contact to commence after another 3 months and stating that this transition period “should suffice for acquainting the child, gently and with professional help, with the reality”).

¹⁴³ But see Maurer in FamRZ 2006, S. 96 ff (commentary to BVerfG decision of 29. 11. 2009): “the biological father is often a “trouble-spot” for the new relationship of the mother, which could lead to the breaking up and loss of this relationship, and to the loss of an opportunity for the child to grow up in a family that would offer him/her good chances for development” (S. 98-99).

¹⁴⁴ Staudinger/Rauscher (2014), § 1684 BGB Rn. 361. See also Staudinger/Frank (2007), § 1741 BGB Rn. 42, 44; Paulitz, Harald, Wie sinnvoll sind Stiefkindadoptionen?, ZfJ 1997, S. 311, 312 ff. (In clear terms also already OLG Stuttgart (1980)).

¹⁴⁵ See references in Staudinger/Frank (2007), § 1741 BGB Rn. 45, also 43.

custodial parent initially imagines or hopes. Studies in the field of psychology have shown that the members of a step-family (the children as well as the adults) often feel overwhelmed by their new roles and often experience considerable stress, which could result in increased tensions among the family members and further complicate the relationships in the household¹⁴⁶. Interestingly, there is some evidence that step-families, where the child maintains a relationship to the external biological parent, function better than families where contact between the child and the external parent is cut off¹⁴⁷.

Furthermore, it is occasionally pointed out by scholars and judges that there is no guarantee that the relationship between the custodial parent and the step-parent will last. Statistically, the divorce rate of second and third marriages in Germany is higher than that of first marriages¹⁴⁸. The decisions of OLG Karlsruhe (1998) and OLG Bamberg (1999) introduced above, made a point of highlighting the fact that there was no way of knowing how the mother's new relationship would play out in the long run, this being all the more reason for the child to maintain a relationship to the external biological parent¹⁴⁹. The same has been pointed out in literature.

¹⁴⁶ Staudinger/Frank (2007), § 1741 BGB Rn. 45.

¹⁴⁷ See Staudinger/Frank (2007), § 1741 BGB Rn. 43 m. w. A. OLG Stuttgart (1980, introduced above) also argued that "It is precisely the successful integration of [the child] into the [new] family, that makes it necessary for [the child] to be able to form, through the exercise of the right to contact, even a child's image of his father, and to keep this image alive" (S. 404).

¹⁴⁸ Paulitz, a. a. O. (144), S. 312. This trend is also evidenced by the number of cases where former step-parents, who adopted their step-child, apply to the courts to revoke the adoption after divorcing the biological parent, see Staudinger/Rauscher § 1741 (2007) Rn. 44 for further references.

¹⁴⁹ OLG Karlsruhe (1998) S. 184; OLG Bamberg (1999) S. 47. See also the commentary to the OLG Karlsruhe (1998) decision by Gerhard Hohloch (Jus 1999, S. 399) S. 400. (Albeit, in both cases, the custodial mother was not officially married to her new partner. However, it goes without saying that, considering the considerable number of couples in Germany who cohabit without officially registering their union, the fact that the mothers in these two cases were not married to their new partners does not automatically mean that the relationship between the adults was bound to be of a short duration.)

Rösler and Reimann argue about step-child adoption cases that rather than “protect” the relationship between the stepparent and the child by severing contact with the other biological parent through adoption, it would make more sense to protect the relationship between the external biological parent and the child, as this relationship might prove to be the “more sustainable and lasting” one¹⁵⁰.

c. Changes in Society

Finally, it is argued that, taking into account the relatively large number of step-families, there could no longer be any “unbearable social strain” on the child from a situation where the child lives in a household with one biological parent and that parent’s new spouse or partner, while continuing to have contact with the other biological parent, as this has become a common phenomenon, and something viewed and accepted as “normal” in the “social environment of the child in kindergarten, school and the neighborhood”¹⁵¹. The case law introduced above also refers to situations where a child has, so to say, “three parents”, as nothing out of the ordinary¹⁵².

Taking the above into account, the courts in the cases above also argued that the child should be made aware of its factual descent as early on as possible, as the older the child gets, the greater the shock and confusion will be¹⁵³.

d. Additional Catalyst -The Improved Legal Position of the Father of a Non-Marital Child

It has been pointed out that an additional catalyst for the shift in case law was the strengthening of the position of the father, who had not been married to the mother of the child in question¹⁵⁴. Until 1997, contact between the child and the non-marital father, was regulated by BGB § 1711 a. F.,

¹⁵⁰ Rösler / Reimann (anm. zu BVerfG B. v. 27. 4. 2006, FamRZ 2006, S. 1355) S. 1356.

¹⁵¹ Staudinger/Rauscher § 1684 (2014) Rn. 361.

¹⁵² Vgl. OLG Bamberg (1999) S. 47 and OLG Köln (2002) S. 953.

¹⁵³ OLG Köln (1998) para. 7; OLG Brandenburg (2006) para. 20.

¹⁵⁴ Staudinger/Rauscher (2014), § 1684 BGB Rn. 361.

which stated that “the person who has personal custody for a child, makes the decisions concerning contact between the child and the father” (§ 1711 Abs. 1 S. 1), leaving it entirely up to the custodial parent (mother) to decide whether and to what extent there was to be contact between the child and the other parent. § 1711 Abs 2 S. 1 stipulated that “*if personal contact with the father serves the best interests of the child*, the court can rule that the father has a right to personal contact”. This was a much stricter condition than what was stipulated in § 1634 a. F. for fathers who had been married to the mother of the child in question (according to § 1634 II S. 2 a. F. the court could *restrict or exclude* the (non-custodial parent`s) right to contact “*when this [was] necessary for the best interests of the child*”). With the 1997 KindRG, § 1711 a. F. was abolished and the non-marital father included in § 1684 (formerly § 1634) on an equal footing with fathers who had been married to the mother of the child. Following this reform, a row of decisions were handed down by German courts concerning contact between a father of a non-marital child and the child. The courts in these decisions ordered contact to take place, including in cases where the father of a non-marital child was seeking contact with a child living in a step-family (as introduced above), and in these decisions, as seen above, the courts took pains to point out that also in cases where it was a father of a non-marital child who was seeking contact, contact was to be understood as in general being in the best interests of the child. Consequently, or so the logic seems to go, seeing as even(?) in the case of an non-marital father, the fact that the custodial mother has entered into a new relationship does not constitute a reason for excluding contact between the external parent and the child, the father who has been married to the mother should certainly not be denied contact¹⁵⁵.

¹⁵⁵ Staudinger/Rauscher (2014), § 1684 BGB Rn. 361. See also Hohloch, a. a. O. (149) S. 400.

2 Step-Child Adoption

Introduction

According to German law all adoptions of minors are so-called “full adoptions”, meaning that also in the case of an adoption of a child by a step-parent, the relationship of the child to its other natural parent and the rights and duties arising from this relationship, including the right to contact, are extinguished (general rule in § 1755 Abs 1, specific rule for the case of stepchild adoption in § 1755 Abs 2). In view of such serious and final effects of an adoption by step-parent, an adoption order is made by the courts only if a number of strict conditions are fulfilled (more in detail below). As there can be no more applications for contact from the external (natural) parent once an adoption order has been made, the dispute between the natural parents concerning the maintaining of a personal relationship between the external natural parent and the child, is occasionally played out during adoption proceedings.

Notably, in the 1990s and the 2000s, the BGH and the BVerfG were called upon to bring clarity into the question of the best interests of the child living in a step-family and the importance of contact with the external parent, in a number of cases concerning step-child adoption¹⁵⁶. More specifically, these decisions dealt with the constitutionality of the conditions under which the consent of the non-marital father to the adoption of his child by the new spouse of the mother could be substituted. Although on the surface the courts were called upon to decide on the constitutionality of the seemingly differential treatment of fathers who had been married to the mother of the child in question, and those who had not, and not directly with contact

¹⁵⁶ Decisions of the BVerfG from 7. 3. 1995 (FamRZ 1995, S. 789, Anm. Buhr, FamRZ 1995, S. 1268), the BGH from 23. 3. 2005 (FamRZ 2005, S. 891), the BVerfG from 29. 11. 2005 (FamRZ 2006, S. 94, Anm. Maurer, S. 96) and the BVerfG from 27. 4. 2006 (FamRZ 2006, S. 1355, Anm. Rösler/Reimann, FamRZ 2006, S. 1356).連邦憲法裁判所の上記 1995 年 3 月 7 日判決を紹介する日本語文献として高橋由紀子「ドイツの婚外子の父の交流権」帝京法学 25 卷 1 号 57 頁 (2007 年) がある。

between the external parent and the child per se, the courts in these decisions addressed the basic underlying questions of how step-child adoption in general was to be regarded from the point of view of the best interests of the child (namely, to what extent the relationship between the external parent and the child (marital or non-marital), was to be protected, and how much importance was to be attached to the legal integration of the child into the step-family through official adoption). As I believe that these decisions give additional insight into the attitude of German courts towards maintaining a relationship between a child and an external parent in cases where a possible substitute parent has entered the scene, I will below introduce the decisions in a concise manner, focusing on how the courts addressed the above-mentioned basic questions. I will also give a short overview of how step-child adoption has been viewed in scholarly literature in Germany.

2.1 Adoption in German Law with a Focus on Step-Child Adoption

Under German law, adoption is performed by court order (§ 1752) (the mere consent of the parties does not suffice). Various condition must be fulfilled, including the consent of (among others) the child that is to be adopted (§ 1746), and the (natural) parents of the child (§ 1747). This means that also in a case where the spouse of one of the natural parents wishes to adopt the child (the so-called step-child adoption, expressly referred to in § 1741 II S. 3¹⁵⁷, § 1754 I concerning the effects of step-child adoption), the consent of the other natural parent is required (more in detail below). After the necessary persons have declared their consent in the manner stipulated in § 1750, the court must decide whether to grant the adoption, considering the best interests of the child (§ 1741 I) as well as the interests of other persons

¹⁵⁷ § 1741 II S. 3: A spouse may adopt a child of his spouse alone.

involved (§ 1745)¹⁵⁸. § 1741 I S. 1 makes it clear that an adoption is admissible only if it serves the best interests of the child and it is to be expected that a parent-child relationship will arise between the adoptive parent and the child.

Once an adoption order is granted and comes into effect, the child attains the legal position of a child of both spouses (§ 1754 Abs 1 in the case where a married couple adopts a child or a spouse adopts a child of the other spouse). Parental custody is held by the spouses jointly (§ 1754 Abs. 3). At the same time, the relationship of the child to its natural parent, or parents in the case where a child is adopted by third parties (as well as the relatives of the parent(s)) and the rights and duties arising from this relationship (including rights concerning maintenance and inheritance, but also the right to contact) are extinguished (general rule in § 1755 Abs 1, specific rule for the case of stepchild adoption in § 1755 Abs 2, which specifies that “if a spouse adopts the child of his spouse, the extinction of the relationship occurs only in relation to the other parent and his relatives” and not in relations to the spouse who is the natural parent). Furthermore, an adoption order once granted is irrevocable and final (the Civil Code only allows for a revocation under exceptional circumstances, §§ 1759 ff).

2.1.1 The Consent of the Parent(s) in Particular

Considering the severe consequences of an adoption (the extinguishing of the relationship to the natural parent(s) and the irrevocability of the adoption order), German law, as stated above, requires the consent of the parent(s) of the child for the adoption of the child (including adoption by step-parent) (§ 1747). Although the family court can substitute the consent of a parent under certain conditions, these conditions are strict. They are set out in §

¹⁵⁸ § 1745: The adoption may not be pronounced if overriding interests of the children of the adoptive parent or of the child to be adopted prevent it or if it is to be feared that interests of the child to be adopted are endangered by children of the adoptive parent. Property interests should not be decisive.

1748, which stipulates that the consent of a parent can be substituted where that parent has *persistently grossly violated his duties to the child* or has shown through his conduct that he is *indifferent* to the child, and where it would be disproportionately disadvantageous to the child if the adoption did not take place. The consent may also be substituted if the violation of duty, although not persistent, is particularly serious and it is probable that it will permanently not be possible to entrust the child to the care of the parent (§ 1748 I)¹⁵⁹.

According to § 1748 IV the consent of *a father who has never been married to the mother of the child* and has never held (joint) custody of the child can be substituted under lighter conditions, if the mother of the child has sole custody (§ 1626a III). In this case, a persistent gross violation or indifference towards the child on the part of the father are not required. The consent of the father can be substituted “if the fact that the adoption does not take place would be disproportionately disadvantageous to the child”. However, although statutory law has set different standards for the substitution of the consent of fathers who have been married to the mother or have at some point had custody of the child, and fathers who have not, case law has raised the hurdle for substituting the consent of the non-marital father to the adoption of his child.

2.2 The Decisions of the Federal Constitutional Court and Federal Supreme Court

The formerly weak position of the non-marital father in the adoption proceedings of his child was first strengthened by the BVerfG in 1995. At the time, the father of a non-marital child had no means to stop an adoption of

¹⁵⁹ The consent of a parent may also be substituted where he is permanently incapable of caring for and bringing up the child as the result of a particularly serious psychological illness or a particularly serious mental or psychological handicap and where the child, if the adoption does not take place, could not grow up in a family and the child’s development would as a result be seriously endangered (§ 1748 III).

his child by the step-father of the child (or indeed an adoption by the mother of the child, which was possible under the law effective at the time). His consent to the adoption of his child was not required, neither were his interests considered by the courts. The BGH in its 7 March 1995 decision¹⁶⁰ stated that a father of a non-marital child as well as a father of a marital child were granted parental rights under § 6 II GG, and that the corresponding regulation in the Civil Code (§ 1747 II S. 1, 2 BGB a. F.) was incompatible with § 6 II S. 1 of the Basic Law to the extent that it required neither the consent of a father of a non-marital child to the adoption of his child by the step-father (or the mother), nor a weighing of his interests¹⁶¹.

One of the central points of deliberation for the BVerfG in the above decision was the necessity of an adoption by a step-parent, and its merits and demerits from the point of view of the interests of the child. The Court pointed to the fact that an adoption of a child by its step-father led to a loss of any rights or obligations of the (biological) father concerning his child, which would reversely also mean the loss of all the corresponding rights of the child, such as rights to maintenance and inheritance (but also a loss of the opportunity to have contact with the father, as the father would lose his right to apply for contact). The Court stated that the “overriding interests of the child” did not justify depriving the (biological) father of any rights concerning the adoption of his child, pointing out first that an adoption by step-father would not occasion any changes in the actual situation of the child. “It is not the case”, the Court stated, “that not until an adoption was granted would the child be given the chance to grow up in a family that would offer him or her good conditions for his or her development” (S. 793). It added that an adoption would rather serve to legally secure an already existing situation.

¹⁶⁰ BVerfG FamRZ 1995, S. 789. (The decision was in turn heavily influenced by *Keegan v. Ireland*, the 26 May 1994 decision of the European Court of Human Rights.

¹⁶¹ The Court in this decision dealt with applications from three fathers concerning the adoption (or the application thereof) of their non-marital children by the corresponding step-fathers (and/or the biological mothers).

Such legal securing of the actual situation might be in the best interest of the child, however, it should be borne in mind that “step-child adoptions are often not unproblematic” and “therefore it cannot automatically be assumed that adoption by the stepfather as a rule serves the best interests of the child” (S. 793).¹⁶²

Taking the above into account, the Court also suggested possible changes to the regulations concerning step-child adoption and step-families. It stated that the interests of the child in the step-father exercising parental custody together with the mother might be protected by strengthening the legal standing of the step-father. The Court added that the legislator might also consider changing the legal regulations concerning step-child adoptions in a way that the relationship between the external biological parent and the child would not be extinguished completely through adoption. (S. 793)

As a result of the 1995 decision of the BVerfG, the legal regulation concerning the consent of a non-marital father to the adoption of his child was amended during the 1997 KindRG. However, the legislator did not opt for a complete equalization of the legal standing of the father of a non-marital child and the father of a marital child (as explained above, in the Civil Code a distinction is made in § 1748 I and § 1748 IV between non-marital fathers who once had custody and fathers who never had custody).

In 2005, the BGH and the BVerfG decided once and for all the question of

¹⁶² In its decision, the BVerfG also referred to the 1976 reform of law concerning adoption (*Das Gesetz über die Annahme als Kind und zur Änderung anderer Vorschriften (Adoptionsgesetz)* v. 2. 7. 1976 (BGBl. I S. 1749)). It pointed out that adoption of a minor was to serve the following aim, namely that a child who had been deprived of a “healthy home” would be given a family (vgl. BT-Drucks. 7/3061, S. 1). Concerning the extinguishing of the relationship to the external parent in the case of a step-parent adoption, the legislator justified this effect of adoption by arguing that any disruption to the new parent-child relationship should be avoided, and claimed that the ties between the child and the external parent were in most cases rather loose (limited to the mere payment of maintenance) (BT-Drucks. 7/3061, S. 22). (referred to on page 789 of the decision)

the constitutionality of such a distinction. The BVerfG in its 29 November decision clearly stated that § 1748 IV was open to an interpretation that could prevent unequal treatment of fathers who had never held custody of the child. The Court, quoting its own 1995 decision (introduced above) and the 23 March 2005 decision of the BGH, confirmed that, considering the constitutionally protected rights of the parties involved, a weighing of the interests of father and child was required, and (bearing in mind that when the relationship to the father is extinguished through adoption, the child will be deprived of all the corresponding rights, such as rights to maintenance and inheritance; that “moreover, as a general rule it does not serve the best interests of the child when any chances of the father to have contact with the child are completely and permanently excluded”¹⁶³; considering the “often not unproblematic nature of step-parent adoption” and the fact that the adoption would occasion no changes to the actual situation of the child (again quoting the 1995 decision)), the adoption not taking place would constitute a “disproportionate disadvantage” for the child in the sense of § 1748 IV “if the adoption would offer the child so notable an advantage that a parent who cares reasonably for the child would not insist on upholding the relationship” (BVerfG FamRZ 2006, 94, 95; BGH FamRZ 2006, 891, 892).

When weighing the corresponding interests, the BGH stated that it would be necessary to weigh whether and how far there was or had been a lived (*gelebt*) father-child relationship or what reasons had prevented the father from developing or maintaining such a relationship (BGH FamRZ 2006, 891, 892). The BVerfG clarified in addition that motives and concerns of the father in refusing consent to the adoption were to be considered, as well as the conduct of the child’s mother (here the court added that it was “of particular significance, whether and to what extent the mother of the child

¹⁶³ BVerfG 2005, S. 95; also BVerfG 1995 S. 793, albeit, referring here to adoption by the mother.

and her husband were attempting to prevent the father from having a relationship to his child”. Indeed, the BGH had stated clearly that “it should be borne in mind that it does not as a rule serve the best interest of the child when the (possibly even primary) aim of the adoption is to completely and permanently exclude the father’s chances to have contact with his child” (S. 892)¹⁶⁴. Furthermore, the BGH stated that even if there was no lived (*gelebt*) relationship between the father and the child, a substitution of the father’s consent under § 1748 IV would only be permissible if the father himself, through his own conduct, was responsible for the failure of such a relationship (BVerfG FamRZ 2006, 94, 95).

The latest decision by the BVerfG concerning step-child adoption and the consent of the (non-marital) father (decision of 27 April 2006) reconfirmed the possibility of a constitutional interpretation of § 1748 IV, as well as the points that were to be considered when weighing the interests of the father and the child against each other (introduced above). In connection with the latter, the Court clarified once more that the integration of the child into an “ideal” or “normal” family through adoption was not to be prioritized above everything else (including in cases where external circumstances – in that particular case the incarceration of the father – had hindered the father from building up a relationship with his child), with the BVerfG criticizing the preceding OLG decision which described contact between the (biological)

¹⁶⁴ In that particular case, according to the understanding of the court, it was precisely the permanent exclusion of the father’s right to contact that primarily motivated the application for adoption. In addition to stating that such motivations on the side of the mother and step-father did not justify the substitution of the consent of the father to adoption, the Court added that it was rather the duty of the mother to promote a relationship between the child and its (biological) father. “Insofar as the [mother] has until the present time not come to terms with the separation from the father of her child, and the child – as a reaction to this – is allegedly afraid of potential visits by the father, it does not follow that there is a need to legally secure the integration of the child into the new family of the mother; rather these circumstances reveal a serious failure of the mother in bringing up her child (*Erziehungsversagen*), one that ought not to be redressed by means of an adoption of the child through the husband of the mother” (S. 893).

father and the child as the father “forcing his way into” the family circle of the mother, the spouse who is willing to adopt, and the child (BVerfG FamRZ 2006, 1355). The Court stated, that “... it is by no means guaranteed that the new relationship will develop as “ideally” (*idealtypisch*) as the [lower] courts implied it would.” Referring to the specific circumstance of the case, it went on to say: “Should there be any truth in the father’s claim (although no longer relevant as to the decisions at hand), that the mother and her husband (the adoptive father) have been living separately for many months, this would be evidence, even in the case at hand, that it can be in the interest of the child not to automatically allow adoption already in cases where external circumstances – here, incarceration - have obstructed the biological father from building a close relationship to his child. The relationship between father and child, which is feasible also during the time the father is incarcerated, can be more stable and lasting than the relationship of the child to the new partner of the mother.”¹⁶⁵

2.3 Step-child Adoption and Contact with a Child Living in a Step-Family in Legal Writing

Step-child adoption has been the subject of a fair amount of academic writing and discussion in Germany¹⁶⁶. Although step-child adoption is statistically a very common type of adoption (more than half of all adoptions of minors in Germany are reportedly step-child adoptions¹⁶⁷), and has a long-standing tradition in German society¹⁶⁸, it has been the target of

¹⁶⁵ S. 1356. Critically about this decision: Maurer, a. a. O. (156), S. 96.

¹⁶⁶ More recently, Staudinger/Frank (2007), § 1741 BGB Rn 41 ff (with extensive further references both from the field of law and other fields); ders, Brauchen wir Adoption? – Rechtsvergleichende Überlegungen zu Notwendigkeit oder Zweckmäßigkeit der Adoption, FamRZ 2007, S. 1693; Muscheler, Karlheinz, Das Recht der Stieffamilie, FamRZ 2004, S. 913; Enders, Wolfgang, Stiefkindadoption, FPR 2004, S. 60; Paulitz, a. a. O. (144).

¹⁶⁷ For statistics see Staudinger/Frank (2007), Vorbem. 28 zu §§ 1741 ff BGB.

¹⁶⁸ Muscheler, a. a. O. (166), S. 915.

continued criticism for the past decades.

Scholars point out that the original aim of adoption of a minor was meant to be that children who had been deprived of parental care could obtain a new family and would be spared living in an orphanage¹⁶⁹. As for a child who lives in a step-family, it is argued, there would be no threat of him or her being sent to an orphanage, as the child has “parents who are capable of and willing to raise him/her, namely (as a rule) two biological parents and one new “social” parent”¹⁷⁰. Naturally, not all children who live in a step-family have a (caring) parent outside that family, the most straightforward example being cases where the other parent has passed away. As for the cases where the non-residential parent is still alive and well, scholars appear to agree (in unison with the higher court case law introduced above) that “step-child adoption, where ties to one biological parent are severed, serves the interests of the [custodial] parent, rather than the interests of the child”¹⁷¹. As is evident also from the higher court decisions above, it is increasingly recognized among legal scholars and practitioners, that step-child adoptions (adoptions of both children born to parent who are married to each other, and to parents who are not) are “often not unproblematic” and that step-parent and –child relationships should not be “set in stone” through adoption unless absolutely necessary¹⁷².

The concrete reasons given in literature for why step-child adoption (and the consequent severing of ties between the external biological parent and the child) is viewed as problematic, largely overlap, on the one hand, with the reasoning of the higher courts introduced above, and, on the other hand,

¹⁶⁹ As voiced by the legislator at the time of the 1976 reform of law concerning adoption, see Muscheler, a. a. O. (166), S. 915, vgl. Enders, a. a. O. (166), S. 60 ff.

¹⁷⁰ Muscheler, a. a. O. (166), S. 915; vgl. Frank, a. a. O. (166), S. 1693, but critical towards this argument BT-Drucks. 13/4899, S. 67.

¹⁷¹ Frank, a. a. O. (166), S. 1695; vgl. Enders, a. a. O. (166), S. 64.

¹⁷² Staudinger/Frank (2007), § 1741 BGB Rn. 45, vgl auch Paulitz, a. a. O. (144), 312 ff; Enders, a. a. O. (166), S. 61, 64.

with the reasons introduced in section II 1.

