





THE ECTHR AND CONFLICTS BETWEEN PARENTS

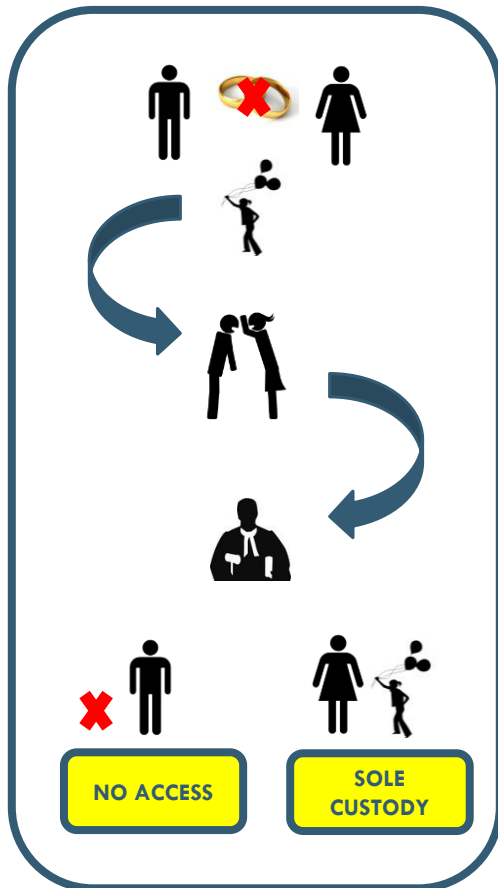
I. BASIC PRINCIPLES

A FOUR PARAMETERS CONTROL MECHANISM

				
PARAMETERS	<p>PROPORTIONALITY What is the respective weight of the conflicting interests at stake ?</p>	<p>SUBSIDIARITY Who is legitimate to strike the balance between the conflicting interests ?</p>	<p>SCOPE Should the balance be struck on the basis of abstract rules or on the basis of the specifics of individual cases ?</p>	<p>DENSITY Should the focus be placed on the substantial outcome or the decision-making process ?</p>
BASIC PRINCIPLES	<p>A fair balance must be struck but particular importance must be attached to the best interests of the child which may override those of the parent</p>	<p>National authorities have direct contact with all the persons concerned but stricter scrutiny is called for as regards parental rights of access</p>	<p>An examination of the whole family situation and of all relevant factors (factual, affective, psychological, material or medical) leading to a tailor-made solution</p>	<p>The Court must determine whether the decision-making process provided the applicant with the requisite protection of his interests</p>

II. COUPLE STATUS AND GENDER

A. CONTACTS/RESIDENCE : SOMMERFELD V GERMANY



“The domestic courts gave decisive weight to the mother’s initial prohibition on access and placed a burden on the applicant father which was heavier than the one on divorced fathers”



Predominant weight to the child’s best interest



Narrow margin of appreciation on contact matters



Decision based on the specifics of the case



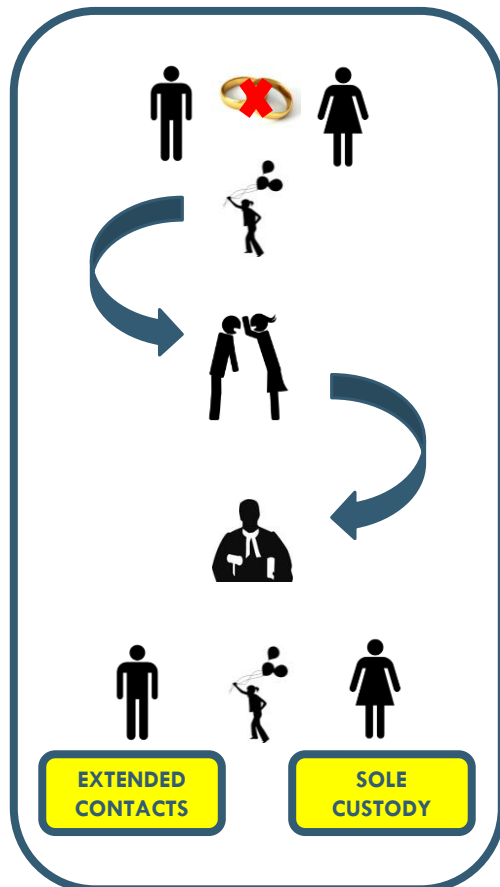
Satisfying decision-making process

No violation of the right to respect for family life

Discrimination based on marriage

II. COUPLE STATUS AND GENDER

B. CUSTODY/PARENTAL AUTHORITY: ZAUNEGGER V GERMANY



"The Court cannot share the assumption that joint custody against the will of the mother is prima facie not to be in the child's interest"



Predominant weight to the child's best interest



Wide margin of appreciation on custody matters



Decision based on general assumptions



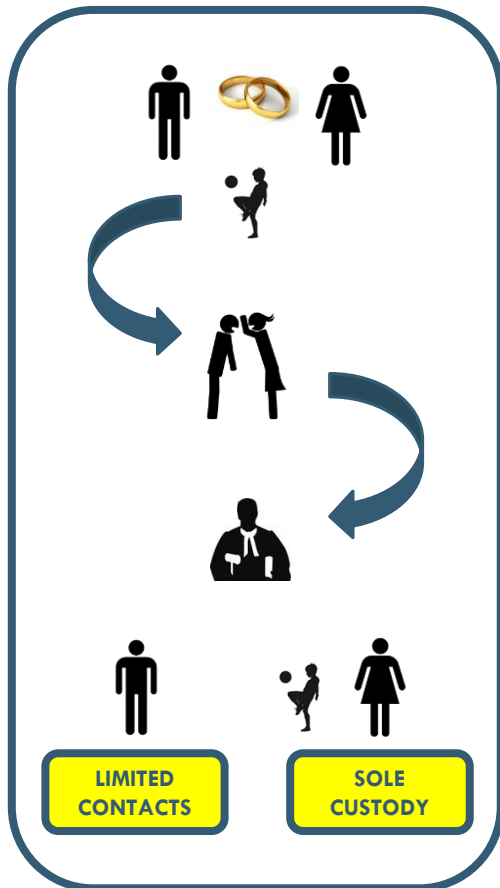
Judicial examination excluded from the outset