Scholars argue that step-child adoptions should not be entered into lightly, as under German law step-child adoptions are, like all other adoptions, final and conclusive, an adoption order once granted is irrevocable and final¹⁷³. With an adoption, the (legal) relationship between the external biological parent and the child is extinguished, and at the same time the step-parent assumes legal responsibility for the child, including all rights and obligations concerning the custody of the child, as well as rights and obligations connected with inheritance and so forth, *for the rest of their lives, irrespective of the state of the marriage to the biological parent of the (former) stepchild*. The number of stepparents who seek to revoke the adoption after divorce from the biological parent, illustrates how many step-parents are apparently not fully aware of the responsibilities they are taking on when adopting their spouse's child¹⁷⁴.

Scholars and practitioners alike point out that although the motive for a step-child adoption should be the welfare of the child, step-child adoptions are often rushed into and undergone for other, often questionable considerations on the side of the new spouse, but especially on the side of the biological custodial parent. Such motives might include the wish to stabilize the new relationship of the adults and to document this stabilization to the outside world¹⁷⁵, but also the wish to “cut off” the other natural parent from the “ideal” new family once and for all¹⁷⁶. As such (adult-centered) motives often overshadow considerations for what is objectively in the best interest of the child, German Youth Offices (*Jugendämter*) and Adoption Placement

¹⁷³ Only under exceptional circumstances mentioned in the BGB, is revocation allowed (§ 1760 ff BGB (e. g. mistake to the child's identity or duress (1760 II) etc); divorce of biological parent and stepparent does not qualify as grounds for revocation.

¹⁷⁴ See Frank, a. a. O. (166), S. 1695; also Muscheler, a. a. O. (166), S. 915; Staudinger/Frank (2007), § 1741 BGB Rn. 44 for references to case law.

¹⁷⁵ Muscheler, a. a. O. (166), S. 915.

¹⁷⁶ Frank, a. a. O. (166), S. 1695; vgl Staudinger/Frank (2007), § 1741 BGB Rn. 42, 44.

Offices (*Adoptionsvermittlungsstellen*) advise against rushing into step-child adoptions, and their guidelines include directions for spotting inappropriate motives for such adoptions¹⁷⁷.

In addition to calling for a closer examination of the real motives of step-child adoption, scholars refer to the possibility of the breaking up of the new, supposedly “ideal” household. Frank in particular provides copious literature references to works in related disciplines, such as sociology and psychology, to argue that a step-household is wrought with challenges to its members¹⁷⁸. Other authors refer to statistics that show that second and thirds marriages (or families that include step-children and –parents) are more likely to be divorced than first marriages¹⁷⁹.

¹⁷⁷Paulitz, a. a. O. (144), S. 312; see also Bundesarbeitsgemeinschaft der Landesjugendämter, “Empfehlungen zur Adoptionsvermittlung - 6., neu bearbeitete Fassung 2009 –“, accessed 2014/08/14 at http://www.bagljae.de/downloads/109_empfehlungen-adoptionsvermittlung_2009.pdf.

Paulitz (who was at the time the head of the Central Adoption Office of the State Welfare Association of Baden (state youth welfare office) in Karlsruhe), speaking from experience in the field, describes a typical case of step-family adoption: Adoption is instigated by the biological custodial parent who sees this as a means to secure a stable partnership with the new spouse, but also wishes for the children to grow up in a “complete” family. The wish to be a “normal” family is often so strong that the application for adoption of child by stepparent is made almost immediately after the marriage of stepparent and residential biological parent, although the process of re-orientation or adapting to the new family structure is by far not completed, and the new familial relationships are still to be developed. Behind such rushed adoptions is often the wish of the adults to solidify the new family and give its members a sense of belonging together. The stepparent might also want to demonstrate their sense of responsibility for the child(ren) of their spouse through adoption. However, Paulitz goes on to point out, experience shows that building a parent-child relationship between a stepparent and a stepchild (and stabilizing other relationships in the same household) in reality takes time (at least 4 years, he says). Based on the above, Paulitz argues that although the adults may have been driven by the abovementioned motives (the wish to secure the unity of the new family through adoption), the adults will have missed the point of adoption, which is centered around “the existing parent-child-relationship and the welfare of the child (not the grownups)” (Paulitz, a. a. O., S. 311, 312). Enders has argued that, considering the continuously large number of step-child adoptions in Germany, it is doubtful whether the courts and the Jugendämter are carefully considering whether the change in the familial relationships of the child occasioned by adoption is, in each individual case, wise from the point of view of the child (Enders, a. a. O. (166), S. 64).

¹⁷⁸ Staudinger/Frank (2007), § 1741 BGB Rn. 43 ff.

¹⁷⁹ Paulitz, a. a. O. (144), S. 312; Muscheler, a. a. O. (166), S. 915.

Taking the above into account, German scholars argue that the extinguishing of a relationship between the external biological parent and the child through adoption by step-parent would in many cases appear unjustified, as the relationship to the external parent might prove more sustainable and lasting than the relationship to the step-parent¹⁸⁰. As well as the biological father-child relationship possibly being the more lasting of the two possible parent-child relationships, knowledge of the biological parent and the continued care of the ties to the external biological parent is also argued to be beneficial, or even necessary to the development of the child, including in cases where the child simultaneously has a strong and sustainable relationship with the step-parent¹⁸¹.

Considering the above, and taking into account the peculiarities of step-child adoptions compared to other adoptions (first and foremost, the possible existence of a caring natural parent outside the step-family), many scholars have called for changes in the legal regulation of step-child adoptions. Some call for a further strengthening of the legal position of the step-parent (for the current state of statutory law and recent reforms see below), in order to render a considerable number of step-child adoptions unnecessary¹⁸², others suggest providing a legal solution so that the child would retain the non-custodial biological parent as such even after adoption by step-parent (a so-called “open adoption”); the law, they argue, should offer flexible solutions for all modern family structures, “the answer cannot lie in

¹⁸⁰ Rösler/Reimann, a. a. O. (156), S. 1356, 1357; Muscheler a. a. O.

¹⁸¹ Coester refers to the loss of a “genetic parent” as an inherent problem of step-parent adoption (Coester, Michael, Reform des Kindschaftsrechts, JZ 1992, S. 809 (S. 816)). Vgl. Frank, a. a. O. (166), S. 1693 and 1697 ff, (stressing the importance of knowing (of) one’s biological parents and referring to findings by psychologists concerning identity issues and other related psychological problems of adopted children); also Rösler/Reimann, a. a. O. (156), 1357; Enders, a. a. O. (166), S. 61 (retaining a legal parent-child relationship to the external parent as significant from the point of view of protecting the identity of the child).

¹⁸² Enders, a. a. O. (166), S. 61, 64 u. a.

constantly forming new *de jure* nuclear families and fading out other familial relationships”¹⁸³.

2.4 The Legal Position of the Step-Parent in German Law

As mentioned below, some authors have called for a strengthening of the status of the step-parent in order to lessen the need for step-child adoptions, which are by some considered as potentially problematic. There have been calls for the strengthening of the legal position of the step-parent from various quarters, not necessarily motivated by a negative attitude towards step-child adoptions. It is argued that strengthening the legal standing of a step-parent in relation to the step-child, will be in the interest of the child concerned as it will legally strengthen the family unit, and provide legal protection and recognition to the factual relationship between a step-parent and a step-child¹⁸⁴. Although official adoption would arguably also deliver such results, in view of the importance of maintaining a tie between the child and the non-residential biological parent (and other considerations outlined in the previous sections), strengthening the legal position of a step-parent without resorting to adoption provides a means to balance the (above-mentioned) interest of the new household on the one hand and the significance of contact between the child and the non-residential parent on the other hand. In addition, in light of the fact that many children nowadays simultaneously have more than two parent-figures ((merely) biological, legal, social in various combinations), it is argued that the law should take a more flexible attitude to such “pluralization of parenthood”¹⁸⁵. Step-families and

¹⁸³ Coester, a. a. O. (181), S. 816; Staudinger/Frank (2007), § 1741 BGB Rn 46; Muscheler, a. a. O. (166), S. 919 u.a.

¹⁸⁴ See for example BT-Drucks. 14/2096, S. 8 (in this instance concerning the proposed § 1687b BGB).

¹⁸⁵ Concerning how German law sees (or should see) the various kinds of “parenthood“, see for example Schwab, Dieter / Vaskovics, Laszlo A. (Hrsg.), *Pluralisierung von Elternschaft und Kindschaft*, Zeitschrift für Familienforschung Sonderheft (8), Leverkusen 2011 (concerning step-families, especially the following contributions:

the gradual strengthening of a step-parent's legal position as described below, provide a good example.

The legal standing of a stepparent has been strengthened through a number of revisions of the BGB since the end of the 1990s¹⁸⁶. The German legislator comprehensively considered suggestions for the improvement of the legal standing of a step-parent during the legislative debate preceding the 1997 KindRG (reforms concerning the child's family name, as well as contact with a former step-child (see below) and the option of applying for an order by the court that the child remain with the step-parent if the custodial residential parent passes away or is otherwise unable to exercise parental custody (*verbleibensanordnung*, see below) were adopted, but suggestions for changes in the law that would allow a step-parent to participate in the exercise of parental custody rejected)¹⁸⁷. Following revisions of the BGB further strengthened the legal position of the step-parent. The current situation is as follows:

a) **Parental custody powers of a step-parent** According to § 1687b BGB, introduced into the BGB in 2001¹⁸⁸, the spouse of a parent with sole parental custody can be granted with *parental custody powers* (often referred to as "small parental custody" or *kleines Sorgerecht*)¹⁸⁹. § 1687b determines the extent of these *powers* as follows: the spouse of a parent with sole parental custody who is not a parent of the child has the power, in agreement with the

Löhnig, Martin, Das Kind zwischen Herkunftsfamilie und neuer Familie eines Elternteils, S. 157 ff, Ostner, Ilona / Schumann, Eva, Steuerung der Familie durch Recht?, S. 289 ff; see also Heiderhoff, Bettina, Kann ein Kind mehrere Väter haben?, FamRZ 2008, S. 1901 ff.

¹⁸⁶ See for example Gernhueber, Joachim / Coester-Waltjen, Dagmar, Familienrecht, München 2010, § 67 Rn. 5 ff, Muscheler, a. a. O. (166), S. 916 ff.

¹⁸⁷ BT-Drucks. 13/4899, S. 66-67.

¹⁸⁸ Introduced with the Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships (*das Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*) of 16. Feb. 2001 (BGBl. I S. 266).

¹⁸⁹ Corresponds with § 9 of the Act on Registered Life Partnerships (*Gesetz über die Eingetragene Lebenspartnerschaft* (LpartG)) for same-sex partnerships.

parent with parental custody, to make joint decisions in *matter of everyday life* of the child” (§ 1687b I sentence 1); “in the case of *imminent danger*, each spouse is entitled to undertake all legal acts that are necessary for the best interests of the child (the parent with parental custody is to be informed without delay) (§ 1687b II)^{190, 191}

b) **Surname of the Child** The 1997 KindRG introduced into the BGB § 1618, which (in its present form) stipulates that “the parent who has the parental custody for an unmarried child alone or jointly with the other parent, and his/her spouse who is not a parent of the child, may *././* give their family name to the child that they have taken into their joint household.¹⁹² *././* Giving the name *././* requires the consent of the other parent where he/she has parental custody jointly with the parent giving the name or the child has his/her name and, if the child has reached the age of five, also the consent of the child. The family court may substitute the consent of the other parent if the giving of the name *././* is necessary for the best interests of the child.*././*”¹⁹³.

c) **Stepparents’ right to contact with (former) stepchild** Also since the 1997 KindRG, stepparents can apply for contact with a (former) stepchild according to § 1685 II, which (in its present form) states that “persons to

¹⁹⁰ § 1687b III also states that the family court may restrict or exclude the powers under § 1687b I “if this is necessary for the best interests of the child”.

¹⁹¹ The idea of allowing a step-parent to participate in the exercise of parental custody (in the legal sense) was initially rejected by the legislator at the time of the 1997 KindRG (see BT-Drucks. 13/4899, S. 67). It was argued that, in cases where the natural parents held joint custody, if a step-parent was also legally allowed to exercise (some) parental custody, this would lead to complications and evoke conflicts, which would first of all negatively affect the child, and that it was sufficient to utilize a power of attorney when the step-parent needed to act for the parent with parental custody (ibid). The suggestion was taken up again in the Proposal of the Bundesrat for an Act for the Improvement of Children's Rights (*Vorschlag des Bundesrates für ein Kinderrechteverbesserungsgesetz*, BT-Drucks. 14/2096 in 1999), which argued that this regulations was necessary in order to “legally protect and recognize” the factual care and responsibility that step-parents exercised over their step-children.

¹⁹² They may also attach this name in front of or after the name of the child.

¹⁹³ The legislator stated that this would facilitate the integration of step-children into the new step-family (BT-Drucks. 13/4899, S. 66).

whom the child relates closely if these have or have had actual responsibility for the child (social and family relationship)” have a right to contact with the child “if this serves the best interests of the child”.

d) **Order that the child remains with persons to whom it relates** For cases where the child has lived for a long period of time in a household with one parent and the parent’s spouse, but where the parent has passed away or can for some other reason no longer exercise parental custody, the 1997 KindRG¹⁹⁴ also introduced into the BGB § 1682 which stipulates that “where the child has lived for a long period in a household with one parent and the parent’s spouse, and where the other parent, who under §§ 1678, 1680 and 1681 may now alone determine the abode of the child, wants to remove the child from the spouse, the family court may of its own motion or on the application of the spouse order that the child remains with the spouse, if and as long as the best interests of the child would be endangered by the removal. /..”

Step-children are, however, under German law not on an equal footing with other children of the family (that is to say children who have a legal parent-child relationship with the adults of the household, including through adoption) concerning inheritance, maintenance (§ 1601 ff), and other legal effects that arise from a legal parent-child relationship¹⁹⁵.

Summary

1. The Significance of Contact between a Child Living in a Step-Family and the Non-Residential Parent in German Case Law

As seen above, there has been a shift in German case law concerning contact between a child living in a step-family and the non-residential parent. As introduced above, the past tendency of German courts was to prioritize the uninterrupted integration of the child into the new household, and the

¹⁹⁴ See BT-Drucks. 13/4899, S. 66.

¹⁹⁵ See for example Muscheler, a. a. O. (166), S. 917 ff.

relationship between the child and the “new parent”, over contact between the non-residential parent and the child. Older case law and scholarly opinion argued that in a scenario where the residential parent remarried, contact with the non-residential parent was unnecessary from the point of view of the child in question, as that child already had a new (substitute) parent-figure in the form of the new spouse/partner of the residential parent. It was also argued that contact with the non-residential parent might even prove harmful for the child concerned, as it would potentially interfere with the exercise of care and custody by the residential parent and the step-parent, disturb the atmosphere of the new household, and obstruct the integration of the child into the new household.

As introduced above, by the end of the 1990s, the general tendency in case law (as well as scholarly opinion) had changed considerably, with the courts arguing that contact took precedence over an undisturbed integration of the child into the new family, and stressing the importance of contact to the child on the one hand (namely that knowledge of and contact with the non-residential parent was in the interest of the child’s self-identification and psychologically stable development), and pointing to the possibility of the breaking-up of the new household (in the face of, for example, divorce statistics of second and third marriages, and an increasing awareness of problems specific to step-families) on the other. As introduced above, case law as well as scholars also point out that the residential parent is likely to oppose contact between the child and the non-residential parent not due to concerns for the wellbeing of the *child*, but for more adult-centered reasons. The same arguments appear in higher court case law concerning step-child adoption and the substitution of the consent of the non-residential non-marital father. As noted earlier, case law states that the reoccurring unwillingness of the residential parent to allow contact, and the wish of that parent that the child would embrace the new spouse or partner of the parent

as a substitute for the non-residential parent, do not suffice, according to the current law, for excluding the other parent from having contact with the child.

Scholars have also argued that, taking into account the new social realities (the fact that step-families are no longer a rare phenomenon in German society), contact with the non-residential parent (or having, in effect, more than two parents) would not occasion social strain on the child. As introduced above, it has also been suggested, that an additional catalyst for the change in case law has been the strengthening of the legal position of the non-marital father.

Although it could be argued that one of the reasons contact between the child and the non-residential parent was not restricted/excluded in the cases introduced in section II 1 was the strong legal standing of the non-residential parent – the right to contact of the non-residential parent being a constitutionally protected right – this argument alone does not really explain the above-mentioned shift in case law, as the understanding that a parent's right to contact is derived from the parental rights stipulated in § 6 II GG was already generally accepted by the 1980s (from which time the earlier case law introduced in this paper originates) (see section I 2.1).

2. A Balance between Stressing the Significance of Contact with the Non-Residential Parent and Protecting the New Household, Criticism towards Step-Child Adoptions

While stressing the importance of maintaining contact between a child living in a step-family and the non-residential parent, German law does not deny that protecting the new household and the relationship between the child and its step-parent is also in the interest of the child. As the case law concerning contact introduced in section II 1 has indicated, the significance of the step-parent for the child is not down-played, and the courts make it clear that both the relationship between the child and the non-residential

parent and the relationship between the child and the step-parent are to be protected.

There has been some debate in Germany concerning how justified step-child adoptions are from the point of view of the best interests of the child. On the one hand, adoption is, according to current law, the only means for the step-parent to attain the *full* set of rights and obligations in relation to the child of a legal parent. On the other hand, as explained above, according to German law, adoption of a step-child (a minor) in German law is a so-called full-adoption, where the legal relationship to the non-residential parent is extinguished at the time of adoption (§ 1755 I). In addition, like other adoptions of a minor, step-child adoptions are final and (practically) irrevocable. In view of such far-reaching effects of a step-child adoption, the legislator has set strict conditions for a step-child adoption, including the consent of the non-residential parent (§ 1747) (which can be substituted only under special circumstances, § 1748). Nevertheless, as introduced above, from the point of view of the significance of maintaining a personal link between the child and the non-residential parent and related problems with step-parent adoptions, some have argued for a change in the legal regulation of step-child adoptions, suggesting, for instance, a legal solution where the child would retain a legal link to the non-residential parent also after adoption by step-parent.

In addition, based on the understanding that, the relationship between a step-parent and step-child warrants legal protection, even if an adoption and consequent severing of ties to the external parent would not always be justified from the point of view of the child, and also to facilitate the integration of the child into the new household, a number of amendments have been made to the Civil Code, (the so-called “small parental custody” (*kleine Sorgerecht*) (§ 1687b BGB), order that the child remains with persons to whom it relates (§ 1682), a right to contact with the child in case of a

divorce or separation of the residential parent and the step-parent (§ 1685 II); § 1618 concerning the surname of the child).

Chapter Summary

In German law, contact is construed first and foremost as the right of the child (§ 1684 I Hs. 1) and only then as an obligation and right of the parents (Hs. 2). Both the right of the child to contact as well as that of a parent is protected by the constitution (§ 6 II GG). § 1626 III sentence 1 BGB clarifies the general stance of the Civil Code towards the importance of contact to the child, by stating that the best interests of the child as a general rule include contact with both parents. A two-tier standard is applied for the restriction or exclusion of contact. § 1684 IV stipulates that the family court may restrict or exclude the right to contact to the extent that this is necessary for the best interests of the child (sentence 1), adding that a decision that restricts or excludes the right to contact or its enforcement for a long period or permanently may only be made if otherwise the best interests of the child would be endangered. The high standard for the exclusion and restriction of the right to contact is justified on the one hand by the fundamental understanding that the right to contact is protected under the Basic Law, and on the other the understanding that contact is in the best interests of the child and should therefore be carried out for the benefit of the child, except if there are exceptional circumstances that create a concrete threat to the welfare of the child. The constitutional position and interest of the parent residing with the child, of the other parent and of the child are to be weighed against each other, and the principle of proportionality is to be strictly followed. The best interests of the child are to be in the center, but at the same time, the rights and interests of the parents are to be given due consideration and protection.

There has been a shift in case law concerning contact between a child living

in a step-family and the non-residential parent, from an earlier tendency to restrict contact in such cases, to a tendency to generally allow contact from the end of the 1990s, with the courts stressing the importance of contact to the development and self-identification of the child on the other hand, and pointing out that the new step-household might not prove to be as “ideal” and lasting as the members of the step-household (especially the adults) initially expected. While stressing the importance of maintaining a personal relationship via contact between the non-residential parent and the child, German statutory and case law also recognize the significance for the child of the relationship to the step-parent, and the need to protect the new family. While there is criticism in Germany concerning the current legal regulation of step-child adoption, the legal standing of the step-parent in relation to the step-child has been strengthened through a number of amendments to the Civil Code, introduced in section II 2.4.

Chapter 2 Contact in Japanese Law

I Statutory Basis and (Legal) Nature of Contact

1 Basis in Statutory Law

The statutory basis of contact in Japanese law is § 766 of the Japanese Civil Code¹⁹⁶, which stipulates contact between the father or the mother and the child as a concrete example of “matters regarding custody of a child¹⁹⁷” (§ 766 I sentence 1). § 766 also states that “the best interests of the child must be the primary consideration” when determining whether and to what extent contact should take place (§ 766 I sentence 2).¹⁹⁸

Differently from some jurisdictions, Japanese statutory law does not stipulate a clear *right* of a parent to contact with their child (or such a right of the child), although whether contact should be understood as a right (of substantive law or otherwise) has been debated in academic circles (more in detail further below). It should also be noted that the word “contact” did not appear in the Japanese Civil Code until the 2011 reform of family law¹⁹⁹. Prior to the 2011 reform, contact was deduced by way of interpretation of § 766 (in conjunction with § 9 I type Otsu No 4 of the Act on Adjudication of Domestic Relations (家事審判法)²⁰⁰) which referred to “necessary dispositions

¹⁹⁶ If not indicated otherwise, references to specific articles hereafter will mean articles in the Civil Code.

¹⁹⁷ § 766 I uses the term 「子の利益」, while in earlier case law and scholarly literature (including post-2011-reform literature), both 「子の利益」 and 「子の福祉」 are used (interchangeably) in this context. I have tried to use “the best interests of the child” throughout this paper, as it also corresponds to § 766 and its official translation at <http://www.japaneselawtranslation.go.jp/>, but have used “welfare of the child” where I have quoted sources (academic writing or case law) that have adopted the term 「子の福祉」.

¹⁹⁸ § 766 is a provision concerning divorce by agreement, see § 771 for judicial divorce.

¹⁹⁹ Law for Amendment of a Part of the Civil Code and Related Acts (Act No. 61 of 2011), in force since 1 April 2012, introduced in more detail further below.

²⁰⁰ Now § 39 Appended Table 2 (3) of the Domestic Relations Case Procedure Act (家事事件手続法). The Act on Adjudication of Domestic Relations was abolished by the enactment of the Domestic Relations Case Procedure Act on 19 May 2011 (Act No 52 of 2011, in force since 1 January 2013).

regarding custody” after divorce²⁰¹.

1.1 Early Case Law

The first reported court decision to allow contact between a non-residential parent²⁰² and a child after the divorce of the parents, and to confirm § 766 as the statutory basis of contact, was a 14 December 1964 adjudication of Tokyo Family Court²⁰³. Following divorce from her husband (who exercised parental authority and custody in relation to the child after the divorce), the non-residential mother of a 5-year-old girl had applied to the family court for a regulation of contact with her daughter, after the residential father and his new wife had refused any contact between mother and child. The court stated that the parent who did not have parental authority and custody in relation to the child, had “a right to have contact with their child (面接ないし交渉する権利), and this right is not to be restricted nor is the parent to be deprived of this right unless the welfare of the child is harmed”, which the court judged not to have been the case, despite the claims of the father that the child in question was well-adapted to the new household, had been told that the new wife of the father was her real mother, and would only be confused by possible contact with a “second” mother.

Not all judges and scholars shared the rather liberal notions of the judge in the above Tokyo Family Court decision. As a matter of fact, in the very same

The Act on Adjudication of Domestic Relations § 9 read as follows: “The family court shall make rulings on the following matters.” Type Otsu No 4 “Designation of custody of a child and other dispositions (処分) related to custody pursuant to the provisions of § 766, Paragraph 1 or Paragraph 2 of the Civil Code (including mutatis mutandis application with respect to § 749, 771 and 788)“.

²⁰¹ § 766 prior to the 2011 reform: If parents divorce by agreement, the matter of who will have custody over a child and any other necessary matters regarding custody shall be determined by that agreement. If agreement has not been made, or cannot be made, this shall be determined by the family court. /../

²⁰² In this chapter, “non-residential” stands for a parent not residing with the child, who might or might not have parental authority or custody in relation to the child. Similarly, the term “residential parent” includes parents who exercise parental authority (possibly jointly with a non-residential spouse with whom they are still legally married) in relation to the child, or possibly only custody.

²⁰³ 家月 17・4・55.

case, following an appeal by the residential father and step-mother, Tokyo High Court stated that it was “only natural” that contact between the parent who did not have parental authority or custody in relation to the child, was “restricted in relation to the exercise of parental authority and custody rights of the person who exercised parental authority and custody”²⁰⁴. The court revoked the decision of the court of the first instance, which had allowed contact between the non-residential mother and the child, and stated that once that parent has “entrusted [the father] with the custody of [the child] [...] at the time of their divorce, [the mother] should respect the [father’s] parental authority and custody, avoid contact (面接) with [the child] until [the child] has come of age and is able to reason for him/herself, and pray from the shadows for [the child’s] sound development. The court judges this to be the way to guarantee [the child’s] happiness. At times when [the child’s] well-being weighs on [the mother’s] mind, she should ask for information concerning [the child] from others, or endeavor to catch secret glimpses of [the child], and be satisfied with the intelligence concerning its development that she is thus able to gather. Acting on one’s emotions, even if those actions are motivated by motherly love, can at times have the effect of causing unhappiness to a child. It must be said that restraining one’s emotions, when they ought to be restrained, for the sake of one’s child, is an expression of true maternal love”²⁰⁵.

As for contact being a right, as claimed by the 1964 decision of Tokyo Family Court introduced above, Osaka High Court in its 24 December 1968 decision stated flatly that “what is sometimes referred to as a right to contact (面接権), cannot be understood to be a legal right”, and went as far as to deny even that contact was a matter that could be decided by the courts in domestic

²⁰⁴ Decision of Tokyo High Court of 8 December 1965 (家月 18・7・31), 32 頁.

²⁰⁵ 33 頁。

relations adjudication²⁰⁶. Thus, as seen above, during these early days opinions concerning whether parties could apply for a regulation of contact to the family courts, or whether there was such a thing as a legal right to contact, were split.

1.2 The 1984 and 2000 Decisions of the Supreme Court

From the 1970s, there was a gradually increasing trend in domestic relations practice to allow contact between a parent who did not have parental authority or custody and the child, and in 1984 the Supreme Court gave its seal of approval to such practice by confirming that whether contact was to be allowed between a parent and child after the divorce of the parents was a question of the interpretation and application of § 766 I and II²⁰⁷. A decade and a half later, in its 1 May 2000 decision the Supreme Court stated that also in cases where the parents were separated but not yet officially divorced, “§ 766 is to be applied by analogy, and the courts can, in accordance with § 9 I Type Otsu No 4 of the Act on Adjudication of Domestic Relations, order appropriate dispositions (処分) concerning contact (面接交渉)”²⁰⁸.

1.3 Contact and the 2011 Amendment of the Civil Code

As already mentioned above, the word “contact” was incorporated into the Civil Code with the 2011 reform of family law. What the 2011 reform did was insert “contact”, as well as “sharing of child support”, as concrete examples of “necessary matters regarding custody” into the already existing § 766 I (sentence 1), and put it in clear terms that “the best interests of the child must be the primary consideration” when determining these matters

²⁰⁶ 家月 21・6・38。

²⁰⁷ 最決昭和 59 年 7 月 6 日(家月 37・5・35)。The non-custodial parent had argued that by denying contact the lower level court had infringed upon his right to the pursuit of happiness arising from § 13 of the Constitution, an argument which the Supreme Court rejected.

²⁰⁸ 家月 52・12・31.

(sentence 2)²⁰⁹.

During the legislative debate preceding the reform, there was some deliberation in academic circles concerning the legal nature of contact in the amended Civil Code (including whether contact should be clearly recognized as a right, possibly that of the child), and to which chapter of Part 4 of the Civil Code the provision concerning contact should be inserted (§ 766 is found in the Chapter II Section 4 which is concerned with divorce, some suggested that a provision concerning contact should be introduced into Chapter IV which is concerned with parental authority)²¹⁰. But in the end contact was stipulated in § 766 (that is, in the section concerning divorce), and the word “contact” appeared as a mere example of “necessary matters regarding custody”, with no reference to it being (anyone’s) right.

As far as contact is concerned, the 2011 reform was a realization of what had already been proposed 15 years earlier, at the time of a previous attempt at reform, namely the 1996 “Outlines for Amendment to a Part of the Civil Code” of the Legislative Council of the Ministry of Justice²¹¹. What effect the amendments will have in reality, remains to be seen. Some scholars argue that the amendments lead to a strengthening of the parent’s position. As one scholar put it, considering that during the 15 years that passed since the

²⁰⁹ § 766 after the 2011 reform reads as follows: (1) If parents divorce by agreement, the matter of who will have custody over a child, contact between the father or the mother and the child, sharing of child support and any other necessary matters regarding custody shall be determined by that agreement. The interests of the child must be considered as a first priority when determining these matters. (2) If an agreement in the sense of the previous paragraph has not been made, or cannot be made, the matters referred to in the previous paragraph shall be determined by the family court. (3) If the family court finds it necessary, it may change a decision made in accordance with the preceding two paragraphs, and order any other appropriate disposition (相当な処分) regarding custody of the child. (4) The rights and duties of parents beyond the scope of custody may not be altered by the provisions of the preceding three paragraphs.

²¹⁰ See for example the debate during a symposium of 「家族法改正研究会」(代表:岩志和 一郎)in 戸籍時報 659 号 43 頁(第 1 回シンポジウム「家族法改正を考える」の論点の整理)、戸籍時報 673 号 28 頁(第 2 回シンポジウム「親権法グループ中間報告会」の論点の整理)。

²¹¹ 平成 4 年の「婚姻及び離婚制度の見直し審議に関する中間報告(論点整理)」(判タ 807 号 47 頁)、平成 6 年 7 月の婚姻制度等に関する民法改正要綱試案の第 4 の一1。

1996 attempt at reform, and despite the continued debate in academic circles, there were no changes in legislation, this latest reform should be seen as “an epoch-making event”²¹². On the other hand, some argue that by not stipulating a right to contact in the Civil Code, the 2011 reform confirmed that it should indeed not be understood as a right of substantive law^{213, 214}.

Reportedly, one of the intended effects of incorporating “contact” as an example of “necessary matters regarding custody” into § 766 was to raise awareness concerning contact. Although in domestic relations adjudication practice ordering contact based on § 766 had become common, it was pointed out at the time of the 2011 reform discussion that in divorces by agreement (which means around 90 per cent of all divorces in Japan) a clear agreement concerning contact was not made in many cases. Inserting the word “contact” into § 766 was expected to urge divorcing couples to make clear arrangements concerning contact at the time of the divorce²¹⁵.

²¹² Kuribayashi Kayo, Family Law in Japan in 2012 – Introduction of the Stop System of Parental Authority, and the Stipulation of Contact and Sharing of Child Support, in *The International Survey of Family Law* [International Society of Family Law] 2013, p. 227 (236).

²¹³ For example 梶村太市「家族法の改正をめぐる諸問題」戸時 675 号 89 頁 (2011 年)。

²¹⁴ A similar difference of opinions concerning whether incorporating the word “contact” to the Civil Code would strengthen the position or even rights of those seeking contact could be observed at the time of the 1996 Guidelines. See for example 大村敦志『家族法』第 2 版第 (有斐閣法律学叢書、2004 年) 173 頁 (arguing that the nature of contact as a right strengthened), but critically once again 梶村太市 in 島津一郎＝阿部徹編『新版注釈民法』(22) 親族 (2) 離婚 §§ 763～771 (有斐閣、2008 年) 91 頁 (§ 766)。

²¹⁵ 飛澤知行編著『一問一答・平成 23 年民法等改正 児童虐待防止に向けた親権制度の見直し』(商事法務、2011) 10-11 頁。In addition to introducing the word “contact” into the Civil Code, further efforts were made on the ministerial level to promote contact (as well as arrangements concerning child support). The Ministry of Justice sought to urge divorcing couples to make arrangements concerning contact by changing the format of the notification of divorce. A section was added to the existing form, where the divorcing parents could indicate whether they had reached an agreement concerning contact (the same about child support) (戸籍通達 (平成 24・2・2 民 1 第 271 号)、戸籍 867 号 62-82 頁) . Prior to these changes, the parents were only required to determine and indicate on the form, who would exercise parental custody after divorce (Japanese law does not allow joint parental custody after divorce, § 819). Determining and indicating the parent who will exercise parental authority is a condition for the notification of divorce to be accepted by the municipal office. This is, however, not the case with agreements concerning contact and child support, as the notification will be accepted even if no

2 The Legal Nature of Contact

2.1 A Right or Not?

There has been continuing debate in academic circles concerning whether contact should (or, considering its statutory basis, could) be understood to be a legal right. Most scholars tend to refer to contact as a “right”, and have done so since as early as the 1960s (although there has been some debate as to whether contact is a right of the parent or the child, as introduced in more in detail below).

However, there has always been a constant (if minority) view that contact should not, or cannot be understood to be a right. Those who argue that contact should not be understood as a right, especially a right of substantive law of the non-residential parent, base their arguments largely on the following. They argue that more often than not contact causes renewed fighting between the divorced or divorcing spouses and exercising contact against the wishes of the custodial parent occasions loyalty conflicts for the child involved, so that in a large number of cases contact is in fact harmful to (the well-being of) the child. Therefore, it logically follows that asserting the rights of a parent to contact would do more harm than good²¹⁶. (This rather negative view of the effects of contact in general found wide support among family law practitioners, such as family court judges, probation officers and conciliation commissioners of domestic relations during the 1970s and early 1980s, coinciding with the introduction in Japan of the influential work of Goldstein, Freud and Solnit²¹⁷²¹⁸. Although no longer the main-stream view

agreement in these matters has been reached. Hence, it remains to be seen how effective this measure will prove to be in reality.

²¹⁶ 梶村太市「子のための面接交渉」ケ研 153 号 88 頁 (92-93 頁) (1976 年)、島津一郎『セミナー法学全集(14)民法 V 親族・相続』(日本評論社、1975 年)14 頁、島津一郎『親族・相続法』103 頁 (1980 年)。

²¹⁷ Goldstein, Freud, Solnit, *Beyond the Best Interests of the Child*, New York, Free Press (1973) (Japanese translation: ゴールドシュタイン・フロイト・ソルニット共著、島

among practitioners and scholars, it is still held by some²¹⁹.) Closely related to this understanding of contact is the argument that contact, by its nature, must be exercised by all parties willingly, or not at all, and should not, and indeed cannot, be forced (meaning that contact agreements and decisions would not be legally enforceable)^{220, 221}

The majority of legal scholars argue that there is no need to deny that a parent has a (legal) right to contact from the start, as it is possible to restrict contact when the best interests of the child call for such a restriction²²².

津一郎監修・解説＝中沢たえ子訳『子の福祉を超えて』(岩崎学術出版社、1990年). Professor Goldstein was invited to give a seminar to legal professionals and scholars in Japan (「ゴールドシュタイン・セミナー結果報告—その1—」調研紀要 25号1頁以下) (1974年).
²¹⁸ See 細矢郁ほか「面会交流が争点となる調停事件の実情及び審理の在り方—民法766条の改正を踏まえて—」家月 64・7・1 (2012年) 18頁以下。Also 佐藤千裕「子の監護事件における面接交渉」家月 41 巻 8 号 203 頁 (1989年) 213 頁。

²¹⁹ For example 梶村太市「家族法の改正をめぐる諸問題」戸時 675 号 90 頁。

²²⁰ 同上。

²²¹ A second argument put forth by those who claim that contact should not be construed as a right in the legal sense, or a right of substantive law, is that § 766 of the Civil Code in conjunction with Domestic Relations Case Procedure Act § 39 Appended Table 2 (3) (or prior to 2013, Act on Adjudication of Domestic Relations § 9 I type Otsu No 4), the legal basis for conciliation and adjudication of contact, provides that contact is “a necessary matter regarding custody” (or “disposition related to custody”) and as such an object of adjudication. According to the current state of the law, they argue, the existence of a right of contact in substantive law is not a prerequisite to the adjudication of contact by the courts. Rather than having a statutory right to contact itself, these scholars argue, parents should be understood to have “a procedural right to *apply for the adjudication of reasonable contact*”, or “a right to apply for suitable measures regarding the custody of a child”. The latter wording reflects the way these scholars take pains to stress that when an arrangement about contact is to be made, the welfare and interests of the child are to be considered paramount, and the claims of a parent only secondary. See 梶村太市『『子のための面接交渉』再論』『21世紀の民法：小野幸二教授還暦記念論集』(法学書院、1996年) 425 頁以下、杉原則彦、最高裁判所判例解説民事編平成 12 年度(下) 511 頁以下、杉原則彦「婚姻関係が破綻して父母が別居状態にある場合に子と同居していない親と子の面接交渉について家庭裁判所が相当な処分を命ずることの可否(最高裁平成 12 年 5 月 1 日判例解釈)」ジュリ No. 1199、86 頁。Also 横田昌紀ほか「面会交流審判例の実証的研究」判タ 1292 号 5 頁(2009年) (6 頁)). For counter-arguments see for example 若林昌子「面会交流事件裁判例の動向と課題」法律論叢 85 号 2・3 合併号 387 頁 (2012年) (392 頁以下)。

²²² See for example 二宮周平「別居・離婚後の親子の交流と子の意思 (2) 一家事審判における面接交渉実現の到達点—」戸時 579 号 4 頁 (2005年) (13 頁) (critical also towards understanding contact as “a right to apply for suitable measures regarding the custody of a child”).

Especially concerning the arguments that the exercise of contact in cases where there is a relatively high level of animosity between the parents would result in the child being caught in a loyalty conflict and therefore harm the child, many authors argue that more often than not such harm can be prevented through professional support and guidance during and following the divorce process, and hence the fact alone that there is animosity between the parents does not qualify as grounds to deny that contact should be understood as a right²²³. Neither, it is argued, does the fact that it is often difficult to enforce agreements or decisions concerning contact, automatically mean that contact cannot be understood as a right in the legal sense. Although enforceability is an important property of a legal right, the fact that in the case of the right to contact there are inherent difficulties with physical enforcement by the state, does not mean that constituting contact as a right will not itself have an effect on the perceptions and behavior of the parties concerned, as well as other persons²²⁴. It is argued that denying outright that a parent (or a child) has a right to contact might unjustly weaken the legal standing of the person seeking contact²²⁵, lead to disillusionment with the law and the judiciary, and in turn potentially to self-execution by the contact-seeking parent²²⁶.

²²³ 棚村政行「離婚と父母による面接交渉」判タ 952 号 56 頁（1997 年）（59 頁以下），若林・前掲（注 221）392 頁。

²²⁴ 棚村・前掲（注 223）60 頁、大塚正之「家事調停における面接交渉の実証的研究」司法研修所論集創立五十周年記念特集号第 2 巻 301 頁（1997 年）（304 頁）、also 相原佳子「報告（2）面会交流の理論と実務「弁護士の立場から」」（シンポジウム「面会交流の理論と実務」（その 2））戸時 690 号（2012 年）39 頁 – points out that if there is doubt about contact being a right, there are limits to how far the parties involved can be persuaded to reach an agreement about contact and cooperate towards the realization of actual contact. Also stresses that it is often equally important to persuade not only the unwilling parents, but the grandparents and other family members in the background. In such cases too, if contact were clearly constituted as a (legal) right, arguments advocating contact would carry a different weight altogether.

²²⁵ 石川稔『家族法における子どもの権利』（日本評論社、1995 年）225-228 頁、棚村・前掲（注 223）59 頁、二宮周平「面接交渉の義務性—別居・離婚後の親子・家族の交流の保障」立命 2004 年(6)334-335 頁。

²²⁶ 棚村・前掲（注 223）60 頁。

In connection with the last argument, some authors call for a re-examination of the concept of a legal “right” in the context of contact²²⁷. They stress that contact is not a fixed and absolute right, but rather a right characterized by relativity, fluidity and reciprocity. This is to say that, while being a legal right, contact can and should be restricted and excluded based on the best interests of the child (also keeping in mind that what is in the best interest of a particular child will vary according to the individual child, and change as the child grows older); that while for the child contact is a right but not an obligation, for the contact-seeking parent it is a right in relation to the other parent but an obligation in relation to the child, and so forth²²⁸.

Scholars who argue that contact should indeed be understood as a right, have long debated about the legal character of this right to contact. The more common views will be introduced below.

2.2 The Legal Nature of Contact

The earliest clear proposition concerning the legal nature of contact was that contact was a natural right arising from the parent-child relationship, irrespective of whether a clear provision existed in statutory law²²⁹. The proponents of this view of the nature of contact argued that contact (面接) with the child was the minimal claim that could be made by a parent who had been deprived of the chance to exercise parental authority and custody in relation to the child, and “the last tie to ensure in actuality parental love and a parent-child relationship” between that parent and the child²³⁰. The

²²⁷ 若林・前掲（注 221）393 頁, also already 石川稔「離婚による非監護親の面接交渉権」別冊判タ 8 号 285 頁（1980 年）（289 頁）。See also 棚村政行『面会交流と養育費の実務と展望—子どもの幸せのために』（日本加除出版、2013 年）14 頁。

²²⁸ 若林・前掲（注 221）393 頁。

²²⁹ 森口静一＝鈴木経夫「監護者でない親と子の面接」ジュリ 314 号 72 頁（1965 年）（75 頁）。

²³⁰ Ibid. As discussed below, many of the earlier theories about the legal nature of (the

right to contact, it was argued, was a right and obligation conferred on the parents in order that they could ensure the favorable development of their child and raise him or her to be a full member of society²³¹. Accordingly, this right (and obligation) pertained to a parent irrespective of whether that parent exercised parental authority or custody²³², and could not be easily restricted or excluded²³³. It has been pointed out that in the mid-1960s, when this theory concerning the nature of contact first appeared, general awareness concerning contact after divorce was rather low, and one of the merits of referring to contact as the natural right of a parent was that this helped promote the idea of continued contact between a parent and a child even after divorce of the parents²³⁴. There is also a fair amount of case law that refers to contact as a natural right of a parent²³⁵.

On the other hand, the above understanding of contact as a natural right arising from the parent-child relationship was criticized for being too vague in the legal sense. It was argued that simply by claiming that a parent had a natural right to contact with their child did not automatically mean that contact could thus be adjudicated by the courts²³⁶. Case law so far had interpreted that the statutory law basis for contact was § 766 of the Civil Code (in conjunction with the Act on Adjudication of Domestic Relations § 9 I Type Otsu nr 4)), and legal scholars accordingly endeavored to explain the

right) to contact assumed it to be the right of the non-custodial parent. Among scholars who argued that contact was a natural right.

²³¹ 久貴忠彦「面接交渉権覚書」阪法 63 卷 99 頁(1967 年)(115 頁)。

²³² 同上。

²³³ 森口＝鈴木・前掲(注 229) 76 頁。

²³⁴ 川田昇「面接交渉権」『民法の争点 I』(有斐閣、1985 年)221 頁、森口＝鈴木・前掲(注 229) 75 頁。

²³⁵ 東京高裁昭和 42 年 8 月 14 日決定(家月 20 卷 3 号 64 頁)、大阪家裁昭和 43 年 5 月 28 日審判(家月 20 卷 10 号 68 頁)、東京高決昭 42・8・14(家月 20・3・64)、大阪家審昭和 43・5・28(家月 20・10・68)、東京家審昭和 44・5・22(家月 22・3・77)、大分家中津支審昭和 51・7・22(家月 29・2・108)、東京家審昭和 62・3・31(家月 39・6・58)、横浜家相模原支審平成 18・3・9(家月 58・11・71)等。

²³⁶ 田中實「面接交渉権—その性質と効果」現代家族法大系編集委員会編『現代家族法大系 2』中川善之助先生追悼(有斐閣、1980 年)258 頁。

legal nature of contact taking this fact into account. Hence, it was proposed by different scholars that contact was 1) not quite the same as the right to custody but a right relevant to custody, or 2) an aspect of parental authority/custody (based on the understanding that the “non-custodial” parent had in fact not been completely deprived of his or her rights to exercise parental authority or custody, but that these rights had merely temporarily been restricted or put on hold.

Legal scholars who supported the former interpretation, namely that contact was a right related to custody, again formed two distinct groups. On the one hand, there were those who claimed that the two ideas of contact being an inherent natural right and contact being a right relevant to custody were not conflicting ideas, that understanding contact to be an inherent right of any parent did not constitute an obstacle to interpreting contact to be an object of adjudication as “a necessary matter relevant to contact”. Rather, they argued, contact was on an abstract level an inherent natural right of a parent, and assumed a concrete form through the agreement of the divorcing spouses, or the conciliation or adjudication through the family court²³⁷.

On the other hand, some scholars denied that contact should be viewed (even abstractly) as a natural right of a parent, as § 766 in conjunction with § 9 I type Otsu No 4 of the Act on Adjudication of Domestic Relations, in a strict sense does not allow such a reading²³⁸. What most sets this view of contact apart from that described in the previous paragraph is that it (consequently?) views the legal position of the non-custodial parent as a relatively weak one. While not denying that the non-custodial parent has a

²³⁷ 久貴・前掲(注 231)117 頁、沼辺愛一「子の監護をめぐる諸問題」家月 25 卷 4 号 15 頁(1973 年)(18 頁)、also 田中實・前掲(注 236)248 頁以下、若林昌子「離婚後の面接交渉権その 1—実務の現状と問題点—」川井健ほか編『講座現代家族法第 3 卷親子』島津一郎教授古稀記念(日本評論社、1992 年)223 頁(227 頁)。See also 山本正憲「面接交渉権について」岡山大学法学会雑誌 18 卷 2 号 185 頁。

²³⁸ 明山和夫『注釈民法(23)親権(4)』(有斐閣、1969 年)75 頁。Examples of case law adopting a similar view 東京家審昭和 39 年 12 月 14 日(家月 17・4・55)、横浜家審平成 8 年 4 月 30 日(家月 49・3・75)。

right to contact, the proponents of this view of contact argue that it is not permissible that the exercise of the right to contact interferes with the care and education of the child as exercised by the custodial parent. Indeed, the details of how contact is to be exercised should be left up to the custodial parent, these scholars point out²³⁹.

The above theories concerning the legal nature of contact were based on the understanding that contact was not (part of) custody per se, but a right relevant [related to] custody, and thus a right that existed outside of (the right to) custody. This understanding was criticized by some scholars on the grounds that the content of the right to contact overlapped with the content of parental authority/custody, and therefore creating an individual right outside parental authority/custody was not justified²⁴⁰. In other words, these scholars argued that the right to contact should be understood to be part of (or an aspect of) parental authority/custody²⁴¹. This proposition might appear odd at first glance, as after the spouses have divorced, one of the spouses (the one who will as a rule want to apply for contact) will no longer have parental authority (§ 819 of the Civil Code). It should be understood, however, that scholars who claim that the right to contact (of a non-custodial parent) should be understood as an aspect of parental authority/custody, base this understanding on a particular interpretation of parental authority and custody. Namely, they argue that even though according to statutory law only one parent may be awarded parental authority/custody after divorce, the other parent's powers to exercise parental authority/custody are merely restricted or put on hold, and that the nominally non-custodial parent in fact

²³⁹ 明山, *ibid* p. 74-75.

²⁴⁰ 中川淳「離婚後親権を行わない父母の一方の面接交渉権」法時 41 巻 9 号 143 頁 (1969 年) など。

²⁴¹ 山正憲「面接交渉権について」岡山大学法学会雑誌 18 巻 2 号 185 頁以下、佐藤義彦「離婚後親権を行わない親の面接交渉権」同志社法学 110 号 418 頁、中川淳・前掲(注 240)、北野俊光「面接交渉」村重慶一編『現代裁判法大系 10 親族』(新日本法規出版、1998 年)264 頁、川田・前掲(注 234)220 頁。

retains “latent” parental authority/custody²⁴². Thus, this parent is understood to be able to exercise their right to contact with their child as part of this “latent” parental authority/custody²⁴³ (the statutory basis for contact still being § 766 of the Civil Code). (Naturally, if one does not support this view of the existence of “latent” parental authority/custody, the non-custodial parent’s right to contact cannot be understood as being part of parental authority/custody either.)

Some scholars have also argued that contact should be understood as a fundamental human right of the parent without parental authority or custody²⁴⁴. Referring to the U.S and Germany, where contact is a constitutionally protected right of the parent without parental authority or custody, these scholars argue that, especially in Japan where contact is, they argue, (too) easily restricted or denied on the grounds of the best interest of the child, the parent’s right to contact should be understood to have its statutory basis in the Constitution (more specifically § 13). Arguably, this would prevent courts from restricting contact too lightly, as such restrictions would amount to a breach of the parent’s constitutional rights²⁴⁵.

To summarize the above, it is clear that even though legal scholars (and practitioners) agree that the statutory basis of contact is § 766²⁴⁶, opinions differ as to the relationship between contact and parental authority/custody (whether they are two independent rights, whether one is a remnant of the other etc).

²⁴² 北野・前掲(注 241)261-262 頁など。

²⁴³ 佐藤義彦・前掲(注 241)419 頁、北野・前掲(注 241)261-262 頁。

²⁴⁴ 棚瀬孝雄「離婚後の面接交渉と親の権利(上・下)」判タ 712 号 4 頁、同 713 号 4 頁(1990 年)、棚村・前掲(注 223) 64 頁。

²⁴⁵ Ibid.