No need to examine the right to respect for family life

Discrimination based on marriage and gender

III. PROMOTION OF SHARED PARENTING ?

A. CONTACTS/RESIDENCE: KACPER NOWAKOWSKI V POLAND



“In principle, it is in the child’s best interests to maintain contact with both parents, in so far as practicable, on an equal footing, save for lawful limitations justified by considerations regarding the child’s best interests”



Predominant weight to the child’s best interest



Narrow margin of appreciation on contact matters



Insufficient consideration of the specifics



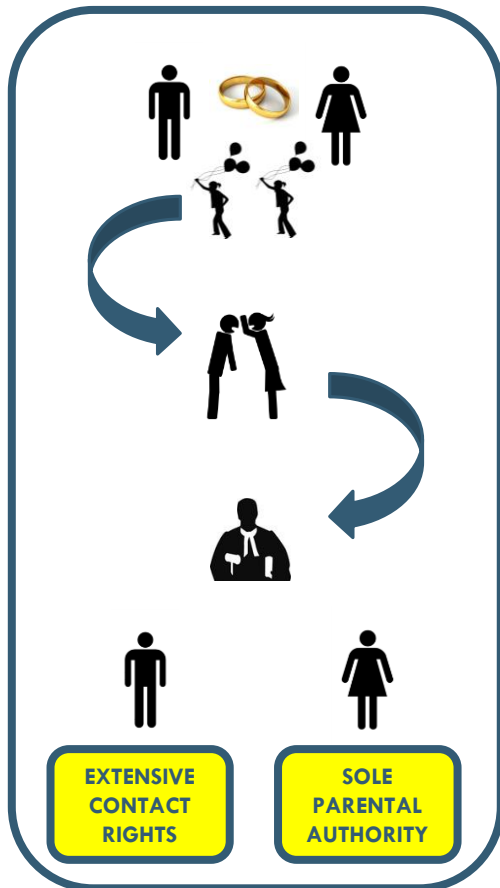
No evidence from specialised experts

Violation of the right to respect for family life

No need to examine discrimination based on disability

III. PROMOTION OF SHARED PARENTING ?

B. CUSTODY/PARENTAL AUTHORITY: BUCHS V SWITZERLAND



“The Court considers that the exclusion of shared parental authority where one of the parents opposes it [...] falls within the margin of appreciation”


Predominant weight to the child’s best interest


Wide margin of appreciation on custody matters


Decision based on the specifics of the case













Satisfying decision-making process

No violation of the right to respect for family life

No discrimination on the ground of marriage or gender
























IV. RELEVANT FACTORS AND PROHIBITED DISCRIMINATIONS

A. RELEVANT FACTORS





	Elsholz v Germany	 Strained relations between parents (best interest) ✓	 Narrow margin (contacts)		 No hearing No expert report ✗
	Süss v Germany	Firm wish of the child (best interest) ✓	 Narrow margin (contacts)	Tailor-made solution ✓	Satisfying decision-making process ✓
	Antonyuk v Russia	Mother's depression (best interest) ✓	 Narrow margin (residence)	Insufficient consideration for the specifics ✗	No expert report ✗
	Glesmann v Germany	Foster care (best interest) ✓	 Wide/ Narrow (both)	Tailor-made solution ✓	Satisfying decision-making process ✓

IV. RELEVANT FACTORS AND PROHIBITED DISCRIMINATIONS

B. PROHIBITED DISCRIMINATIONS

	Salgueiro v Portugal	 Sexual orientation 	 Not acceptable 	 Abnormal situation 	 Decision based on written proceedings 
	P.V. v. Spain	 Emotional instability caused by gender reassignment	 Very weighty reasons test	 Measured and tailor-made decision	 Specially commissioned expert
	Hofmann v Austria	 Practical consequences of mother joining Jehovah's Witnesses	 Objective + reasonable justification test	 Abstract assumptions relating to convictions	
	Kaçper v Poland	 Objective obstacle of the father's disability	 Narrow margin (contacts)	 Insufficient consideration of the specifics	 No evidence from specialised experts

V. THE (NON-) ENFORCEMENT OF THE DECISIONS BEATUS POSSIDENS ?

				
GENERAL PRINCIPLES	<p>A fair balance must be struck but particular importance must be attached to the best interests of the child which may override those of the parent</p>	<p>National authorities have direct contact with all the persons concerned but stricter scrutiny is called for as regards parental rights of access</p>	<p>An examination of the whole family situation and of all relevant factors (factual, affective, psychological, material or medical) leading to a tailor-made solution</p>	<p>The Court must determine whether the decision-making process provided the applicant with the requisite protection of his interests</p>
SPECIFIC PRINCIPLES	<p>Necessity to take into account the general interest in ensuring respect for the rule of law</p>	<p>States enjoy a “certain” margin of appreciation : their obligation to facilitate meetings is not absolute / it is not one of result, but of means</p>	<p>No automatic and stereotyped measures but rather a serious reflexion on concrete solutions and although coercion is not desirable, it must not be ruled out</p>	<p>The adequacy of a measure is to be judged by the swiftness of its implementation</p>