²⁴⁶ It is worth mentioning that since early on it has been pointed out that using § 766 as the basis for conciliation and adjudication concerning contact is an inevitability, a result of defective or incomplete regulation of the parent-child relationship in the Civil Code (森口＝鈴木・前掲(注 229) 76 頁)、also 国府剛「面接交渉権の制限と憲法 13 条」『家族法審判例の研究』144 頁(日本評論社、1971 年)(149-150 頁)。

2.3 Right of the Parent? Right of the Child?

As it is commonly the non-residential *parent* who seeks contact with their child, in earlier times scholars tended to think of contact naturally as the right of a parent. However, it was not long before the view surfaced among Japanese scholars that contact was in fact a right of the *child*²⁴⁷. At first opinions seem to have been divided as to whether contact should be understood to be a right of the child alone, or a right of a child as well as its (non-residential) parent. The former view, namely that contact was the right of the child and *not* a right of a parent, was justified by the fact that at the time (the 1970s and early 1980s) a rather “pre-modern” understanding of parental rights (an understanding that a parent had absolute rights over their children) prevailed among the general public, and it was argued that if such an understanding was left to be applied in case of post-separation and post-divorce contact, the interests of the parent would take center stage and those of the child would be overlooked. In order to prevent such an undesirable result and ensure that the interests of the child would be central to any arrangement or decision concerning contact, it was, therefore, essential to spread among the general public (as well as practitioners of law) the understanding that contact was indeed *not* a right of a parent, but a right of the child²⁴⁸.

Although this explanation might have been meaningful in that particular context, at that particular time, it was argued in later literature that there was no need to deny the right of the non-residential parent to contact in order to ensure that the best interests of the child were not overlooked²⁴⁹.

²⁴⁷ I have explored this further in my master's thesis 「面接交渉と子どもの立場」, (unpublished) submitted in Tohoku University Graduate School of Law in January 2012.

²⁴⁸ 稲子宣子「子の権利としての面接交渉権」日本福祉大学研究紀要 42 号 95 頁以下。

²⁴⁹ See for example 石川・前掲(注 227)289 頁、also 棚村政行「離婚後の子の監護一面接交渉と共同監護の検討を中心として」石川稔ほか『家族法改正への課題』231 頁(日本加除出版、1993 年)255 頁以降。

Indeed, the interests of the child would be sufficiently protected by applying the rule that contact should not be allowed when it would harm the welfare of the child²⁵⁰, a point concerning which scholars and practitioners alike have always been in agreement. Consequently, the “Contact-as-the-Right-of-the-Child” doctrine found its new basis in the gradually spreading understanding that maintaining a personal relationship to both parents, even after the separation of the parents, was meaningful to the child and its development^{251 252}. This coincided with the increasing acceptance of the understanding that parents held not only rights but also obligations towards their children, leading a number of scholars to argue that, also in the context of post-separation contact, the non-residential parent had the obligation to make an active contribution to the nurturing and socialization of the child via contact²⁵³, and that at the same time the residential parent was obliged not to obstruct such contact²⁵⁴ as much for the benefit of the child as the that of the non-custodial parent.

At present, the majority of scholars appear to agree that the basic nature of post-separation/divorce contact includes both aspects, namely, on the one hand, the right and obligation of the parents to maintain a relationship to their child, and on the other hand the right of the child to be cared for and maintain a personal relationship with a parent no longer residing with them, and that in case of a clash between the interests of the parties concerned, the

²⁵⁰ 棚村・前掲(注 249)255 頁, 二宮・前掲(注 225) 335 頁、棚村政行「子の監護調停の実務指針―面接交渉を中心として」早法 72 卷 4 号 323 頁(1997 年)。

²⁵¹ See for example 爪生武・真板彰子「離婚後の親子交流の実情」判タ 925 号 70 頁(1997 年)、永田秋夫ほか「子の監護に関する処分(面接交渉)事件における調査官関与の在り方」家月 48 卷 4 号 89 頁(1996 年)。

²⁵² Also, an important catalysts for stressing the importance of the child as a subject of its own right to contact, and not as a mere subject of parental claims, was the adoption of the Convention on the Rights of the Child by the UN General Assembly of the UN 1989 (signed by Japan in 1990 and ratified in 1994). (see for example 山田美枝子「現代離婚法の課題としての子の権利の保障」法学政治学論究 11 号 88 頁、棚村・前掲(注 249)257、259 頁)。

²⁵³ 棚村・前掲(注 252) 239 頁、石川・前掲(注 227)286 頁。

²⁵⁴ 田中通裕「面接交渉権の法的性質」判タ 747 号 323 頁。

best interests of the children are to be considered as paramount^{255, 256}

It is often not clear whether those who argue that contact should be understood as a right of the child mean this “right” as a right of substantive law in the strict sense of the word (including the right of the child to claim contact on its own behalf)²⁵⁷, or rather more abstractly as a “right” in the sense that the interests of the child were to be given due (or even central) importance in a contact dispute. It must be borne in mind, however, that current statutory law does not foresee a right of the child to contact²⁵⁸. It is also generally understood that the child him/herself may not make an application for the adjudication of contact to the courts²⁵⁹. It is, however thinkable that the parent residing with the child applies in the name of the child to the court for the regulation of contact between the child and the non-custodial parent. One such case was adjudicated by Saitama Family Court in 2007²⁶⁰. The parents of the child in question had divorced when the child was still very young, and the child had no

²⁵⁵ 棚村・前掲(注 250)323 頁、山田亮子「面接交渉の権利性と義務制」床谷文雄・若林昌子編『親家族法実務体系 2』(新日本法規、2008 年) 318 頁、二宮周平『家族法』第 4 版(新世社、2013 年) 123 頁、若林・前掲(注 221) 393 頁 etc.

²⁵⁶ It has also been argued by several authors, that understanding contact to be the right of the child, and explaining it as such to reluctant parents (both custodial parents who are against contact between the child and the non-custodial parent, as well as non-custodial parents who show little interest in contact with their children), but also other persons such as grandparents and other relatives who have influence over the parents and the child but are reluctant towards the exercise of contact, can be an effective way of convincing such persons to come to an agreement and cooperate towards the realization of contact (棚村・前掲(注 223) 64 頁、二宮周平「子の年齢、心身の成長状況と面接交渉の可否」判タ 940 号 95 頁(1997 年))。

²⁵⁷ Clearly arguing this to be the case 石川・前掲(注 227)。

²⁵⁸ See 梶村・前掲(注 221) 453 頁、本山敦「面接交渉の権利性—大阪地裁平 17 年 10 月 26 日未公判」司法書士 414 号 49 頁。

²⁵⁹ From the wording of § 766 of the Civil Code, it is clear that either of the divorcing spouses may apply for contact. Whether any other person, such as grandparents, siblings or foster parents can apply, has been the object of debate, see for example 梶村太市 in 島津一郎＝阿部徹編『新版注釈民法』(22)親族(2)離婚 §§763～771(有斐閣、2008 年)144 頁(§766)。

²⁶⁰ さいたま家審平成 19 年 7 月 19 日(家月 60・2・149)。

actual memories of the father (the mother became custodian at the time of the divorce), but was, according to the mother, still keen to get to know him. The father, for various reasons, was negatively minded towards contact. Following an application by the mother, the Saitama Family Court ordered that indirect contact was to take place (the father was to write the child in question letters four times a year). Nevertheless, even if the law allows for the residential parent to apply for the regulation of contact, the residential parent will only make such an application in the name of the child if he/she him/herself is positively minded towards contact. If, however, this is not the case, the application will naturally not be made, even if the child wishes contact with the non-custodial parent.

2.4 Relevance of the Discussion Concerning the Legal Nature of Contact

It has been argued that scholarly debate concerning the legal nature of contact has little practical relevance nowadays, first of all due to the fact that the statutory basis of contact has been established beyond question, and secondly, because it is pointed out that whichever understanding of the legal nature of contact one adopts, when it comes to the deliberation of whether contact should be allowed and to what extent it should be allowed in a particular case, the best interests of the child will be the standard for deciding²⁶¹. Hence, it might be said that from the point of view of domestic relations practice the more pressing question is, what exactly constituted the best interests of the child in the context of post-separation/divorce contact, and what constituted a threat to those interest²⁶² (discussed in more detail

²⁶¹ For example 善元貞彦「面接交渉とその制限—事例の分析を中心として—」右近健男ほか編『家事事件の現況と課題』（判例タイムズ社、2006年）158頁（168-169頁）。But differently for example 佐藤千裕・前掲（注218）205頁。

²⁶² Yoshimoto *ibid.* But see above (under subheading “A Right or Not?”) arguments concerning the relevance of recognizing contact as a (legal) right. During the legislative debate preceding the 2011 reform of family law, the question of whether contact should

in the following section).

be clearly recognized as a right, possibly that of the child, in the Civil Code, was left unresolved arguably *because* opinions concerning this point still differed considerably (飛澤・前掲 (注 215) 12 頁).

II Restriction and Exclusion of Contact

Introduction

The post-2012-reform § 766 I states that the best interests of the child must be the primary consideration when making any agreements or decisions about contact, both when parents are trying to reach an agreement amongst themselves and when it is the court who is called upon to decide (§ 771 for the case of judicial divorce). This is not a new notion. There has long been consensus among legal scholars and practitioners in Japan that whether contact should be allowed at all, or to what extent and in what form it should be allowed, is to be determined in the light of the best interests of the child(ren) concerned. That is to say, there is agreement as to the *general idea*, but considerable disagreement remains as to the finer points, such as exactly what effect the numerous individual factors relevant to a decision concerning contact (e.g. the opposition of the custodial parent, apparent refusal of the child, past or present behavior of the non-residential parent, remarriage of the residential parent etc) have on the child, and how much importance should be assigned to each factor (which factor might “outweigh” others).

On a more basic level, notions of the overall significance and merits of post-separation/divorce contact between the child and the non-residential parent, especially the significance of such contact for the child and its development, have changed over time. This has partly been due to an almost continuous increase in divorces, and consequently an increase in the number of parents (and other persons) seeking contact, but also to the introduction of various related research done (mostly abroad) in other fields, such as child and family psychology, concerning contact and its effects on the child.

Below I will try to outline how the best-interests-standard in contact disputes in Japan has evolved in scholarly debate and in case law.

1 The Best-Interest-Standard in Scholarly Debate and Case Law

a. From 1964 to the Early 1990s

As described in the previous section of this paper, following the 1964 decision of the Tokyo Family Court (the first reported decision to allow contact between a non-custodial parent and a child), there was lively debate among family law scholars and practitioners as to the legal nature of contact. Indeed, this appears to have been the main focus of debate concerning contact, whereas initially there was not much discussion concerning a clear standard for restricting or denying contact, apart from a general acquiescence to the basic understanding that there was not to be contact when it was found that the welfare or best interests of the child would be harmed if contact was exercised.

This apparent trend lead Ishikawa to point out in 1980 (16 years after the first reported decision) that there was indeed no clear standard in existence in Japan, and prompted him to suggest some general guidelines²⁶³. Ishikawa listed a number of factors that might lead to contact being denied or restricted in a certain case. He argued that contact should be denied ① if exercising contact would have a harmful effect on the child or the relationship between the residential custodial parent and the child (here Ishikawa had in mind cases where there was a threat of physical harm to the child by the non-custodial parent, but also for example cases where the non-residential parent spoke ill of the residential parent in front of the child)²⁶⁴; and ② when there was considerable risk of the non-custodial parent abducting the child. On the other hand, Ishikawa stated that contact should not automatically be denied ③ when the child appears to refuse contact (he pointed out that it must be borne in mind that the child's wishes might be influenced by the attitude of the custodial parent towards the other

²⁶³ 石川・前掲(注 227)288 頁。

²⁶⁴ He also refers to circumstances that are equal to the grounds for a loss of parental authority.

parent, and that it was important to take time to examine the true feelings of the child), or ④ when there had not been contact for a considerable period of time after the separation of the parents. Ishikawa also felt that ⑤ an application for contact from a solvent parent who refused to pay child support should be denied (except in cases where the child expressed a wish to have contact and there was no direct harm to the child from the non-payment of child support)²⁶⁵. As Ishikawa himself pointed out, his “guidelines” were not based on any analysis of existing Japanese case law on contact, as there was, by 1980, no substantial body of such case law. Instead, he had to resort to borrowing insights from other jurisdictions (more particularly U.S. statutes and practice of the time). Incidentally, the “problem factors” he pointed out (especially harm to the child or to the relationship between the child and the custodial parent, risk of abduction, refusal of the child, non-payment of child support) remained the focus of subsequent scholarly debate concerning the restriction of contact.

Ishikawa’s “guidelines” were among the first attempts towards a clearer standard for restricting or denying contact, and subsequently other scholars would often refer to these guidelines, agreeing or disagreeing with certain parts, or suggesting their own (enhanced or reduced) lists of factors (for example Wakabayashi (1992)²⁶⁶, Tanamura (1997)²⁶⁷, Otsuka (1997)²⁶⁸, Kitano (1998)²⁶⁹, Shimizu (2000)²⁷⁰, Yamada (2003)²⁷¹, Ninomiya (2005)²⁷², Yoshimoto (2006)²⁷³, Sakae/Watanuki (2008)²⁷⁴, Yokota et al (2009)²⁷⁵

²⁶⁵ All the above in 石川・前掲 (注 227) 288 頁。

²⁶⁶ 若林・前掲 (注 237)。

²⁶⁷ 棚村・前掲 (注 223)。

²⁶⁸ 大塚・前掲 (注 224)。

²⁶⁹ 北野・前掲 (注 241) 257 頁 (concerning the restriction of contact, 264 頁以下)。

²⁷⁰ 清水節『判例先例親族法 III 親権』(日本加除出版、2000 年) 316 頁以下。

²⁷¹ 山田美枝子「親権の帰属と面接交渉の拒否の具体的基準—裁判例等の検討を中心として—」調停時報 155 号 72 頁以下 (2003)。

²⁷² 二宮・前掲 (注 222)。

²⁷³ 善元・前掲 (注 261)。

²⁷⁴ 榮春彦・綿貫義昌「面接交渉の具体的形成と執行」若林昌子・床谷文雄編『新家族法実

Hosoya et al (2012)²⁷⁶, Wakabayashi (2012)²⁷⁷ and others).

Ten years onward, in the beginning of the **1990s**, a clear standard was yet to emerge. In 1992 Wakabayashi stated critically that there had not been enough debate concerning a standard for allowing/restricting contact and that it was left to the discretion of the individual judges whether and to what extent contact was to be allowed in a particular case. This, Wakabayashi argued, was not a desirable state of affairs, as (due to a lack of a clear standard) the judges had too much discretion, and their decisions concerning contact were most likely influenced by the individual judges' personal values concerning parent-child relationships. Wakabayashi argued that not only did this result in legal uncertainty, but she also supposed that a lack of a clear standard was one reason why some practitioners steered clear of contact²⁷⁸.

b. From the Latter Half of the 1990s Onward

By the latter half of the 1990s, the body of case law concerning contact had expanded to the extent that various scholars attempted to analyze this existing case law and outline general tendencies concerning the restriction of contact²⁷⁹. After looking at the body of case law, they concluded that it was not possible to deduce a common standard as opinions and attitudes towards contact and what was in the best interests of the child appeared to vary widely from judge to judge, as well as among family court probation officers and conciliation commissioners of domestic relations ²⁸⁰. There was agreement among judges on the most basic level, that is that when considering whether contact should be allowed or to what extent it should be

務大系 2』335 頁以下 (2008 年)。

²⁷⁵ 横田ほか・前掲 (注 221)。

²⁷⁶ 細矢・前掲 (注 218)。

²⁷⁷ 若林・前掲 (注 221)。

²⁷⁸ 若林・前掲 (注 237) 232、234 頁。

²⁷⁹ Especially 棚村・前掲 (注 223)、北野・前掲 (注 241), and 清水・前掲 (注 270) include copious case law references. Also, later on, 善元・前掲 (注 261) (with various comprehensive tables of case law up to 2003).

²⁸⁰ 棚村・前掲 (注 223) 57 頁、大塚・前掲 (注 224) 291-292 頁。

restricted, various factors such as the physical and mental state and circumstances of the child, its age and wishes, the effect that contact with the non-residential parent would have on the care and upbringing of the child as well as the relationship between the child and the residential custodial parent, the wishes of each of the parents, the level of discord between the parents, the ability of each parent to agree upon and accommodate contact etc, were to be considered comprehensively, and that contact was not to be allowed when it was likely that the best interests of the child would be harmed through the exercise of contact. However, opinions about what exactly was to be considered harmful to the child in the context of contact with the non-residential parent, differed from judge to judge. Scholars reiterated Wakabayashi's earlier impression that it was highly likely that decisions were influenced by the individual practitioners' personal values²⁸¹, and pointed out that this resulted in unpredictability of the results of individual cases concerning contact and would eventually lead to a loss of faith in the judiciary²⁸². Hence, many argued, there was an urgent need to establish clearer standards²⁸³.

In an attempt to ensure more consistency and indicate a clearer standard for the restriction and exclusion of contact, various scholars and practitioners consequently proposed lists of relevant factors, analyzing how these factors should be understood to effect the welfare/best interests of a child and whether they could qualify as grounds for the exclusion or restriction of contact.

Below, I will introduce the different factors that might possibly lead to the restriction/exclusion of contact, as highlighted by scholars, practitioners and case law. I will outline general trends in case law (based on previous

²⁸¹ 山田美枝子・前掲（注 271）77 頁、棚村・前掲（注 223）60 頁。

²⁸² 棚村・前掲（注 223）60 頁、山田美枝子・前掲（注 271）77 頁。

²⁸³ In addition to the above references, also 山田美枝子「面接交渉事件における子の福祉の判断例」民商 120-1, 154 頁（1999 年）（161 頁）。

analyses by Japanese authors) and refer to scholarly opinions concerning the assessment of the individual factors, as well as towards the trends in case law (and how some of these opinions have changed over time due to, among other things, the introduction of related legislation and changes in the awareness of/attitude concerning post-separation contact between parent and child).

2 Individual Factors that Might Lead to the Restriction/Exclusion of Contact

2.1 Problematic Behavior of the Contact-Seeking Parent

Violence against Spouse and/or Child

Introduction – Different Types of Violence “Violence” or “domestic violence” often appear in academic literature as one of the key factors for the restriction or exclusion of contact. It is important to note here, however, that it is not always clear, first of all, what kind of “violence” is meant (especially in older literature, the authors appear to have in mind mostly direct physical violence, and it is not clear whether a similar weight is assigned to other types of violence, such as emotional, verbal or economic violence, in contact cases). Secondly, it is in principle possible to differentiate between cases where the non-residential parent has been violent only towards the other parent (but not the child), and cases where that parent has been violent towards the child as well (or, indeed, only the child). A number of scholars do not appear to differentiate between violence against spouse and violence against the child in contact cases²⁸⁴. This might, of course, be intentional and meant to indicate that violence is violence, no matter who it is directed against, and that contact with a violent person is in general harmful to the child. Some authors, however, do make the distinction, and in fact point out a

²⁸⁴ For example 榮春=綿貫・前掲（注 274）336 頁、若林・前掲（注 221）397 頁, also 善元・前掲（注 261）166 頁), (however, the latter is introducing tendencies in case law and case law itself does not always make a clear differentiation, hence possibly no differentiation by the author either).

possibly different outcome in contact disputes. For example Yokota et al argue that in cases where there has been violence against the *child* or child abuse, contact with the violent/abusive parent “is clearly contrary to the welfare of the child” and consequently contact should be denied “without further consideration of other factors”²⁸⁵, whereas in cases where there has been violence against the other *spouse*, Yokota et al are less absolute and speak of “restrictions” rather than automatic exclusion²⁸⁶.

I will try to introduce scholarly opinions and case law concerning contact cases involving violence against child and violence against spouse separately, as far as it is possible.

1) Violence against Child by the Non-Residential Parent

As far as scholars differentiate between violence against spouse and violence against child, there seems to be agreement that in cases where the contact-seeking parent has been (physically) violent towards the *child* (or might use violence against the child during the exercise of contact²⁸⁷), contact should be understood to be harmful to the best interests of the child and should thus be denied²⁸⁸.

On the other hand, practitioners are cautioned to carefully assess the

²⁸⁵ 横田ほか・前掲（注 221）7 頁、10 頁。

²⁸⁶ 横田ほか・前掲（注 221）9 頁。（they remark, however, that in cases involving DV, in “most cases” contact will probably be denied, p 10).

²⁸⁷ 清水・前掲（注 270）316 頁、細矢ほか・前掲（注 218）78 頁。

²⁸⁸ 横田ほか・前掲（注 221）7、10 頁、若林・前掲（注 221）403 頁、石川・前掲（注 227）288 頁、二宮・前掲（注 222）12 頁（specifies that not even indirect contact should be allowed); 細矢ほか・前掲（注 218）78 頁 – (more specific about types of violence/abuse. “In cases where the non-custodial parent has used violence against the child or abused the child in any other way in the past, and the child as a result fears the non-custodial parent, as well as cases where it is possible that the non-custodial parent will abuse the child during contact, it should be said that there is cause for excluding/restricting contact”. Some case law has taken a less absolute stand. For example in 東京家八王子支審平 18・1・31（家月 58・11・79）→ *before the parents separated, the currently contact-seeking parent occasionally spanked the children and locked them into their room. Contact denied with younger children due to risk of harmful effect on the children, but contact allowed with the older child (reasons included, among others, successful past contact and the child having also some positive memories of the non-custodial parent).*

validity of any claims of child abuse made by the residential parent, before reaching a decision concerning future contact²⁸⁹ (see also below under “Violence against Spouse”).

It is also important to note here that in Japan child abuse is now understood to include the child witnessing violence by one parent against the other (§ 2 No. 4 of the Act on the Prevention etc of Child Abuse (as amended in 2004)). This will be discussed in more detail in the next section.

2) Violence against Spouse

Violence (including past violence) by the non-residential parent against the residential parent has always been considered by scholars and practitioners alike as a valid reason for the restriction (often even the complete exclusion) of contact²⁹⁰. Earlier case law is near unanimous in denying contact in cases involving spousal violence by the non-residential/ non-custodial parent²⁹¹, but there were exceptions to this trend, for example the often cited ruling of Nagoya High Court of 29. Jan. 1997²⁹², which allowed some contact between a child and a violent spouse.

Several authors²⁹³ point to a change in the attitude of the courts around the year 2000 in cases concerning contact with a violent spouse. Increased awareness of the serious and lasting effects of DV on the victim, accompanied by the coming into force of the Act on the Prevention of Spousal Violence and the Protection of Victims in 2001²⁹⁴ appears to have resulted in the courts adopting a more absolute stand in cases involving DV, with a row of court decisions denying the application for contact by a violent

²⁸⁹ 細矢ほか・前掲 (注 218) 78 頁。

²⁹⁰ See 細矢ほか・前掲 (注 218) 78 頁以下、若林・前掲 (注 221) 403 頁、横田ほか・前掲 (注 221) 9, 10 頁、榮春=綿貫・前掲 (注 274) 336 頁、二宮・前掲 (注 222)、善元・前掲 (注 261) 166 頁、山田美枝子・前掲 (注 271) 80 頁、清水・前掲 (注 270) 316 頁以下、北野・前掲 (注 241) 264 頁 and others.

²⁹¹ 大阪高決昭 55・9・10 (家月 33・6・21) and many others.

²⁹² 家月 49・6・64.

²⁹³ 二宮・前掲 (注 222) 10 頁、細矢ほか・前掲 (注 218) 30, 78 頁 etc.

²⁹⁴ Act No. 31 of April 13, 2001.

(former) spouse published following the enactment of the aforementioned Act²⁹⁵.

There are varying opinions among authors as to whether (past) DV should automatically mean that contact between the child and the violent spouse should be denied, or whether a certain amount of differentiation is appropriate between violence between the parents and the relationship of parent and child.

There are those who refer to a violent spouse as “the archetype of an unfit parent”²⁹⁶, pointing out that often the violent spouse is violent not only towards the other spouse but the child as well (as in the 16. Jan 2002 ruling of Yokohama Family Court²⁹⁷), and that even if the parent seeking contact was violent towards the other spouse but not directly physically violent towards the child, the harmful effects on the child from witnessing domestic violence should not be underestimated²⁹⁸. Indeed, since the beginning of the 2000s, there is increasing awareness among family law practitioners, and on the side of the legislature, of the harmful effects of the child witnessing violence between its parents²⁹⁹. Since 2004, the child witnessing spousal

²⁹⁵ 東京家審平 13・6・5 (家月 54・1・79)、横浜家審平 14・1・16 (家月 54・8・48) (*non-custodial parent violent towards the child as well as the other parent, the court judged that the non-custodial parent did not exhibit sufficient remorse towards his past actions*)、東京家審平 14・5・21 (家月 54・11・77)、東京家審平 14・10・31 (家月 55・5・165)。

²⁹⁶ 二宮・前掲 (注 222) 10 頁。

²⁹⁷ 家月 54 卷 8 号 48 頁。

²⁹⁸ 二宮・前掲 (注 222) 11 頁, also 横田ほか・前掲 (注 221) 7 頁. Similar 細矢ほか・前掲 (注 218) 78-79 頁: Hosoya et al argue that in cases where witnessing spousal violence has caused psychological trauma to the child and where the child has yet to recover from this trauma, contact should be understood to harm the welfare of the child and hence a restriction or exclusion of contact is justified.

²⁹⁹ Literature in Japanese concerning the harmful effects of DV on children: 吉浜美恵子ほか編『女性の健康とドメスティック・バイオレンス—WHO 国際調査／日本調査結果報告書』(新水社、2007) 13 頁 ff; 西澤哲ほか「児童福祉機関における思春期児童等の心理的アセスメントの導入に関する研究」(厚生労働科学研究平成 15 年度研究報告書)- the results of this research were incorporated into the 「子ども虐待対応の手引き」 of the Ministry of Health, Labor and Welfare. Research done in the U.S concerning the harmful effect on children of witnessing DV has also been introduced in Japan (see for further references 立石直子「ドメスティック・バイオレンス事例への対応」法時 85 卷 4 号 59 頁以下 (2013

violence is understood to be a form of child abuse under § 2 No. 4 of the Act on the Prevention etc of Child Abuse³⁰⁰ (as amended in 2004). It is also stressed that violent spouses tend to deny or underestimate the effects of their own past violence, justifying their acts as nothing more than discipline or a natural by-product of conjugal disagreement, thereby lacking understanding towards their victims as well as a wish to change their behavior³⁰¹. Based on the above, a number of Japanese authors argue in favor of a stricter stance towards contact with a violent spouse, agreeing with post-2000 (published) case law^{302, 303}

On the other hand, others argue that even if there has been spousal violence, contact between the violent spouse and the child might be conceivable in some cases. These scholars argue that contact should not automatically be denied in cases involving spousal violence, but that instead various other factors such as the type and level of violence, the concrete effect of the violence on the spouse and the child in question, but also whether the violent parent has expressed regret of their past actions should

年)。

³⁰⁰ Act No. 82 of May 24, 2000.

³⁰¹ 立石・前掲(注 299) 60 頁、棚村政行「葛藤の高い面会交流事件の調整技法」棚村政行＝小川富之編『家族法の理論と実務』(日本加除出版、2011 年) 392 頁。

³⁰² Ninomiya (二宮・前掲(注 222)) argues that, as with child abuse, in cases involving DV even indirect contact should not be allowed, as such contact would constitute a threat to the other parent and child and their family life (12 頁). He remarks, however, that after some time has passed since the ceasing of the violence, contact might be conceivable, but when deciding whether contact should be allowed (possibly in the presence of a third party), the stage of the development of the child as well as the attempts of the violent spouse to reflect on and redress his or her past behavior should be considered. (p. 11) Also 山田美枝子・前掲(注 271) 80 頁、横田ほか・前掲(注 221) 10 頁 (estimates that contact will be denied in most cases); 立石・前掲(注 299) 60 頁 and others.

³⁰³ Publications by organizations and bodies focused on the protection of victims of DV also tend to stress the harmful effects of spousal violence on the child, and argue that the safety of the spouse who has been victim of domestic violence, and the child should come first, and contact should only be allowed under strict conditions (see for example 日本 DV 防止・情報センター編著『知っていますか? ドメスティック・バイオレンス 一問一答〈第 4 編〉』(解放出版社、2008 年) - refers to the harm to the child from witnessing DV, as well as the tendency of DV recurring in the following generations and so forth (p. 27ff), stressing that the safety of mother and child should come first (p. 75)).

also be duly considered, and that contact between the violent spouse and the child might be conceivable in some cases, especially when the level of violence was comparatively low³⁰⁴. Some authors also stress that supervised contact should be considered as an option before contact is completely excluded³⁰⁵.

Finally, it is a well-known fact that in domestic relations practice domestic violence and child abuse claims by the residential parent against the contact-seeking parent are not uncommon³⁰⁶, and that the contact-seeking parent will frequently contest the validity of such claims. In much of the literature, both practitioners and scholars call for a close investigation of objective evidence such as doctor's reports and other evidence presented by the parties, as well as hearing out all involved parties and involving the family court probation officer (ordering an independent investigation by the latter), and cautioning judges (as well as conciliation commissioners of domestic relations) against denying contact based on mere claims of DV or child abuse by the residential/custodial parent^{307, 308}.

³⁰⁴ For example 榮春=綿貫・前掲（注 274）336 頁、see also 細矢ほか・前掲（注 218）79 頁.

³⁰⁵ For example 棚村政行『子どもと法』（日本加除出版、2012 年）84 頁, referring to practice in the U.S., argues that past violence should not result in the separation of parent and child and breaking off of any contact, but that via the potential use of supervised contact and other means, a future reunification of parent and child should be retained as a possibility. Also 細矢ほか・前掲（注 218）79 頁。

³⁰⁶ 細矢ほか・前掲（注 218）78 頁、清水・前掲（注 270）316 頁。

³⁰⁷ 細矢ほか・前掲（注 218）79 頁, also 若林・前掲（注 221）403 頁 and 清水・前掲（注 270）316 頁。See also 棚村・前掲（注 301）392 頁以下 (lists specific points that practitioners should pay attention to when handling violence claims in contact disputes)).

Hosoya et al refer to cases where the custodial parent claims that (s)he is suffering from PTSD as a result of past DV, that her symptoms worsen when contact is carried out, and that this as a result has a harmful effect on the child (see for example 東京家審平成 14・5・21 (家月 54・11・77)). While admitting that in some cases a complete exclusion of contact would be appropriate, Hosoya et al and others urge practitioners to require the custodial parent to submit medical certificates, or a written decision concerning a protection order, in order to ascertain whether there indeed was DV, to understand the concrete symptoms of PTSD etc, and furthermore judges and conciliation commissioners of domestic relations are urged to consider whether the respective families of the

Above, I attempted to introduce the state of academic debate and case law in Japan concerning contact and violence by talking about violence against spouse and violence against child under two different subheadings. Nevertheless, it is definitely true that it is not always wise to draw a line between the two. As discussed earlier, even if the child is not the object of direct (physical) violence, witnessing violence between parents can be equally emotionally damaging for the child, and can constitute child abuse according to Japanese statutory law. Also, in a practical sense, it has been pointed out by practitioners that violence by one parent against the other will in many cases affect the relationship between the child and the violent spouse (the child might fear the violent parent as a result of being exposed to spousal violence, and consequently adamantly refuse contact, which, as discussed further on, could possibly qualify as cause for the courts to deny contact). In addition, especially with smaller children, carrying out contact is difficult without some cooperation from the residential/custodial parent, but if that parent fears or distrust the non-residential parent as a result of past violence, exercising contact might be physically unrealistic.

Other Types of Problematic Behavior

In cases involving problematic behavior on the side of the contact-seeking parent other than spousal violence and child abuse, namely (what has been highlighted in scholarly literature in Japan) “unethical” and “markedly antisocial” behavior such as alcoholism, drug abuse, but also high possibility of abduction of the child by the non-residential parent, constant breaking of the rules agreed upon (or ordered by the court) concerning contact,

parents are willing to cooperate, or whether it is possible to enlist the cooperation of a third-party organization for the exercise of contact (細矢ほか・前掲 (注 218) 79 頁).

³⁰⁸ On the other hand 立石・前掲 (注 299) 60 頁 – critical towards allowing contact in cases involving DV claims if the custodial parent is not able to prove harm to the welfare of the child.

interfering with how the residential/custodial parent is raising the child etc, case law appears as a rule to deny contact³⁰⁹. A majority of the scholars appear to agree in principle, although many argue that contact might be allowed in cases where the degree of the “problematic behavior” is judged to be comparatively low³¹⁰. Also, many scholars point out that if direct contact is not deemed suitable, indirect contact (phone calls, letters, but also the custodial parent providing information such as pictures, videos and report cards to the non-residential parent) should be considered, and even encouraged³¹¹.

“Unethical” and “Markedly Antisocial” Behavior This category, as proposed by Japanese scholars, is understood to include alcohol and drug abuse etc by the contact-seeking parent³¹² (in addition to violence, which was discussed in the previous above). It is generally agreed that contact should be restricted, if not completely excluded, if these factors are present, as exercising contact would harm the wellbeing and healthy development of the child as well as hamper a stable relationship between the child and the residential parent³¹³.

³⁰⁹ As pointed out by 山田美枝子・前掲（注 271）78 頁、善元・前掲（注 261）166 頁、横田ほか・前掲（注 221）10 頁。

³¹⁰ For example 山田美枝子・前掲（注 271）78 頁、善元・前掲（注 261）166 頁 (referring to one of the very few exceptions in case law, 京都家審昭 47・9・19（家月 25・7・44）→ *The non-custodial parent had abducted the child in the past, but regrets his behavior and dutifully pays child-support, the relationship between the child and the non-custodial parent was not a bad one to begin with, the custodial parent did not distrust the non-custodial parent. Contact allowed (some restriction as to the frequency etc).* But advocating an apparently stricter approach in all cases where there are problems pertaining to the person and behavior of the non-residential/ non-custodial parent for example 若林・前掲（注 221）403 頁。

³¹¹ 棚村・前掲（注 223）61 頁、山田美枝子・前掲（注 271）80 頁。

³¹² See for example 和歌山家裁昭和 55・6・13（家月 33・6・29）、浦和家審昭和 56・9・16（家月 34・9・80）、浦和家審昭和 57・4・2（家月 35・8・108）、東京家裁平成 13・6・5（家月 54・1・79）。See also 大阪高平 4・7・31（家月 45・7・63）(*somewhat mentally unstable non-custodial mother, supervised contact allowed*) .

³¹³ 北野・前掲（注 241）264 頁、榮春=綿貫・前掲（注 274）335 頁、清水・前掲（注 270）316 頁 (Shimizu stresses, however, that it is not uncommon for the custodial parent to deny contact claiming that the contact-seeking parent has a tendency to violence or a

Abduction (or the Threat thereof) of the Child by the Non-Residential Parent Scholars agree that contact should be restricted or completely excluded, if the probability of the non-residential parent abducting the child is high (for example in cases where abduction has occurred in the past)³¹⁴. The need to restrict or exclude contact in such cases is deemed justified, as abduction would cause the child emotional distress due to being removed from their current environment, and therefore harm the child's best interests³¹⁵. It is argued by some, however, that in certain cases contact in the presence of a third party, or at a certain limited location could be possible³¹⁶.

Rule-Breaking and Interfering with the Residential/Custodial Parent's Child-Raising The parents' ability and willingness to follow the rules agreed upon during conciliation proceedings or set by the courts is an important prerequisite to the smooth exercise of contact. Japanese scholars point out that by breaking these rules, even the minimal amount of trust between the parents necessary for the exercise of contact will be lost, and the child will be harmed in the process³¹⁷. Therefore, it is argued that if the contact-seeking parent is unable or unwilling to follow the set rules, contact should be restricted, and in cases of repeated and blatant rule-breaking, sometimes a complete exclusion of contact is inevitable and justified³¹⁸.

character or personality disorder, and urges practitioners to assess the situation (and the contact-seeking parent's suitability to have contact with the child) based on objective information and facts as far as possible. See also 若林・前掲 (注 221) 403 頁。
³¹⁴ 細矢ほか・前掲 (注 218) 77-78 頁、横田ほか・前掲 (注 221) 9 頁、石川・前掲 (注 227) 288 頁 (argued that no face-to-face contact should be allowed), 大塚・前掲 (注 224) 302 頁 (argued that contact should not be denied in cases where the custodial parent has an abstract fear that the other parent *might* abduct the child). Relevant case law: 京都家裁昭和 47・9・19 (家月 25・7・44) (*non-custodial parent regrets past behavior, contact allowed but somewhat restricted*). See also 大阪高判平成 17・6・22 (家月 58 卷 4 号 93 頁)、東京高判平成 15・1・20 (家月 56 卷 4 号 127 頁)。

³¹⁵ 細矢ほか・前掲 (注 218) 77-78 頁。

³¹⁶ 細矢ほか・前掲 (注 218) 77-78 頁。

³¹⁷ 若林・前掲 (注 221) 403 頁。

³¹⁸ 棚村・前掲 (注 305) 82 頁. See for example 横浜家裁相模原支部平 18 年 3 月 9 日 (家

In some cases, breaking the rules agreed upon in conciliation or set by the court is accompanied by the non-residential parent (excessively) interfering with how the residential parent is raising the child³¹⁹ and bad-mouthing the residential parent in front of the child³²⁰, which is also considered harmful to the best interests of the child, as it inevitably results in increased conflict between the parents³²¹. Case law as a rule is reported to limit or completely exclude contact in cases involving rule-breaking on the side of the non-residential parent³²².

Non-Payment of Child Support According to case law, whether child support is being paid is taken into consideration by the courts, but non-payment of child-support alone does not appear to lead to the restriction or exclusion of contact³²³. There has been some debate among scholars concerning this point. Although there is legally no reciprocal relation between contact and child support, a number of scholars in Japan argue that a parent who does not fulfil his/her duties towards their child should not be awarded with the right to have contact with the child³²⁴. On the other hand, others argue that non-payment of child support should not automatically result in the exclusion of contact, and that contact should be allowed if it is

月 58・11・71) (*non-custodial parent did not follow the rules agreed upon during conciliation, contact denied*); See also 東京家審平 14・10・31、那覇家沖縄支審平 15・9・29。

³¹⁹ See for example 福岡高那覇支決平 15・11・28 (家月 56・8・50) (*non-custodial parent requested contact with the sole aim of interfering with the custodial parent's child-rearing policies, contact restricted but not completely excluded (contact allowed if the child (14 years old) wishes it)*).

³²⁰ 榮春=綿貫・前掲 (注 274) 336 頁、also 石川・前掲 (注 227) 288 頁 (argues that contact should not be allowed if the non-custodial parent bad-mouths the custodial parent during the exercise of contact).

³²¹ 横田ほか・前掲 (注 221) 9 頁、榮春=綿貫・前掲 (注 274) 336 頁。

³²² As reported by 山田美枝子・前掲 (注 271) 78 頁、横田ほか・前掲 (注 221) 9, 10 頁。

³²³ See for example 大阪高平 18 年 2 月 3 日 (家月 58 卷 11 号 47 頁)。

³²⁴ 石川・前掲 (注 227) 288 頁 (unless the child wishes contact, and there has been no direct harm to the child from the non-payment of child support), also 北野・前掲 (注 241) 265-266 頁、清水・前掲 (注 270) 330 頁、榮春=綿貫・前掲 (注 274) 336 頁 (“a type of abuse of [the contact-seeking parent's] rights”), 若林・前掲 (注 221) 404 頁。

deemed beneficial to the child³²⁵.

It has been pointed out, however, that even if there is legally and theoretically no reciprocal relation between the two, in practice regular payment of child support by the non-custodial parent has been observed to encourage the custodial parent to allow (more generous) contact, and, reversely, if the custodial parent refuses contact between the child and the non-custodial parent, the non-custodial parent often as a retort refuses to pay child support³²⁶.

Unfitting Motive for Contact Application Finally, scholars and practitioners have pointed out that it is important to ascertain the real motive of the non-residential/ non-custodial parent for requesting contact. If the application for contact is motivated not by a wish to see the child but solely by unfitting or unsuitable considerations, such as attempting to reconcile with the residential/custodial parent or reversely in order to bully the residential/custodial parent, as well as aiming to use contact conciliation proceedings to negotiate reducing child support, it is generally agreed that contact should be denied, since if contact was allowed and even enforced in such circumstances, it would be harmful to the best interests of the child³²⁷.

³²⁵ 棚村・前掲（注 223） 61 頁、大塚・前掲（注 224） 302 頁。

³²⁶ 棚村・前掲（注 223） 61 頁、see also 大塚・前掲（注 224） 275-276 頁: after analyzing conciliation records in Yokohama Family Court over a period of a 12 months (1996), found that in cases where the parties had reached an agreement concerning contact, it was more likely that child support was being paid, as compared to cases where no agreement concerning contact had been made; also Shimizu（清水・前掲（注 270） 330 頁） points out that in reality there are many cases where the custodial parent refuses contact between the child and the non-custodial parent on the grounds that child-support is not being paid, and vice versa, the non-custodial parent refuses to pay child support because the other parent refuses to let him/her see the child. See also for example 京都家審判昭和 47・9・19（家月 25・7・44）。

³²⁷ 大塚・前掲（注 224） 301 頁 and 清水・前掲（注 270） 316 頁 (abuse of rights, consequently contact should be denied), Cf. 榮春=綿貫・前掲（注 274） 335 頁, refers to 東京家裁平 14・10・31（家月 55・5・165）。

2.2 High Level of Conflict between the Parents

It is commonly accepted that in cases where there is a high level of animosity and conflict between the parents, the exercise of contact between the non-residential/ non-custodial parent and the child could reignite or escalate old quarrels, and potentially result in the child being caught in loyalty conflict. It is for this reason that especially in the past some authors were skeptical about post-separation parent-child contact, arguing that, except for amicable separations, contact in the midst of parental conflict would most likely be harmful to the welfare of the child³²⁸. In particular in the 1970s, such views were rather common among many family law practitioners in Japan, due partly to the introduction of the research and views of Goldstein et al in Japan at the time (as already introduced elsewhere in this paper). Majority scholarly opinion, however, has advocated for more contact even in cases where there is a considerable amount of animosity between the parents, as introduced briefly below.

It is reported that although the tendency in **case law** in recent years appears to be to allow contact rather than exclude it (with the courts tending to hesitate denying contact solely on the grounds of conflict between the parents)³²⁹, there are also a considerable number of cases involving a high level of conflict between the parents where the courts have excluded contact

³²⁸ As also elsewhere 梶村 (注 216) , but also more recently 梶村太市「子のための面接交渉再々論」『小野幸二先生古希記念論集 21 世紀の家族と法』(法学書院 2007 年) 207 頁 etc.

³²⁹ Yokota et al point out that in cases involving intense conflict or animosity between the parents where there appear to be no justifiable grounds for the non-residential parent to refuse contact, and especially in cases where the parents have previously reached an agreement concerning contact and some contact has already been exercised in the past (with relative success), courts tend to allow contact (横田ほか・前掲 (注 221) 10 頁). Some examples of cases where contact was allowed despite a high level of antagonism between the parents: 名古屋家審平成 2・5・31(家月 42 卷 12 号 51 頁)、名古屋高決平 9・1・29 (家月 49・6・64)、東京家審平 18・7・31 (家月 59・3・73)、大阪高決平 21・1・16 (家月 61・11・70)、京都家審平 22・4・27 (家月 63・3・87)、大阪高決平 22・7・23 (家月 63・3・81)。

(mainly or entirely) due to such conflict³³⁰. In fact, judgments in high-conflict cases have always shown a considerable amount of inconsistency from judge to judge³³¹.

Although much of the literature refers to “intense conflict case law” as a separated category, it should be kept in mind, however, that in most of the case law concerning the restriction of contact there is considerable conflict between the parents (as these are cases that could not be agreed upon during the conciliation process), and that there are almost always other factors besides ‘intense conflict’ involved, hence it is often difficult to assess whether it was the intense conflict between the parents that was deemed the sole or main factor that could potentially harm the child, or whether it was the accumulative effect of various factors, of which ‘intense conflict’ was one (but perhaps not necessarily the deciding factor)³³².

Scholars and practitioners have observed a gradual change in the attitude of the courts in cases involving contact and intense conflict between the

³³⁰ As pointed out by 善元・前掲 (注 261) 166 頁、横田ほか・前掲 (注 221) 10 頁. Some more recent examples: 東京家審平 13・6・5 (家月 54・1・79)、さいたま家審平 19・7・19 (家月 60・2・149)、東京高決平 19・8・22 (家月 60・2・137)。

³³¹ See for example 山田美枝子・前掲 (注 283) (introduction and analysis of 横浜家審平 8・4・30 (家月 49・3・75) and 名古屋高平 9・1・29 (家月 49・6・64), two cases involving a high level of animosity and conflict between the parents, where the two courts’ standards for allowing/restricting contact in such cases appear to differ considerably. (Also, the above 名古屋高平 9・1・29 reversed the decision of the court of the first instance 名古屋家審平 8・9・19 (家月 49・6・72), which had denied contact). Yamada also points out these two cases (similar circumstances but seemingly different standard applied): 東京高決平 2・2・19 (家月 42・8・57) and 大阪高決平 4・7・31 (家月 45・7・63) (in both cases the residential parent is strongly against contact, in both cases the child in question is 3 years old. One difference is that in one case the contact-seeking parent is the mother, in the other case the father) (pointed out by Yamada on p. 160) .

³³² For example, in 那覇家裁沖縄支部平成 15・9・29 (家月 56・8・55) and 福岡高裁那覇支部平成 15・11・28 (家月 56・8・50) (the appellate court of the former) the judge considered the high level of conflict between the parents as well as the constant rule-breaking on the side of the contact-seeking parent (contact excluded for half a year); 東京家裁平成 7・10・9 (家月 48・3・68) →also intense conflict between parents was taken into account, but the strong refusal of the 13-year-old child appears to have had the most weight for the court, see also 大阪家裁平成 5・12・22 (家月 47・4・45) (various factors considered).

parents, towards actively promoting the exercise of contact³³³. It has been pointed out that, at present, already on the conciliation level, family court probation officers and the results of their independent investigation are utilized, conciliation commissioners are making a conscious effort of stressing to the warring parents the importance of contact from the child's point of view, while explaining that it is the best interests of the child that are central to contact, and carrying out tentative contact (試行的面会交流) on the premises of the court. Also in cases that move on to adjudication proceedings, instead of completely excluding contact in cases involving a high level of conflict, courts are consciously attempting to secure some direct contact by detailing the conditions of the exercise of contact (specific time, place, method of handing over the child, also possible supervision by a third person), and in cases where direct contact is deemed unsuitable or implausible under present circumstances, actively urging indirect contact, such as exchanging letters, or ordering the custodial parent to send pictures or videos of the child, or report cards and other information to the non-residential parent³³⁴.

As mentioned above, most scholars agree that it is inappropriate to exclude contact solely on the grounds that there is a high level of antagonism

³³³ In particular Wakabayashi (若林・前掲 (注 221)) argues that earlier it was common for the courts to deduce that in cases involving intense conflict between the parents the best interests of the child would be harmed and therefore restrict or exclude contact, whereas in recent years the trend has changed to promoting the exercise of contact as much as possible in intense conflict cases (p. 401).

³³⁴ 山田美枝子・前掲 (注 283) 159, 161 頁、山田美枝子・前掲 (注 271) 80 頁、清水・前掲 (注 270) 326 頁、二宮・前掲 (注 222) 12 頁、榮春=綿貫・前掲 (注 274) 337 頁以下、棚村・前掲 (注 305) 79 頁、若林・前掲 (注 221) 402 頁 (→ argues that intense conflict between the parents should be dealt with as a problem of deciding a concrete appropriate method for the exercise of contact in a particular case, Wakabayashi also stresses the importance of appropriate support for the parties. Speaking from personal experience with domestic dispute cases, Wakabayashi highlights the importance of the role of the family court probation officer in helping the (former) spouses overcome the negative experiences in the past and think more objectively about what is best for the child, and indeed argues that in most cases with the right support the conflict will be mitigated (若林・前掲 (注 221) 407 頁)

between the parents³³⁵. They argue that this would be unjustified when considering the overall importance of maintaining a personal relationship between a non-residential parent and the child after the separation of the parents³³⁶. On the other hand, scholars concede that in cases where the antagonism and conflict between the parents is especially intense, the exercise of contact could cause excessive stress and strain on the psyche of the child and might therefore be harmful to the best interests of the child, and hence an exclusion of contact would be justified³³⁷. But it is argued that before reaching such a conclusion, other relevant factors should be taken into consideration as well, and the concrete negative or harmful effect on the child should be carefully considered in the light of the specific circumstances of the case^{338, 339}.

Finally, some scholars stress that, especially in cases involving a high level of conflict between the parents (but also, for example, in cases involving past DV, as explained in the previous section), the conflict between the adults (the horizontal relationship) on the one hand and the relationship between a parent and child (the vertical relationship) on the other should be considered as two separate things, and therefore past or present problems between the grown-ups should not influence a decision concerning the present and future

³³⁵ 北野・前掲(注 241) 265 頁、清水・前掲(注 270) 326 頁、二宮・前掲(注 222) 11 頁以下、若林・前掲(注 221) 407 頁。

³³⁶ 棚村・前掲(注 223) 61 頁、棚村・前掲(注 305) 79 頁 etc.

³³⁷ 棚村・前掲(注 305) 79 頁。

³³⁸ 榮春=綿貫・前掲(注 274) 336 頁, also already 棚村・前掲(注 223) 56、60 頁。

³³⁹ Also similarly practitioners: Yokota et al: “It is a common fact that many divorced spouses do not get along well, and in cases where the contact dispute has moved to adjudication proceedings, it is often the case that the (former) spouses are also involved in a heated dispute concerning matters other than contact, hence in such scenarios emotional confrontations tend to escalate. Even if there is dispute between the parties, if there is no direct harmful influence to the child, means should be employed that would mitigate the conflict between the custodial parent and the non-custodial parent, and direct contact (面接) between the non-custodial parent and the child should be considered” (横田ほか・前掲(注 221) 9 頁)。Similar 細矢ほか・前掲(注 218) 80 頁。

relationship of a parent and child³⁴⁰. However (as also mentioned above under the subheading “Violence against spouse and/or child”), it is not always possible to separate the one completely from the other. For example, children who find themselves in the midst of intense parental conflict, might (in some cases rather vehemently) refuse contact with a beloved parent in order to escape the stress and anxiety caused by the fighting that the child associates with the exercise of contact, and especially in the case of an older child, this will make the enforcement of contact in reality near impossible (about such wishes of the child see below under “Refusal of the Child”). Also, in the case of smaller children who are more dependent on the residential/custodial parent, as well as more sensitive to the stress that that parent feels towards the non-residential parent and/or contact between the child and the other parent, the possible negative effects of contact with the non-residential parent to the child, and the difficulties related to the actual exercise of contact, are in fact closely connected with circumstances pertaining to the residential, and the relationship between the residential parent and the non-residential parent.

2.3 Circumstances Pertaining to the Child

Circumstances pertaining to the child, such as the child refusing contact or experiencing stress, emotional anxiety or physical symptoms such as headaches immediately preceding or following contact with the non-residential parent, as well as potential loyalty conflict as a result of contact with the non-residential parent, have been considered as potential grounds for restricting or excluding contact.

Refusal of the Child

Whether the refusal of the child to have contact with the non-residential parent is grounds for the restriction or exclusion of contact, has been the

³⁴⁰ See for example 清水・前掲（注 270）326 頁、若林・前掲（注 221）392 頁。

subject of some debate in Japan.

Japanese law stipulates that in adjudication cases concerning contact, the wishes and opinions of the child involved should be heard (Domestic Relations Case Procedure Act § 152 II (the statement of a child 15 years or older should be heard), § 65 ((also for younger children) “... the family court shall endeavor to understand the intentions of the child by hearing statements from said child, having a family court probation officer conduct an examination or using any other appropriate method..”), § 258 I) and that his or her wishes should be taken into consideration “according to the child’s age or degree of development” (§ 65).

As is often pointed out, it is not altogether uncommon for the residential parent to justify refusing contact by claiming that the child wishes no contact, and it is also not uncommon for the child to find it difficult to express his or her true feelings concerning contact, especially if they are caught in a loyalty conflict³⁴¹. Therefore, it is generally agreed that when considering the wishes of the child, in addition to the age and development of the child, various factors such as the reasons the child gives for refusing contact, the intensity of the refusal, the background to the refusal such as the domestic situation of the child and the details of the dispute between the parents etc must be examined as far as possible and taken into account³⁴².

Refusal of the Child -- Age of the Child Scholars agree that the stated wishes of older children have considerable (possibly even deciding) weight. “Older” in this case is generally understood to indicate 10 years old or older ³⁴³. In addition to the fact that older children have a better understanding of the circumstances that they and their parents find

³⁴¹ 細矢ほか・前掲 (注 218) 80 頁。

³⁴² 細矢ほか・前掲 (注 218) 80 頁、清水・前掲 (注 270) 329 頁、大塚・前掲 (注 224) 302 頁 etc.

³⁴³ 二宮・前掲 (注 222) 5 頁、横田ほか・前掲 (注 221) 9 頁 (higher classes of elementary school).

themselves in, it is also argued that ordering or exercising contact against the wishes of an older child would often be against the child's best interests (as well as physically problematic)³⁴⁴. With children younger than 10, their verbal statements are generally understood to not have deciding weight, and should be understood and assessed in the context of their specific age and stage in development³⁴⁵.

Refusal of the Child -- Reasons for Refusal The reasons behind a child's refusal are varied and may include negative past experiences with the contact-seeking parent such as domestic violence or child abuse, anger towards the contact-seeking parent for deserting the other parent and the child (possibly for a new partner), disinterest or uneasiness due to having no memories of the non-residential parent, and so forth³⁴⁶. It is suggested that if the refusal of the child is "objectively justified", the non-residential/non-custodial parent's application for contact will most likely be refused (as concrete examples of such "objectively justified" reasons, literature offers the following: when the child is afraid of the non-residential as a result of that parent's violent behavior during cohabitation, but also when the child feels resentful towards the adulterous non-residential parent (in such cases, if the child's feelings of fear or resentment could not be expected to be mitigated "through the efforts of the non-custodial parent", contact will likely be excluded))³⁴⁷. On the other hand, if the child feels "vaguely uneasy" about contact because (s)he has only scant ³⁴⁸ or no memories ³⁴⁹ of the

³⁴⁴ 清水・前掲(注 270) 329 頁、横田ほか・前掲(注 221) 10 頁 ("when the child has reached an age where (s)he is capable of clearly stating his/her wished, and when such a child has refused contact, it could probably be said that in most cases it would not be appropriate to allow contact"), also 榮春=綿貫・前掲(注 274) 337 頁。

³⁴⁵ 横田ほか・前掲(注 221) 9 頁、二宮・前掲(注 222) 5 頁。See also 棚村・前掲(注 223) 61 頁以下。

³⁴⁶ 清水・前掲(注 270) 329 頁 etc.

³⁴⁷ 清水・前掲(注 270) 329 頁、若林・前掲(注 221) 403-404 頁。

³⁴⁸ 清水・前掲(注 270) 329 頁。

³⁴⁹ 大塚・前掲(注 224) 302 頁。

non-residential/ non-residential parent (e.g. in cases where the parents separated when the child was very young), it is argued that allowing contact should not automatically be expected to have a harmful effect on the child, but that initiating contact could lead to the building up of a parent-child relationship and the child acknowledging a “new” parent³⁵⁰. In such cases, literature and practitioners stress the importance of the role of professional support for the child, as well as for the parents (e.g. through the family court probation officer)³⁵¹.

Refusal of the Child – True Wishes of the Child or Not It is also generally acknowledged, that a child might outwardly refuse contact, despite a possibly affectionate or otherwise problem-free relationship with the non-residential parent in the past, in order to avoid the stress associated with having contact with that parent against the wishes of the residential parent. Also, the child’s wishes and impressions of the non-residential parent might be influenced by those of the residential parent³⁵². In such cases, it is commonly agreed that the true wishes and feelings of the child should be ascertained³⁵³. This is often a complicated task, and expert skills and knowledge are required. There are those who argue that when the refusal of the child is not a “true” refusal, or refusal from the heart (as described above), it will possibly not qualify as grounds for restricting or excluding contact³⁵⁴. Again, scholars and professionals stress the role of the family court probation officer not only in identifying the wishes of the child but also in providing necessary support for the child (and the parents), urging the parents to cooperate, and working on the emotions of the child³⁵⁵.

³⁵⁰ 大塚・前掲 (注 224) 302 頁。

³⁵¹ 清水・前掲 (注 270) 329 頁。

³⁵² 石川・前掲 (注 227) 288 頁、北野・前掲 (注 241) 265 頁、二宮・前掲 (注 222) 5 頁。

³⁵³ 石川・前掲 (注 227) 288 頁、榮春=綿貫・前掲 (注 274) 337 頁、細矢ほか・前掲 (注 218) 80 頁。

³⁵⁴ 細矢ほか・前掲 (注 218) 81 頁。

³⁵⁵ 清水・前掲 (注 270) 329 頁、see also 若林・前掲 (注 221) 392 頁、403 頁以下, and 佐々

Refusal of the Child – Case Law It has been reported that in cases where the child refuses contact or is otherwise negatively minded towards contact, the body of case law is divided into cases where contact is allowed and cases where contact is excluded (there being a considerable number of both)³⁵⁶. The latter group tends to include the cases involving older children³⁵⁷. It has been pointed out that in recent domestic relations practice, there is an increasing tendency to not automatically refuse contact when the child refuses contact, but instead conscious efforts are made to promote contact (direct or indirect) by actively utilizing the expert skills of the family court probation officer, carrying out tentative contact on the premises of the family courts and so on³⁵⁸.

Circumstances Pertaining to the Child (Other)

Emotional Unsettlement of the Child, Decline in Academic Performance and so forth as a Result of Contact It has been pointed out that the exercise of contact could be understood to harm the child's welfare if, as a result of contact, the child is emotionally unsettled, suffers from head-aches

木健「面会交流における子の意思—片親疎外（症候群）理論を巡って—」法時 85 巻 4 号 61 頁（2013 年）（62 頁）。Research done abroad (mainly in the US) concerning the so-called “parental alienation” (or “Parental Alienation Syndrome”) has also been introduced and recognized in Japan. See for example 小澤真嗣「子どもを巡る紛争の解決に向けたアメリカの研究と実践」ケ研 272 号 149 頁（2002）；棚瀬一代『離婚と子ども—心理臨床家の視点から』（創元社 2007）137 頁；佐々木健「ドイツ法における親子の交流と子の意思—PAS（片親疎外症候群）と子の福祉の視点から」立命 327・328 号（2009）354 頁以下。More recently for example 佐々木健「面会交流における子の意思—片親疎外（症候群）理論を巡って—」法時 85 巻 4 号 61 頁以下（2013 年）。

³⁵⁶ See 棚村・前掲（注 223）61 頁以下、二宮・前掲（注 222）5 頁以下、横田ほか・前掲（注 221）8 頁以下 for extensive case law references. Some examples: contact denied: 東京高裁平 19・8・22（家月 60・2・137）→ *children do not wish contact and distrust the father, the court argued that when contact was exercised it would consequently occasion considerable stress to the children, contact denied*; 岡山家審平 2・12・3（家月 43・10・38）→ *contact allowed in spite of the children's rather negative attitude towards the non-residential parent (and vehement opposition to contact by the residential parent)*; 東京家審判平 18・7・31（家月 59・3・73）→ *contact allowed in the presence of a third party, etc.*

³⁵⁷ As pointed out by 横田ほか・前掲（注 221）8 頁。

³⁵⁸ 二宮・前掲（注 222）12 頁。

or fever, there is a decline in the child's performance at school etc³⁵⁹. Some authors have argued that in such cases at least a temporary suspension of contact is justified, while the child (and the parents) receive professional help and support³⁶⁰, while others have argued that contact should not be easily restricted or excluded merely on the grounds of possible emotional unsettlement of the child or a decline in the child's academic performance³⁶¹.

The term **“loyalty conflict”** also appears frequently in Japanese case law and literature concerning contact. It is widely acknowledged in Japan that when the parents do not see eye to eye on contact and are possibly arguing over other matters as well, there is a very real risk that the child will be caught in a loyalty conflict, and consequently its best interests will be harmed. As mentioned elsewhere in this paper, formerly practitioners were rather quick to restrict or exclude contact on the grounds of potential loyalty conflict. However, in recent years both academics and practitioners tend to argue that, considering the general significance of continued contact with the non-residential/ non-custodial parent on the healthy development of the child, a potential loyalty conflict (as well as potential emotional unsettlement of the child, as above) is not grounds for automatic exclusion of contact, but that rather efforts should be made first to prevent or mitigate the effects of loyalty conflict, by providing professional support and education for the parents as well as support for the child (as well as urging supervised or indirect contact, when direct contact proves impracticable), and only in cases where such efforts have no effect and it is judged that in a specific case the best interests of the child will be harmed, is an exclusion of contact

³⁵⁹ 清水・前掲（注 270） 317 頁。

³⁶⁰ 清水・前掲（注 270） 317 頁、but considering the importance of contact to the development of the child, no indeterminate exclusion of contact under these circumstances (p 325).

³⁶¹ 棚村・前掲（注 223） 61 頁。

justified³⁶².

On the other hand, if there are **serious** problems with the **psychological/mental condition of the child**, contact will be restricted³⁶³.

Young Age of the Child has occasionally been suggested as grounds for restricting or excluding contact³⁶⁴. However, the *young age* of the child *alone* does not appear to automatically mean an exclusion of contact. The authors (as well as the cases cited by those authors³⁶⁵) refer to cases where there is intense conflict and animosity between the parents, and point out that with very young children, carrying out direct contact between the child and the non-residential/ non-custodial parent would require a considerable amount of cooperation from the side of the residential/custodial parent (as opposed to older children who could be expected to exercise contact independently), and when such cooperation could not be expected from the residential/custodial parent, carrying out contact in practice would be impossible. As already

³⁶² 若林・前掲 (注 221) 392 頁、二宮・前掲 (注 222) 12 頁、清水・前掲 (注 270) 325 頁 etc.

³⁶³ See 長野家裁上田支部平成 11・11・11 (家月 52・4・30) →the child was treated in a psychiatric hospital in the past and was receiving psychiatric treatment at the time of the decision, the prolonged conflict between the parents having been one of the factors to worsen the child's condition.

³⁶⁴ For example 山田美枝子・前掲 (注 271) 78 頁、善元・前掲 (注 261) 337 頁、榮春=綿貫・前掲 (注 274) 337 頁, also similar 清水・前掲 (注 270) 325 頁。

³⁶⁵ For example Sakae and Watanuki (榮春=綿貫・前掲 (注 274) 337 頁) refer to 横浜家平 8・4・3 (*a case where the custodial parent had remarried and the new spouse had adopted the children; contact allowed with the older child who would be able to exercise contact independently without the cooperation of the custodial parent, but contact denied with the younger child*). Very critically about this decision (especially about the fact that contact with younger child (aged 9 at the time) was denied: 二宮・前掲 (注 256) ("it is the role of court rulings to clarify under which conditions contact should be allowed in cases of children [who are not old enough to exercise contact independently, where the residential/custodial parent is opposed to contact]. This ruling indicates a movement backwards in a time when family court probation officers and other related persons are taking pains to secure that [contact] agreements are reached as far as possible in the midst of complicated human relations" (p 95)). Yamada (山田美枝子・前掲 (注 271)) and Yoshimoto (善元・前掲 (注 261)) above refer to 千葉家裁平成 1・8・14 (家月 42・8・68) and 東京高裁平成 2・2・19 (家月 42・8・56) (*the latter is the decision of the appellate court of the former*) (*child (3 years old, thinks that the younger brother of the mother is its real father, residential mother adamantly opposed to contact between the child and the non-residential father)*).

pointed out under the subheading “High Level of Conflict between the parents” above, however, recently the trend is to urge contact as far as possible in such cases, by employing third parties to assist with the handing over of the child and/or supervising the contact, or ordering indirect contact. Also, there is published case law that has allowed contact with smaller children in spite of a high level of conflict between the parents³⁶⁶.

2.4 Past Agreements and (Successful) Exercise of Contact in the Past

Yokota et al suggest that whether an agreement concerning contact was reached between the parents in the past, and whether any actual contact was carried out, is also an important factor that might influence the outcome of a contact dispute³⁶⁷. Indisputably, making a decision about future contact always involves a certain amount of guessing and predicting, and if there has been relatively successful contact between the child and the contact-seeking parent in the past, this is proof that future contact might go equally well. As Yokota et al point out, in cases where there has been contact in the past between the child and the contact-seeking parent, the courts tend to consider the outcome of such contact, as it helps, among other things, to determine the degree of attachment between the child and the non-custodial parent³⁶⁸. Yokota et al point out that case law tends to allow contact in cases where an agreement concerning contact was reached between the parents in the past, and actual contact has been carried out, as compared to cases where such

³⁶⁶ For example 岡山家審平 2・12・3 (家月 43・10・38) (children aged 9 and 8), 名古屋家審平 2・5・3 1 (家月 42・12・51) (child aged 7), 大阪高決平 4・7・31 (家月 45・7・63) (child aged 3!).

³⁶⁷ 横田ほか・前掲 (注 221) 7 頁。

³⁶⁸ For example in 大阪高平 18 年 2 月 3 日 (家月 58 卷 11 号 47 頁) the court took into consideration that there had been successful contact between the non-custodial mother and the children in the past, and that especially the older child strongly wished for contact to continue in the future, and although the behavior of the mother towards the children during such contact might have at times not matched the ideas about raising children held by the custodial father and his new wife, the court judged that it could not be said that the welfare of the children was hurt

agreement has not been reached and no contact has occurred³⁶⁹. Nevertheless, this is not considered a deciding factor and, as Yokota et al argue, future contact could still be restricted or excluded, even if there was successful contact in the past³⁷⁰.

2.5 Some Points of Consideration

As already pointed out earlier (in “2.2 High Level of Conflict between the Parents”), it is important to keep in mind that in much of the case law concerning contact, more than one of the above-mentioned factors is present in any given case, and it is not always clear how much weight each individual factor carried for the court (or, indeed, in what way each individual factor was considered to be harmful (or not harmful) for the best interests of the child).

It should also be noted that the various scholars who described tendencies in case law, grouped existing cases into two groups according to whether contact was “allowed” or “excluded”, and if in the end there were more cases in the “allowed” group than in the “excluded” group, the conclusion followed that courts tended to allow contact under such or such circumstances. It has, however, been pointed out, that especially in earlier years, in some cases where the courts deemed contact as such permissible, the **frequency** and length that was deemed permissible, was rather limited (some hours a couple of times a year etc)³⁷¹, which is by some not considered as sufficient in order to maintain a close relationship between the child and the

³⁶⁹ Ibid.

³⁷⁰ Ibid. Here, Yokota et al refer, among others, to case law where the circumstances the child is in have changed as a result of the custodial parent remarrying.

³⁷¹ 棚瀬孝雄「両親の離婚と子どもの最善の利益―面会交流紛争と日本の家裁実務」自由と正義 60(12), 9 頁(2009) (Tanase points out that “even bi-weekly visits are not standard in Japanese family courts”, and is critical towards Japanese domestic relations practice that does not share the belief (with some Western countries) that “frequent, meaningful, and continuing contact” is in the best interest of the child (p 13)), also similar 若林・前掲 (注 221) 391 頁 (especially about past case law, allowing contact only 2-3 times a year).

non-residential parent³⁷².

Concerning the most common frequency of contact as allowed/ordered by the courts, in some countries, such as Germany, direct contact twice a month (usually on the weekends, often including an overnight stay), is considered an unwritten rule. In Japan, the norm in cases that have reached the courts (but also on the conciliation level) appears to be once a month. For example Yokota et al point out, based on the existing body of case law, that in cases where there are no problems with the relationship between the non-custodial parents and child, where parents have agreed on contact and (relatively successful) contact has taken place in the past, the daily circumstances of the custodial parent and the child are not unstable, and the child is not unwilling to have contact, case law most often tends to deem contact once a month as appropriate (and that, in cases where there is a relatively high level of animosity between the parents, contact allowed tends to be of lower frequency)³⁷³. Yokota et al also point out that “once a month” is favored in conciliation³⁷⁴.

Summary

As seen above, the way domestic relations practice has viewed and assessed the above-mentioned factors, has changed over time. On the one hand, in recent years the courts appear to have adopted a stricter attitude towards allowing contact in cases where the contact-seeking parent had been violent towards the other parent and/or the child in the past, as a result of the adoption of related legislation. On the other hand, there appears to be an overall gradual trend from restricting or completely excluding contact in the

³⁷² 棚瀬・前掲 (注 371) 9 頁、若林・前掲 (注 221)。

³⁷³ 横田ほか・前掲 (注 221) 10 頁。

³⁷⁴ See Yokota et al *ibid* for references to analyses of conciliation records in family courts. The same (once a month as the most common frequency for contact) was pointed out by Otsuka in 1997 (大塚・前掲 (注 224)) based on an analysis of conciliation cases in Yokohama Family Court at the time.

1970s and 1980s (especially in cases where there was intense conflict and animosity between the parent and a high probability of the child being caught in a loyalty conflict, but also in cases where the residential custodial parent had remarried, as introduced further below), to acknowledging the significance of post-separation/divorce contact for the child and consequently actively promoting the exercise of contact as far as possible (including, when necessary, supervised contact, or indirect contact), except when it was clear that, considering all the different circumstances of a particular case there was concrete harm from contact for the child.

Below, in lieu of a summary, I will briefly attempt to provide some general context for the above-mentioned gradual change in case law towards allowing more contact³⁷⁵.

Contact in Domestic Relations Practice in the Early 1970s to the Late 1980s

As already pointed out earlier in this paper, despite a growing number of court rulings allowing contact between the non-custodial parent and the child following the divorce of the parents during this period, in the late 1970s and early 1980s the main-stream attitude among domestic relations practitioners in Japan towards allowing contact was rather cautious³⁷⁶. (In the 1970s that the work of Goldstein, Freud and Solnit was introduced in Japan³⁷⁷; the arguments of Goldstein et al were widely shared among family law practitioners in Japan at the time³⁷⁸, and many practitioners as well as

³⁷⁵ Based largely on 細矢ほか・前掲 (注 218) 15 頁以下, who attempt to describe the changing attitude towards contact held by Japanese courts, as well as the general public, against the general background of social and economic change, and in particular changes in the structure of the family, gender roles inside the family etc, but also changing views in the field of child and family psychology and psychiatry on the effect of divorce on children and the significance of post-divorce contact, from the 1970s onward.

³⁷⁶ See 細矢ほか・前掲 (注 218) 20 頁以下 etc.

³⁷⁷ As pointed out by 細矢ほか・前掲 (注 218) 18 頁. Prof. Goldstein, Dr. Freud, and Dr. Solnit argued for the protection and prioritizing of the relationship between the child and the residential parent (what they called the “psychological parent”), to the extent that the residential parent should determine to what extent or whether at all contact should take place between the other parent and the child.

³⁷⁸ See 細矢ほか・前掲 (注 218) 18 頁以下、佐藤千裕・前掲 (注 218) 213 頁。

scholars agreed that the wishes of the residential parent were to be understood to coincide with the best interests of the child, and that when the non-residential parent opposed contact between the child and the non-residential parent, exercising contact would cause conflict between the parents which would in turn be harmful to the healthy development of the child³⁷⁹.

However, from around the **mid 1980s**, some family court probation officers started to introduce the work of Wallerstein et al in Japan, which stressed the importance of post-separation and post-divorce contact with the non-residential parent for the child both in the short and in the long term³⁸⁰.

Contact in Domestic Relations Practice in the 1990s The 1990s saw a *gradual* shift away from the formerly reserved and cautious attitude towards contact among domestic relations practitioners in Japan. The catalysts for this shift are said to be, on the one hand, the 1984 Supreme Court decision (which left no doubt concerning the statutory basis of contact in Japanese law, and the fact that contact disputes could be adjudicated by family courts), the signing and ratification of the UN Convention on the Rights of the Child (which recognized a “right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests” (§ 9 II), and drew the attention of family law practitioners to the significance of contact from the child's point of view), as well as the attempts at a reform of Japanese family law in 1996 (introduced earlier)³⁸¹. In addition, the introduction and gradual acknowledging of research from abroad, stressing the importance of contact with the non-residential parent for the child,

³⁷⁹ 細矢ほか・前掲(注 218) 18 頁以下。

³⁸⁰ For example 佐藤千裕・前掲(注 218)(introduction of the work of Wallerstein et al pps. 221 ff)、牛田高文「面接交渉を進めるための指針(ガイドライン)」ケ研 209 号 131 頁(1986 年)。

³⁸¹ See 細矢ほか・前掲(注 218) 24 頁。

contributed to an increasing awareness among domestic relations practitioners of the potential positive effects of contact for the child³⁸².

It is suggested that from the 1990s, family law practitioners were less keen to exclude contact simply on the grounds that contact might induce conflict between the parents and therefore automatically harm the child. The new approach was rather to consider all the various circumstances relevant to a specific case in order to reach an appropriate conclusion concerning contact³⁸³. However, notions concerning the concrete merits and demerits of contact varied from judge to judge and conciliation commissioner to conciliation commissioners, and, consequently, as pointed out earlier, standards for restricting or excluding contact also varied considerably, resulting in a rather inconsistent body of case law.

It is also during the 1990s that scholars were particularly critical of case law, not only the fact that there was no apparent uniform standard for the restriction or exclusion of contact and that consequently the case law was inconsistent, but also because many scholars criticized the judges of being too reserved about allowing contact³⁸⁴.

³⁸² See for example 爪生武・真板彰子「離婚後の親子交流の実情」判タ 925 号 70 頁 (1997 年)、永田秋夫ほか「子の監護に関する処分 (面接交渉) 事件における調査官関与の在り方」家月 48 巻 4 号 89 頁 (1996 年).

³⁸³ 細矢ほか・前掲 (注 218) 26 頁, 若林・前掲 (注 221) 391 頁. Hosoya et al also report that it is during the 1990s that first considerable research is done concerning tentative contact at the Family Court as a concrete means of promoting and facilitating future contact (see 細矢ほか・前掲 (注 218) 26 頁以下 for further references).

³⁸⁴ See for example 棚村・前掲 (注 223) 61 頁: critical of an apparent tendency among practitioners of easily restricting or denying contact in cases where “it was foreseen that contact would unsettle the child emotionally”, for example when the child (as argued by the residential parent) did not wish a change of environment, refused contact due to feelings of fear or resentment towards the non-custodial parent, the child’s performance at school was argued to have fallen due to the emotional stress connected with contact, but also cases where the child was not aware of the existence of the non-residential biological parent. Also 山田美枝子・前掲 (注 271) 80 頁 – Yamada argued that for scenarios involving remarriage of the custodial parent, contact with very young children, and “*in particular*” sever conflict between the parents, practitioners should more actively promote contact. Also similar Yoshimoto about case law up to 2003 (善元・前掲 (注 261) 163 頁).

Contact in Domestic Relations Practice from the 2000s onward The basic approach of the courts to contact disputes continues to be to deliberate what is appropriate or reasonable contact in a particular case, considering all the specific circumstances of that case. At the same time, there is an increasing tendency on the side of the family courts to promote the exercise of contact as far as possible (including in cases that were formerly considered as inherently problematic from the point of view of the best interests of the child, such as intense conflict cases and cases involving small children). On the conciliation level, the conciliation commissioners, family court judges and family court probation officers are making conscious attempts to actively encourage contact by explaining the importance of contact from the child's point of view to the parents, carrying out tentative contact on the premises of the court and so forth. When a case moves on to adjudication proceedings, the courts are increasingly attempting to secure direct contact by detailing the conditions of the exercise of contact, ordering supervised contact in more difficult cases, and if direct contact is deemed unsuitable or implausible under present circumstances, actively urging indirect contact in order to maintain a link between the child and the non-residential/ non-custodial parent³⁸⁵.

One of the reasons behind this is the increasingly accepted understanding that contact with the non-residential parent is something inherently meaningful or even indispensable for the child³⁸⁶. Indeed, from the 2000s onward there are a fair number of court rulings concerning contact that declare their premise to be that contact is as a rule necessary for the healthy

³⁸⁵ 若林・前掲(注 221) 401 頁以下 etc (indirect contact in the form of phone calls, letters, or photos and report cards etc sent to the non-custodial parent are understood to serve, on the one hand, the purpose of providing the non-custodial parent with a means to follow up on the wellbeing and development of the child, and on the other hand, notably, the purpose of paving the way to possible future direct contact (see for example 京都家裁平成 18 年 3 月 31 日審判 (家月 58 卷 11 号 62 頁)).

³⁸⁶ In addition to works already cited, 小田切紀子「子どもから見た面会交流」自由と正義 60 卷 12 号 (2009 年) 28 頁以下など。

development of the child (providing the child, among other things, with the opportunity to experience first-hand the love of both (natural) parents), and that therefore contact should only be restricted in exceptional cases where it would clearly harm the best interests of the child³⁸⁷. This has led some authors to argue that case law is showing a growing tendency to allow contact as a rule, unless certain (exceptional) grounds for the restriction/exclusion of contact are present³⁸⁸, whereas others criticize such an apparent tendency towards a presumption of (the benefits of) contact to the child³⁸⁹.

As further proof of a growing awareness of the importance of post-separation/divorce contact between the non-custodial parent and the child, it has also been pointed out that, when deciding which parent should exercise parental authority or custody, the courts increasingly consider as one of the factors whether a parent is positively minded towards contact between the child and the other parent³⁹⁰.

Furthermore, in 2013, the Supreme Court confirmed that if the parents had reached an agreement concerning contact during conciliation proceedings (or contact had been allowed in an adjudication by the family court) but the custodial parent refused to comply with their obligations arising thereof, indirect compulsory execution could be ordered (Civil Execution Act § 172, Domestic Relations Case Procedure Act § 75 and 268)³⁹¹.

Since the 2000s, the importance of the role of organizations supporting the practical exercise of contact in cases where the cooperation of the parents in

³⁸⁷ See for example 大阪高判平成 21 年 1 月 16 日 (家月 61・11・70) and 大阪高判平成 18 年 2 月 3 日 (家月 58・11・47)。

³⁸⁸ 若林・前掲 (注 221) 401 頁, similar but slightly more moderate 細矢ほか・前掲 (注 218) 30 頁、75 頁以下。

³⁸⁹ 梶村太市『新家事調停の技法』(日本加除出版、2012 年) 203 頁以下、梶村太市『裁判例からみた面会交流調停・審判の実務』(日本加除出版、2013 年) 243 頁以下など。

³⁹⁰ 細矢ほか・前掲 (注 218) 30 頁, see for example 大阪高裁平成 17 年 6 月 22 日決定 (家月 58・4・93)。

³⁹¹ 最判平成 25・3・28 民集 67 卷 3 号 864 頁。

the exercise of contact cannot be expected, is also highlighted³⁹². While a number of recent court decisions refer to the option of using the services of such organizations³⁹³, especially in cases where there is considerable animosity between the parents which might obstruct the exercise of contact, it must nevertheless be borne in mind, that such services are only offered in a limited number of big cities³⁹⁴, and, due to a lack of public subsidies, are only available to parents who can afford the required fees³⁹⁵.

³⁹² See the 2011 survey by Tanamura et al, ordered by the Ministry of Justice, titled 「親子の面会交流を実現するための制度等に関する調査研究報告書」, accessible at http://www.moj.go.jp/MINJI/minji07_00100.html (last accessed 21. Nov 2014).

³⁹³ For example 東京家裁平成 18 年 7 月 31 日審判 (家月 59 卷 3 号 73 頁)。

³⁹⁴ For example FPIC in Tokyo and FLC Vi-Project in Osaka.

³⁹⁵ 棚村・前掲 (注 392) 32 頁、細矢ほか・前掲 (注 218) 33 頁。

III Remarriage of the Residential Parent and Contact between the Child and the Non-Residential Parent

1 Overview

Remarriage of the residential/ custodial parent and/or the subsequent adoption of the child or children by the new spouse of the residential/ custodial parent has been highlighted by practitioners and scholars as possible grounds for the restriction or complete exclusion of contact between the child and the non-residential (legal) parent. In such cases, the residential (legal) parent often refuses contact between the non-residential parent and the child, claiming that contact with the non-residential parent should not be allowed as such contact would endanger the stability of the new household and potentially confuse the child³⁹⁶.

To date, there are few published rulings of Japanese courts concerning contact between the non-residential legal parent and a child living in a household with the residential legal parent and the new spouse (including common law spouse) of that parent. The relevant rulings published until now are ① adjudication of Tokyo Family Court of 14 Dec. 1964³⁹⁷, ② decision of Tokyo High Court of 8 Dec. 1965 (the appellate court of ①)³⁹⁸, ③ adjudication of Osaka Family Court of 28 May 1968³⁹⁹, ④ adjudication of Ooita Family Court (Nakatsu branch) of 22 July 1976⁴⁰⁰ (the child was adopted by the older sister of the father who had parental authority, and the sister's husband, the non-residential mother petitioned for contact), ⑤ adjudication of Tokyo Family Court of 31 March 1987⁴⁰¹ (step-father is the common law spouse of the custodial mother), ⑥ adjudication of Yokohama

³⁹⁶細矢ほか・前掲（注218）81頁。

³⁹⁷家月17巻4号55頁。

³⁹⁸家月18巻7号31頁。

³⁹⁹家月20巻10号68頁。

⁴⁰⁰家月29巻2号108頁。

⁴⁰¹家月39巻6号58頁。

Family Court of 30 April 1996⁴⁰², ⑦ adjudication of Kyoto Family Court of 24 Aug. 2005⁴⁰³, ⑧ decision of Osaka High Court of 3 Feb. 2006⁴⁰⁴ (the appellate court of ⑦), ⑨ adjudication of Kyoto Family Court of 31 March 2006⁴⁰⁵.⁴⁰⁶

Of these 9 rulings, contact between the non-residential legal parent and the child(ren) concerned was allowed in rulings ① (subsequently overruled by ② (contact denied)), ⑤、⑥, and ⑦ and ⑧ (decision of the appellate court of ⑦)⁴⁰⁷. It should, however, be noted that ⑦ was decided by the Family Court before the formal marriage of the custodial father (although the future spouse was already living in the same household as the father and his children from the previous marriage, and this fact was noted by the court), and that in the same case Osaka High Court in ⑧ subsequently restricted the scope of contact that had been allowed by the court of the first instance⁴⁰⁸. It is also noteworthy that in ⑥ the court allowed contact between the father and the elder of the two children (13 years old at the time of the decision), but denied contact with the younger child (at the time 9 years old).

Furthermore, even though contact was allowed in rulings ⑤ and ⑥, the scope of such contact could be considered rather meager, namely once a year

⁴⁰²家月 49 卷 3 号 75 頁。

⁴⁰³家月 58 卷 11 号 56 頁。

⁴⁰⁴家月 58 卷 11 号 47 頁。

⁴⁰⁵家月 58 卷 11 号 62 頁。

⁴⁰⁶ There is also 横浜家裁相模原支部平 18 年 3 月 9 日 (家月 58・11・71), where the custodial parent had remarried, but this fact does not appear to have been considered as relevant by the parties and appears not to have been considered by the court either.

⁴⁰⁷ The court in ruling ⑨ deemed both direct contact in the form of face-to-face meetings, as well as contact via phone calls and exchange of letters inappropriate, but ordered the residential mother and her spouse (who had adopted the child) to send the non-residential legal father 2 pictures of the child per years, together with copies of the child's report cards.

⁴⁰⁸ The court of the first instance had allowed monthly direct contact of the length of several hours in a single day as well as contact including overnight stay twice a year. Osaka High Court, taking into consideration that the circumstances had changed as the father had married his common-law spouse and the latter had adopted the children of the father, did not deem contact including over-night stay as appropriate.

in ⑥⁴⁰⁹ and twice a year in ⑤ (as noted under subheading “Some Points of Consideration”, the most common frequency for the exercise of contact, at least by the 1990s, and still during the 2000s, was once a month). Rulings ⑦ and ⑧ were the first published decisions to allow for more frequent contact in the remarriage-adoption scenario, namely (direct) contact once a month.

As there are so few published decisions, it is difficult to outline any general tendencies, but based on the few published rulings, authors have deduced that until the mid 2000s, the courts tended to deny contact in cases where the custodial parent had remarried and/or the new spouse had adopted the children, except in cases involving older children (such as ruling ⑥ - contact allowed with the 13-year-old (older child of the two) on the grounds that the child was old enough to exercise contact independently without any involvement on the side of the custodial parent, but contact denied with the 9-year-old younger sister on the grounds that, in the case of a child of such young age, the cooperation of the custodial parent would be necessary for the actual carrying out of contact, but that in the case at hand, the opposition of the custodial parent to contact was of such a degree that no cooperation could be expected), or scenarios like in the case of ruling ⑤, where the child was of mixed origins, leading the court to judge that contact with the non-Japanese parent was necessary for such a child⁴¹⁰.

In rulings from the 1960s and 1970s (②, ③、④), the courts judged that, considering that the child in question was living under the care of the residential legal parent and the step-parent, has (potentially by this stage already) “adapted well to his/her present family life” or is otherwise contented with its present situation (②、③), or, indeed, has been led to

⁴⁰⁹ Indeed, in this case the non-residential contact-seeking father petitioned for contact once a year, consequently the court most likely did not deem it necessary to allow more contact than had originally been petitioned for.

⁴¹⁰山田美枝子・前掲（注 271）77 頁、善元・前掲（注 261）164 頁、榮春＝綿貫・前掲（注 274）337 頁。

believe that the new spouse of the custodial/ residential parent (or parents in the case of ruling ④) is its natural parent (②, ④), contact with the non-residential legal parent would “throw the child’s peaceful family life into turmoil”, “wound the child’s innocent young heart” and consequently “hamper its healthy mental development” (②、④). Hence, the non-residential legal parent was instructed by the courts to respect the parental authority and custody of the residential legal parent (as well as, where applicable, the new spouse), avoid meeting the child and follow its development “from the shadows” (②、③、④).

Also in ruling ⑥ (from 1996), the court stated that, following the remarriage of the custodial parent, it was “understandable” that the residential parent wanted to avoid contact between the non-residential parent and the child, and that considering that since the new spouse had adopted the children “new parent-child relationships have been formed, and the children appear to be leading stable lives, it cannot be affirmed that contact with [the non-residential legal parent] against the wishes of the [residential parent] because the legal father (実父) wishes to ascertain that the children are growing up without problems, is indispensable for the welfare of the children.”

In case law until the mid 2000s, the courts appear to have put much weight on the fact that the remarriage/adoption cases often involved heightened animosity between the residential legal parent and the non-residential legal parent, as well as unbending unwillingness of the residential legal parent to allow contact (see especially ruling ⑥⁴¹¹). As introduced above under sub-heading “High Level of Conflict between the Parents”, in cases involving intense animosity and conflict between parents (irrespective of whether such conflict was potentially a result of the remarriage of the custodial parent),

⁴¹¹ 評釈：二宮周平「子の年齢、心身の成長状況と面接交渉の可否(平成 8.4.30 横浜家審判)」判タ 940 号 95 頁(1997)、山田美枝子「面接交渉事件における子の福祉の判断例(平成 8.4.30 横浜家審判, 平成 9.1.29 名古屋高決)」民商 120-1, p 154 (1999)。

courts (especially in earlier years) tended to restrict contact.

In addition, a lot of the case law (especially earlier rulings but also ruling ⑨) and some authors also refer to the need to protect “the stability of the new household” (that from the point of view of the best interest of the child the stability of the new family should be prioritized over contact with the non-residential legal parent)⁴¹². As it became more and more widely accepted among family law practitioners that contact with the non-residential parent was beneficial for the child both in the short and the long run, it was increasingly argued that an appropriate balance should be sought between “the stability of the new household” and the maintaining of contact with the external legal parent⁴¹³. In this sense, rulings ⑦ and ⑧ were considered as “clearly different” from older case law⁴¹⁴. In ruling ⑧, Oosaka High Court stated that “contact between the non-custodial parent and the child is essentially beneficial to the healthy development of the child, and therefore it should, as a rule, be allowed, except in cases where there is a threat that the child’s welfare will be harmed through contact”⁴¹⁵.

At present, many scholars and practitioners agree that contact should not automatically be restricted or excluded simply on the grounds that the residential parent has remarried. Rather, it is argued, all circumstances relevant to a particular case (such as the age and stage of development of the child, to what extent the child is aware of the non-residential parent, past

⁴¹² For example Otsuka speaks of “the right of the child to build a new family” (as colliding with “the right of the biological parent to contact with the child”), and contact with the non-residential biological parent as something negative that will unsettle the new household the child is living in. He also argues that in some cases a child might grow up without problems in a scenario where it has more than two parents, but that in such circumstances it is also likely that the child’s welfare will be hurt (大塚・前掲 (注 224) 259 頁), also 北野・前掲 (注 241) 263 頁). But also more recently 岡部・三谷『実務家族法講座』民事法研究会 (2006) 207 頁。

⁴¹³ 善元・前掲 (注 261) 165 頁、棚村・前掲 (注 227) 16 頁、又は 83 頁以下。

⁴¹⁴ 中村恵「再婚家庭の中で暮らす子と非監護権者との面接交渉」法セ増刊 (速報判例解説 Vol. 1) 119 頁 (2007) , 122 頁。

⁴¹⁵ 家月 58 卷 11 号 47 頁 (51 頁)。

contact or the lack thereof with the non-residential parent, and the particulars of the relationship of the child with the new spouse of the residential parent) should be considered, in order to determine the concrete effect contact would have on that particular child⁴¹⁶.

Interpretation(s) by the Courts as to What is Harmful to the Best Interests of a Child in the Remarriage/Adoption Scenario Interestingly, although the majority of the Japanese case law (as well as a lot of the literature, see also further below) see contact between the non-residential parent and the child as potentially harmful to the child, there is some variation as to the interpretation of what constitutes concrete harm to the child in this scenario. Concrete harm to the child living in a step-family from contact with the external natural parent is argued to originate, for example, from the following: (1) emotional unsettling of the child (especially a small child) through contact in the early (fragile) stage of the establishing of the new (step-)family, as the new household and the new parent-child relationship have not stabilized yet (ruling ⑨, also ⑧)⁴¹⁷; (2) emotional unsettling of the child (especially a small child) through contact in later stages of the

⁴¹⁶ 細矢ほか・前掲 (注 218) 81 頁, similar 榮春=綿貫・前掲 (注 274) (but somewhat cautious about contact in the remarriage/adoption cases): all relevant circumstances should be considered and in cases where there is “minimal effect on the custody of the child etc”, contact could be allowed (337 頁).

⁴¹⁷ Ruling ⑨: (in this particular case, official adoption had taken place just a few days before the adjudication of the family court concerning contact, however, the step-mother had lived in the same household as the child for the past year and a half) the court judged that “it cannot be said that the emotional bond between the child and [the step-mother] is yet as strong as that between a legal mother and her child (実親子). In such circumstances, it is inevitable that at present, in order to avoid disturbing the care environment of [the child], contact between [the non-residential legal mother] and the child should be restricted.” Consequently, the court denied any direct contact between the child and the non-residential legal mother, as well as contact via the phone and any exchange of letters. The residential father was ordered to send the non-residential legal mother 2 photos of the child once a year, together with copies of the child’s report cards. Also the court in ruling ⑧, which allowed rather generous contact in the end, argued that as the new household was still in the process of establishing itself, it was necessary to refrain from over-night visits at the non-residential parent’s house in order to avoid harm to the emotional and psychological stability of the children concerned.

establishing of the step-family, *because* the new household and parent-child relationships have already stabilized (and the child is “leading a peaceful life” in the new family) (rulings ②, ③、④、⑥); (3) the child is possibly not aware that one (or both) of the grown-ups that are living with him/her is not his/her biological parent (as in the case of ruling ④, but also ①／②⁴¹⁸), and the sudden appearance of a “second mother” or “second father” would unsettle the child and “hamper its healthy mental development”.

Concerning (1) above, this argument also appears in literature⁴¹⁹, and is based on the understanding that in an early stage of the forming of the step-family, where sufficient stability in the new household has not yet been reached, contact with the non-residential legal parent could unsettle and possibly break up the new household and consequently harm the child⁴²⁰.

Concerning (2) above, this logic appears especially in older case law, which tended to argue that the non-residential legal parent should not unsettle the child by insisting on contact, considering that the child had already experienced the unfortunate circumstances of the parents’ divorce, but had been given a new opportunity to grow up in a “complete” family, had managed to adapt to the new family, and was now leading a peaceful life in this new family.

Concerning (3) above, Japanese case law reveals varying attitudes among

⁴¹⁸ These do not appear to be isolated cases. Yokota et al (2009) also point out, for example, that in domestic relations practice it is not rare to come across a case where the custodial parent has told the child that the other natural parent has passed away (横田ほか・前掲 (注 221) 8 頁).

⁴¹⁹ 早野俊明「ステップファミリーにおける面接交渉」『家族と法の地平—三木妙子・磯野誠一・石川稔先生献呈論文集』160 頁 (2009 年) (182 頁, 184 頁以下)、横田ほか・前掲 (注 221) 8 頁。

⁴²⁰ Hayano (ibid) consequently suggests that there should be no direct contact between the child and the non-residential parent for the first couple of years from the establishment of the new household. Hayano also suggests other indicators: whether both spouses have children from their previous relationships, or only one of the spouses, and in cases where the new spouse of the custodial parent has no previous children, whether it is a step-*mother* or a step-*father* (the former considered more problematic) (p. 184).

judges concerning what is in the best interests of (or, reversely, what is harmful for) a child who would be confronted with their biological parentage (which he or she was previously not aware of) through contact. Rulings ①/② are concerned with contact between a child living in a step-family and its non-residential legal parent, where the child had been told by its residential father that the new spouse of the father is in fact its “real mother” and that the previous spouse of the residential parent (the biological mother) was only taking care of the child until now due to some special circumstances. In the case of ruling ④, referred to above, the non-residential legal mother petitioned for contact with a child who had been adopted by its paternal aunt and uncle (the father had been appointed as parent with parental authority at the time of the divorce of the parents) at a very young age and believed the adoptive parents to be its biological parents. In ruling ①, Tokyo Family Court argued as follows: (concerning the fact that the residential father had told the child that the new spouse of the father was the child’s “real mother”) “leaving aside the question of the propriety of [the father] telling [the child] such things, it is, for one, doubtful that [the child], who was living with [the non-residential mother] until (s)he was 6 years old, really believes [the father]’s explanations to be the truth; and even supposing that (s)he does believe [the father]’s story to be true and as a result feels somewhat agitated at the prospect of having contact with [the non-residential mother], when taking into consideration [among other things the fact that [the child] was reluctant to be handed over to [the father] and after weighing [the negative effects of such possible agitation] against the benefits to [the child] from contact with [the mother], it does not follow as a matter of course that the welfare of [the child] will be harmed through contact.” In ruling ② (the ruling of the appellate court of ①), the court did not refer to the fact that the child had been told that the step-mother was its biological mother, but stated that “despite the unfortunate circumstance of his/her parents’ divorce, [the

child] has, as a result of the efforts made by [the father] and his wife /../, adapted well to his/her present family life and is leading a peaceful life. If under these circumstances [the child] would be faced (面会) with [the non-residential/ non-custodial mother] as his/her mother, [the child] would, as is rightfully feared by [the father], be dragged into the conflict between [the father], [the mother] and [the step-mother], and there is a very real risk that [the child]'s peaceful family life would be thrown into turmoil, his/her innocent child's heart would be wounded, and his/her healthy mental development hampered." Consequently, ruling ② denied any contact. Ruling ④ is almost identical to ruling ② in its reasoning, stating that if the child who believed the aunt and uncle to be her biological parents and was understood to lead a peaceful life under their care, were to have contact with the contact-seeking non-residential/ non-custodial mother, the child's "innocent child's heart would not only be wounded, but there is a very high risk that her healthy mental development would be hampered and her peaceful family life with [the adoptive parents] would be thrown into turmoil." On the other hand, in other instances, Japanese courts have stated the importance of the child knowing of and having contact with the non-residential parent⁴²¹.

⁴²¹ See the 14 Aug 1989 ruling of Chiba Family Court (家月 42・8・68) (the child (3 years old at the time of the rulings) believed that the younger brother of the residential mother, who sometimes visited the child and the mother, was its father, the mother was adamantly opposed to any contact.) Chiba Family Court stated that the child in this case found itself in "extremely abnormal circumstances", and argued that although the mother claimed that contact with the non-residential father would unsettle the child emotionally, "such claims were based on [the mother's] emotional and one-sided views, and, taking into consideration the fact that [the mother's] younger brother could under no circumstances become [the child's] father, as well as the age of [the child], it should be said that in fact the welfare of the child would be served by arranging direct contact (面接) between [the child] and [the non-residential father] as soon as possible and letting [the child] know that [the contact-seeking father] was his real father (真実の父)". Consequently, the Court ordered contact twice a month of the length of at least 3 hours. (Tokyo High Court (ruling of 10. Feb 1990 (家月 42・8・56)) revoked the decision and sent it back to the first instance, arguing that considering the age of the child, the virtual lack of any previous contact, the mutual distrust between the parents, the adamant

Changes in Japanese Society and Contact with a Child Living in a Step-Family It has been pointed out in literature that second and third marriages of people with under-age children are no longer a rarity in Japanese society⁴²², and that the formerly dominant understanding that in such cases no contact with the non-residential non-custodial parent is desirable, is increasingly considered unacceptable⁴²³. It has also been argued in the context of the remarriage-adoption scenario, that the child is perfectly capable of maintaining a relationship with the non-residential parent alongside relationships with a residential parent or parents (biological or adoptive) exercising custody⁴²⁴.

opposition of the mother to contact, stated that although it was understandable that the non-residential father wished to rectify the present situation and make the child aware of its father, at present contact would have “a vastly harmful effect on the emotional stability of the child and it is highly likely that the welfare of the child would be harmed”).

⁴²² There are no clear statistics as to the number of step-families or children being raised in step-families in Japan. The statistics do indicate that one in every 4 marriages is a remarriage for at least one of the spouses (according to the Vital Statistics (人口動態統計) on the Ministry of Health, Labor and Welfare for 2013 (retrieved from <http://www.e-stat.go.jp/SG1/estat/List.do?lid=000001127023>), out of all the marriages entered into in Japan in 2013 (total number: 660,613), 173,569, or 26.3 % were remarriages (remarriage for both husband and wife: 62,138 cases or 9.4 % of all marriages; remarriage for husband but first marriage for wife: 64,772 cases or 9.8 % of all marriages; remarriage for wife but first marriage for husband: 46,659 cases or 7.1 % of all marriages). Considering the large number of second or third marriage, it is estimated that the number of children living in a step-family is also growing (早野・前掲 (注 419) 161 頁 and others).

⁴²³ 山田美智子(FPIC)「父母の再婚と面会交流」戸時 685 号 (2012 年) 79 頁以下。

⁴²⁴ 二宮・前掲 (注 255) 127 頁、also 山田亮子「面接交渉の取り決めについて」「季刊教育法」153 号 (2007 年) 72 頁、75 頁 about simultaneous “biological parent-child relationships”, “legal parent-child relationship etc”. In response to a growing need, in recent years a number of books offering information and advice to parents and children living in a step-family, have been published in Japan. Two examples of such book are 沢慎司、茨城尚子、早野俊明、SAJ 編著『Q&A ステップファミリーの基礎知識—子連れ再婚家族と支援者のために』(明石書店、2006 年) and 新川てるえ「子連れ離婚を考えたときに読む本」(日本実業出版社、2006 年). The former stresses the significance of the relationship between the child and the non-residential parent, and advises residential parents and step-parents to not obstruct contact between the child and the external parent, but rather to support and urge such contact (p. 155-157, 206 etc). The book also advises the adults to make the child aware of the non-residential parent's presence as early as possible (p. 178-179), and stresses that the more parents caring for a child, the better (p. 155-156).

On the other hand, some take a more cautious stand towards contact in the remarriage/adoption scenario. For example Yokota et al argue that although step-families are no longer a rarity in Japan, and although there are cases where contact between the non-residential legal parent and the child is exercised without any problems, there are still many instances where the emotional conflict between the residential and non-residential (legal) parents is intense (and hence the situation poses a viable risk to the best interests of the child)⁴²⁵. Yokota et al also point out that in recent years Japanese translations of picture books, mostly from the US, depicting step-families and contact between the child and an external parent in a positive light (embracing having “two homes” and “two mothers/fathers”), have been published, but they express doubts concerning whether such attitudes towards step-families can be accepted in Japanese society without reservation (although allowing that attitudes in Japan towards contact with children living in a step-family are gradually changing)⁴²⁶.

Summary: The general stance of the courts towards contact in cases where the residential parent has remarried and/or the new spouse has adopted the children, should be said to be rather cautious. With the exception of rulings ⑦ and ⑧ above, contact (especially direct contact) in such cases has either been excluded or limited to a couple of times a year. There appears to be some variation from judge to judge concerning the interpretation of what constitutes concrete harm to the child from contact in the remarriage/adoption scenario, and the significance of contact with the

⁴²⁵ 横田ほか・前掲（注 221）8 頁. Yokota et al (speaking from their experience as practitioners) point out several factors that can heighten the conflict between the grown-ups in cases where the custodial parent has remarried: on the one hand, they point out, it is not entirely uncommon for the residential parent to tell the children that the other parent has passed away, and on the other hand, there are many non-residential/ non-custodial parents who are adamant about contact, as they want to ascertain the well-being of the children, partly as a result of reports in mass media involving child abuse by step-parents.

⁴²⁶ Ibid.

external parent. Similarly, opinions among scholars appear to differ.

2 Step-Child Adoption in Japanese Law

Japanese case law concerning contact between a child living in a step-family and the non-residential legal parent includes cases where the new spouse of the parent who exercises parental authority has adopted the child of their spouse. Below I will briefly introduce the relevant statutory law, as well as debate among scholars concerning step-child adoption and the legal position of the step-parent.

Japanese law allows step-child adoption. Japanese law knows two types of adoption, the so-called “regular adoption” ((普通)養子縁組) and special adoption (特別養子縁組). In principle, in the case of a step-child adoption, both types of adoption are possible⁴²⁷, however, the requirements/conditions for a special adoption are stricter, and the legal consequences differ somewhat. Japanese case law and scholarly opinion tend to deem special adoption by step-parent inappropriate in most cases⁴²⁸, and, possibly as a

⁴²⁷ Indeed, § 817-3 II and proviso to § 817-9 specifically refer to special adoption of the child of the other spouse.

⁴²⁸ Practitioners and legal scholars are generally unwilling to allow special adoption of stepchild by a step-parent (as pointed out by 栗林佳代「継親子関係をめぐる諸問題」(社会的親子特集) 法時 86 巻 6 号 40 頁 (2014) (41 頁)、早野俊明「日本におけるステップファミリー(子連れ再婚家族)の法規制」憲法論叢 13 号 57 頁 (2006 年) (65 頁)). It is argued that in the case of step-parent adoption the conditions stipulated in § 817-7 (“A ruling of special adoption shall only be made *if both parent of a person to be adopted are incapable or unfit to care for the child* or there are any other special circumstances, and it is found that the special adoption is especially necessary for the interests of the child”) are not met, as the custodial spouse of the step-parent is caring for the child (ibid). Some also caution against allowing special adoption by a step-parent by pointing out that special adoption can only be dissolved under very strict conditions (817-10) (中川良延 in 中川善之助＝山畠正男編『新版注釈民法(24) 親族(4)』(有斐閣、1994 年) 352 頁). On the other hand, there is debate concerning the interpretation of “special circumstances” in § 817-7, with some arguing for a looser interpretation in the case of step-child adoptions (see 床谷文雄「嫡出否認をした『継子』を特別養子とする申立てを認容した事例」判タ 949 号 78 頁、79 頁、中川高男「特別養子縁組申立人夫婦の一方の非嫡出の子との民法八一七条の七にいう特別の事情」リマークス 1998 〈上〉 78 頁など. For case law, see 名古屋高決昭和 63 年 12 月 9 日 (家月 41・1・121) (*adoption not allowed*), see also 東京高裁決平成 8 年 11 月 20 日 (家月 49・5・78) (嫡出否認した子, *special adoption allowed*,

consequence of this, step-families tend to opt for regular adoption. Hence, below I will concentrate on this type of adoption in the context of step-families.

Although step-child adoptions are not uncommon in Japan⁴²⁹, the law concerning step-child adoptions has been the target of some criticism from scholars. The legislator has sought to simplify adoption by a step-parent by waiving the permission of the family court in cases where the child to be adopted is “a lineal descendant of either the adoptive parent or the adoptive parent’s spouse” (proviso to § 798); the permission of the family court is, as a rule, required for the (regular) adoption of a minor (§ 798)). Some authors argue that, in order to guarantee that the interests of the child are protected, the permission of the family court should be required for all adoptions of minors, including those by step-parents⁴³⁰. In addition, the consent of the external parent who does not have parental custody in relation to the child, is not required in the case of a regular adoption (§ 797 I)⁴³¹. This means that it is relatively easy for the spouse of the parent with parental authority to adopt his/her step-child without the non-residential legal parent even knowing about the adoption⁴³². It has been argued by some scholars that the consent of the non-residential (legal) parent who does not have parental

see also 原審の千葉家審判平成 8 年 3 月 5 日); 名古屋高決平成 15 年 11 月 14 日 (家月 56・5・143) (*special adoption deemed permissible in a case where the step-parent wished to adopt a child of their spouse, in whose case there was no legal parent-child relationship between the child and its father*).

⁴²⁹ Suzuki (2008) p 471 points to the high ratio of step-child adoptions among adoptions of minors as a point of similarity between Japan and Germany.

⁴³⁰ 中川良延 in 中川善之助＝山畠正男編『新版注釈民法 (24) 親族 (4)』(有斐閣、1994) 248 頁、山本正憲『先例判例 養子法』(日本加除出版、1996 年) 73 頁.

⁴³¹ In case of a special adoption: § 817-6: A ruling of special adoption shall only be made if both parents of the person to be adopted give his/her consent to the special adoption, provided that this shall not apply in cases where the parents are incapable of indicating their intention or the parents have abused the child, abandoned the child without reasonable cause, or there is any other cause of grave harm to the best interests of the child.

⁴³² And this, in fact, happens rather frequently, as pointed out by 鈴木博人「ドイツの養子法—福祉型養子お連れ子養子を中心に—」民商 138-4・5-64 (2008 年) 492 頁.

authority should also be required in case of a regular adoption⁴³³.

As a result of adoption (both regular adoption and special adoption), a legal parent-child relationship will be established between the child and the spouse of the parent who had sole parental authority before the adoption (§ 809)⁴³⁴. Consequently the spouse of the parent with parental authority, who has adopted the child, will have joint parental authority over the child together with their spouse (§ 818 II)⁴³⁵. A significant difference between regular adoption and special adoption in Japanese law (and also step-child adoption in Germany and in Japan) is that, whereas in the case of special adoption the (legal) relationship between the child and the legal non-residential parent who does not have parental authority in relation to the child (as well as the relatives of that parent) is dissolved (§ 817-9), this is not the case with regular adoption, where the child retains a legal parent-child relationship with the non-residential parent. This means, for example, that that parent can still apply for contact with the child (as is apparent from the case-law referred to earlier).

To summarize, on the one hand, the new spouse of the custodial parent can adopt the child without the consent (and, indeed, without the knowledge) of the non-residential legal parent, but on the other hand, the legal parent-child relationship between the non-residential parent and the child will be retained, and consequently the non-residential (legal) parent can still apply for contact with the child (however, as introduced above, case law tends to in fact restrict or exclude the actual exercise of contact in such cases).

⁴³³ 石川稔「監護権者または非監護権者たる父母の同意を得ない代諾養子縁組の効力」沼邊愛一＝太田武男＝久貴忠彦編『家事審判事件の研究（１）』（一粒社、1988年）216頁、223頁。

⁴³⁴ § 809 An adopted child acquires the status of a child in wedlock of his/her adoptive parent(s) from the time of adoption.

⁴³⁵ § 818 II If a child is an adopted child, he/she shall be subject to the parental authority of his/her adoptive parents.

3 The Legal Position of the Step-Parent in Japanese Law

From the point of view of the law, at present, adoption is the only means to establish a legal parent-child relationship between the child and the step-parent with all its legal effects, especially parental authority and custody, obligation to support (扶養義務 in § 877 I) and rights concerning inheritance. Without undergoing adoption, a step-child and step-parent are related by affinity in the first degree (§ 725, § 726), which means that they only have a mutual obligation to “help each other” as “relatives who live together” according to § 730, and, only under “special circumstances” a duty to support (§ 877 II). Although the step-parent will, in reality, care for the step-child much in the same way as a custodial parent, there is no legal basis for this exercise of care in Japanese law at present. In addition, following the divorce of the custodial parent and the step-parent, case law has denied contact between the child and step-parent (東京家審昭和 49 年 11 月 15 日 (家月 25・10・61)).

Especially in recent years there has been increasing debate among scholars concerning the legal standing of a step-parent, combined with criticism towards the current regulation of step-child adoption⁴³⁶. So far, no legislative action has been taken.

⁴³⁶ 大村敦志「『再構成家族』に関する一考察」民研 500 巻 (1998 年) 34 頁以下、早野俊明「日本におけるステップファミリー (子連れ再婚家族) の法規制」憲法論叢 13 号 (2006 年) 57 頁以下、鈴木博人・前掲 (注 432) 470 頁以下 (comparing Japanese and German law, pointing out similar problems concerning step-child adoption in Germany and Japan)、栗林佳代「継親子関係をめぐる諸問題」(社会的親子特集) 法時 86 巻 6 号 40 頁以下 (2014) (specifically about obligation to support and exercise of parental authority by the step-parent, as well as contact with step-child following divorce (comparison with French law), copious further references), etc.

Final Summary and Conclusion

German and Japanese legal systems have answered very differently the questions I posed in the introduction to this thesis, concerning the general significance of a continued personal relationship between a child and its non-residential parent, concerning what is to be understood to be in best interests of the child, concerning the (legal) standing of a step-parent in relation to their step-child, and so forth. The scenario of the remarriage of the residential parent provides interesting insights into all these questions. It can be concluded that German statutory and case law stress the importance of a continued personal relationship via contact between a child and its non-residential parent for the child, while also not downplaying the importance of the step-parent and the new step-household for the child; Japanese law clearly prioritizes the new household over the relationship of the child with the non-residential legal parent.

Contact between a Child Living in a Step-Family and the Non-Residential Parent

As introduced in Chapter I, Japanese case law concerning contact between a child living in a step-family and its non-residential parent tends to restrict or completely exclude contact between the child and the non-residential parent in cases where the child in question is living in a step-family. Especially older case law has justified the exclusion of the non-residential parent by arguing that the non-residential parent should not upset and confuse a child who is living in an otherwise happy, stable and wholesome new household, by insisting on contact.

In German case law, on the other hand, (as introduced in Chapter II) since at least the end of the 1990s, contact between the child and the external parent is generally allowed in cases where the child lives in a step-family. It is noteworthy that as recently as the 1980s, there was a tendency to restrict

contact in such a scenario, prioritizing the uninterrupted integration of the child into the new household and the relationship between the child and the “new” parent.

The change in German case law, and the current tendency of German courts to allow contact in the step-family scenario, is possibly due to the following:

(a) The strong position of the non-residential parent seeking contact. In Germany, a parent’s right to contact is a constitutional right based on § 6 II GG. In addition, it is noteworthy that a row of higher court decisions and reforms of statutory law have strengthened the rights of the non-marital father in relation to their child, which has in turn been argued by some to have contributed to the tendency of the courts allowing more contact for non-residential parents in general. However, as already noted earlier, the fact alone that the parent’s right to contact is a constitutionally protected strong right, does not convincingly explain the change in case law concerning contact between a non-residential parent and a child living in a step-family, as the understanding that a parent’s right to contact is derived from the parental rights stipulated in § 6 II GG was already generally accepted by the 1980s (the period where the earlier case law introduced in this thesis originates from). In conjunction with the strong position of the contact-seeking parent, it is also important to note that the residential parent has an obligation to, not only not obstruct contact, but to actively promote it (§ 1684 II).

(b) As introduced in Chapter 1 of this paper, the general backdrop to the change in case law concerning contact between a child living in a step-family and the non-residential parent, from restricting contact to promoting contact, is a gradually increasing tendency in case law and scholarly literature, concerning contact as a whole, to promote contact, based on the understanding that contact is generally in the best interests of the child and its development. This understanding was also introduced into statutory law

in the form of § 1626 III S.1., and paved the way to the recognition of a child's own statutory right to contact in Art 1684 I Hs. 1. Although there has never been absolute unity in Germany among legal scholars, as well as experts from other fields, as to the extent to which contact should be promoted by the courts, it is currently generally accepted among scholars and practitioners that § 1626 III S.1 (which states that the best interests of the child as a general rule include contact with both parents) is, as a *general* rule, justified. Hence, there is a common starting point for any deliberation of contact, in the form of a common assumption concerning its basic significance for the child. As is apparent from the case law introduced in this paper, the step-family scenario is not considered to be an exception to this general rule.

Indeed, although the standard for the restriction or exclusion of contact in a particular case is the elusive "best interests of the child", a notoriously vague standard, German statutory law provides a concrete hint, in the form of § 1626 III S. 1, for the interpretation of what is to be understood to be in the best interests of the child in the context of contact between a child and its non-residential parent.

While (a) and (b) above are not restricted to the remarriage-scenario, but apply in the case of contact in general, the following could additionally be argued to be the reasons behind the tendency of German case law to allow contact in particular in cases where the child lives in a step-family.

(c) Changing perceptions concerning step-families and "parents". As introduced in Chapter 1, older case law in Germany was quick to agree to the claims of residential parents that contact with the non-residential parent would confuse the child and hinder its smooth integration into the new family, arguments, which are no longer considered valid by German courts. Both judges and scholars have become increasingly aware that step families are "often not unproblematic" (an understanding backed by findings in social

sciences as well as statistics concerning divorce rates of second and third marriages), as in the process of forming a step-family, the members of a step-family face a myriad of problems specific to this particular type of family, with both the adults and the children often finding themselves overwhelmed. Taking the above into account, German judges and scholars recognize that in reality, a step-family might not turn out to be as “ideal”, or as close to a (harmonious) first-marriage nuclear family, as the parties had initially hoped, meaning that the bond between the non-residential parent and the child might possibly turn out more lasting than that between the child and a step-parent, consequently rendering the exclusion of contact between the non-residential parent and the child “in favor of” an undisturbed integration of the child into the new household and the stabilizing of the relationship between the child and the step-parent considerably less justified.

The case law introduced in Chapter 1 II also illustrates a change in the perception of the functions and roles of the various parent-figures in the child’s life. In cases concerning a child living in a step-family and that child maintaining personal contact to an external parent, German courts do not insist on “one-father-and-one-mother-per-child”. It is understood that both the step-parent and the non-residential parent, in their different roles and functions, are significant for the child, and that consequently both merit protection by the law and the courts.

(d) Changes in society, more particularly the increasing number of step-families, are taken into consideration as it is argued that there can be no social strain on a child from having three or more “parents”.

Japanese law (a) does not stipulate a statutory right to contact, of either a parent or a child. As introduced in Chapter 2, there has been a fair amount of debate in Japan concerning whether contact should be constituted as a legal right, or indeed, whether it *could* be understood to be a right of substantive

law considering the current statutory basis of contact, and, if contact was to be construed as a legal right, then *whose* right. I have introduced (in Chapter 2 I 2.1) the arguments that have been brought for and against construing contact as a legal right in Japan.

The question is, how relevant the discussion concerning whether contact should be construed as a statutory right or not is to the actual deliberation and outcomes of contact disputes. After all, a parent's right to contact, even if it is recognized as a formal legal right, is not absolute and will be restricted when the best interests of the child call for a restriction. Does the recognition of contact as a legal right (of a parent) in fact lead to the courts granting contact more liberally in individual disputes? Does a statutory right to contact somehow restrict/modify the "best interests of the child" standard, or does the "best interests" standard simply overrule any rights? Indeed, this raises the bigger question of how the concept or nature of "rights" (and "obligations") should be construed in the context of contact (or indeed family relationships and family law in general)? These are complicated questions to which this thesis does not provide a clear answer.

(b) Although both practitioners and scholars in Japan agree as to the general idea that contact should be restricted or excluded if it is harmful to the best interests of the child, it is clear that there is no consensus concerning the finer points in Japan. For one, opinions differ greatly among practitioners and scholars as to the general merits or demerits of contact for the child, whether the possible long-term benefits outweigh the possible immediate negative effects of contact to the child, or whether contact should only be understood to be beneficial for the child when the parents have a voluntary agreement concerning contact, but in principle harmful for the child when there is dispute between the parents. Hence, there is not even a common starting point for the deliberation of contact. As I have attempted to illustrate also in the case of case law concerning contact with a child living in

a step-family, there are differing interpretations among practitioners concerning the concrete effect the various individual factors relevant to a particular case have on the child and its best interests. Such differing interpretations of the significance of contact to the child, and what might constitute harm from contact to the child, are one of the possible causes for a lack of a clearer standard for the restriction or exclusion of contact, and consequently a rather inconsistent body of case law, with individual judges possibly basing their decisions on personal values.

(c-d) In general, Japanese courts appear to argue that in the context of contact with a child living in a step-family, from the point of view of the best interests of the child, the “new household” and its stability, and the wishes of the residential parent (and step-parent) should be prioritized over contact with the non-residential parent. Although in the literature in recent years some scholars and practitioners have argued that the child is capable of maintaining a relationship with the non-residential parent as well as a step-parent, and that with the increasing number of step-families in Japanese society the formerly dominant understanding that contact with the non-residential parent should be excluded is becoming increasingly unacceptable, the courts in principle still appear to be guided by a basic notion that the law should prioritize and protect the “typical” or “ideal” closed nuclear family consisting of (up to) two parent and their child(ren).

Importance of the Step-Parent for the Child, Protecting the “New Family”

Japanese case law in the remarriage scenario clearly appears to prioritize the relationship between the step-parent and the child, or the stability of the new household, over the relationship between the non-residential legal parent and the child (arguing that the child’s best interests call for this).

German courts appear to stress that *both* relationships are important for the child. The fact that German law does not downplay the importance of the

step-parent, is also evident in the legal regulation of the position of a step-parent in relation to a step-child (the so-called “small parental custody” (*kleine Sorgerecht*) (§ 1687b BGB), order that the child remains with persons to whom it relates (§ 1682), a right to contact with the child in case of a divorce or separation of the residential parent and the step-parent (§ 1685 II). Also, the legislator designed § 1618, concerning the surname of the child, to facilitate the integration of a step-child into the new family.

Interestingly, in Japan, the legal standing of a step-parent, unless that parent adopts their step-child, is very weak. As noted earlier, especially in recent years there has been increasing debate among scholars concerning the legal standing of a step-parent (combined with criticism towards the current regulation of step-child adoption), but so far, no legislative action has been taken.

Post-Separation/-Divorce Parent-Child Relationship through the Prism of Step-Child Adoption

Both in Japan and Germany, adoption is the only means to establish a legal parent-child relationship between the child and the step-parent with all its legal effects. As introduced in the same sections, statutory law concerning the adoption of a minor, including adoption by step-parent, differs considerably in Japan and Germany.

German law stipulates that all adoptions of minors are so-called “full adoptions”. In the case of a step-child adoption, this means that as a result of an adoption by step-parent, the legal parent-child relationship between the external parent and the child will be extinguished (§ 1755 I), which also means that that parent can no longer apply to the courts for contact with the child. As explained above, considering the severe consequences of an adoption, an adoption order for a step-child adoption is only issued by the courts, if a number of strict conditions are fulfilled. Importantly, the consent

of the external parent is always required (§ 1747).

The regulation of step-child adoption in German law has received a fair amount of criticism, with critics arguing, on the one hand, that, considering the significance of the relationship between the external parent and the child living in a step-family, the consequences of step-child adoption for the non-residential parent and for the child (a complete extinguishing of the legal parent-child relationship) are too severe, and that the near all-or-nothing approach as concerns the legal standing of the step-parent in relation to the step-child is not justified. Some have suggested amending the regulation of step-child adoption so that the relationship to the non-residential parent would not be extinguished, while others have argued for the strengthening of the legal position of the step-parent in relation to the child, in order to render step-parent adoptions largely unnecessary. As already mentioned above, partly due to such criticism towards step-child adoptions, the above-mentioned reforms strengthening the legal standing of a step-parent have been undergone, and although adoption is still the only way for a step-parent to attain the same legal standing as their custodial spouse in relation to the child, the necessity of undergoing adoption has been somewhat lessened by these recent amendments.

Japanese law (including case law) concerning step-families presents somewhat of a puzzle. On the one hand, a non-residential parent (who does not exercise parental authority or custody in relation to the child) cannot object to or stop a (regular) adoption of the child by the new spouse of the other parent (§ 797), and step-child adoption is further simplified by the fact that the permission of the court, otherwise required for a (regular) adoption of a minor, is not necessary in the case of a step-child adoption (proviso to § 798). In addition, the legal standing of the step-parent in relation to the child (if the step-parent does not adopt the child) is very weak. Hence it appears as if Japanese law is pushing the step-parent to adopt their step-child.

On the other hand, on the surface, Japanese statutory law appears flexible and open to allow some participation of the non-residential legal parent in the life of the child concerned, since in the case of a regular adoption, the legal parent-child relationship between the non-residential parent and the child will not be extinguished, leaving the door open for the non-residential parent to apply for contact. However, as seen above, the courts will in fact restrict or exclude contact in most cases, prioritizing the “new family” over the relationship between the child and the non-residential parent.

Final Conclusion

As seen above, Japanese and German statutory and case law have adopted very different approaches as to the significance of contact with the external parent for a child living in a step-family, and how to strike a balance between the different interests concerned (including the stability of and the smooth integration of the child into the new household).

In **Germany**, the statutory law and the courts (as well as the scholars) stress the importance for the child of, on the one hand, a continued relationship with the non-residential parent, and on the other hand the relationship with the step-parent and the integration of the child into the new family (the importance of the new family is highlighted, while not excluding the external parent from the life of the child). In connection with step-child adoption and the legal standing of the step-parent in relation to the child, in recent years, German law appears to have moved towards more legal flexibility for a more open definition of a family.

Japanese law, on the other hand, clearly considers the relationship between the child and the non-residential parent to be less significant than the relationship between the child and the step-parent, the “smooth integration” of the child into the new family, and, indeed, the wishes of the residential legal parent, with the courts often viewing contact between the external

parent and the child in a remarriage scenario as an in principle unwelcome interference by the external parent with the “new family” of the child.

When considering the case law concerning contact between a child living in a step-family and the non-residential parent in context with the statutory law concerning step-child adoption in Japan, and the weak position of the step-parent if that parent does not adopt the step-child, it becomes apparent that the basic approach of the Civil Code and of the courts is still to prioritize and protect the “ideal” or “typical”, complete (legal) nuclear family, with deep-set notions in the back-ground that (contact with) the non-residential parent is, after all, not that significant for the child, and that contact can therefore be relatively easily restricted.