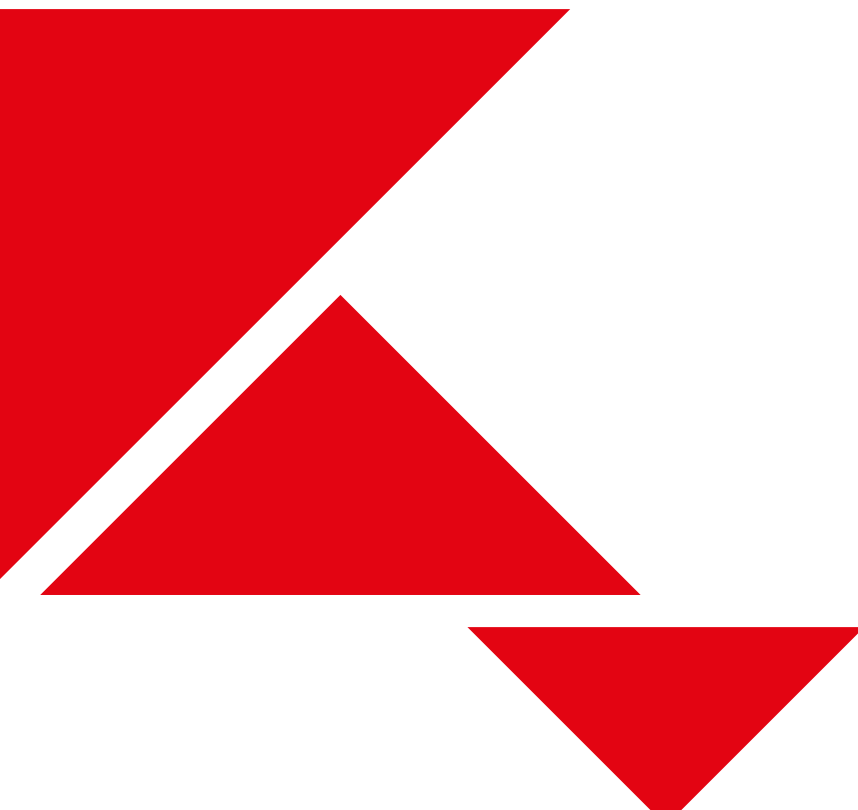


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The Role of Judges in Swiss Federal Jurisprudence Regarding Shared Physical Custody Social Sciences Perspectives

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RESEARCH PAPER

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Abstract

Court judgments must refer to the child's best interests when determining physical custody arrangements in parental separation cases (Article 3 para. 1, Convention on the Rights of the Child; Article 133, Swiss Civil Code). This paper explores whether the criteria outlined in Swiss federal jurisprudence for evaluating shared physical custody (SPC) in the child's best interest align with social science findings on children's outcomes in both lone and SPC arrangements.

Parents with higher socioeconomic status (SES) are more likely to adopt SPC arrangements. SES parents also tend to experience lower conflict and maintain higher quality relationships with their children compared to lower SES parents. These characteristics have partially explained the association between SPC and children's wellbeing, reflecting social selection in this custody arrangement and its better outcomes for children in SPC compared to those in LPC. However, over the last decade, SPC has gradually spread across social strata, aided by an increasing favorable legal framework. While research on children from disadvantaged backgrounds and high-conflict families remains limited and fragmented, there is growing evidence that SES alone does not explain the advantages experienced by children in SPC.

Research indicates that three key mediators shape children's well-being in both intact families and in situations of separation or divorce: the quality of parenting, the quality of the child's relationships with respective parents and/or parental figures, and the quality of the relationships between the parents and/or parental figures.

Given the evidence of various children's outcomes based on custody arrangements, it is crucial to understand the extent to which the arguments in court judgments are consistent with social science findings and, when they are not, what factors contribute to these discrepancies. Schwarzer (2021) analyzed approximately thirty¹ Swiss Federal Court (FC) judgments, primarily concerning SPC but also including LPC, as the legal criteria are largely similar with some nuances. The judgments were randomly selected from all judgments issued between July 2014 to March 2021.

The three main findings are: a) most judgments refer to social science research's criteria on the child's well-being but fail to acknowledge the current state of research, the limitations and open questions in the field; b) judgments differ greatly in the extent to which they evaluate the parents' pre-separation situation or its potential development over time; and c) the legal criteria are predominantly interpreted according to the "static approach" to the child's best interests, favoring the status quo, which results in granting LPC to the mother. The scarce consideration of empirical research on custody arrangements' impacts and judges' great interpretative power produce a certain level of unequal treatment for families. The FC generally supports the rulings made by the lower courts. For instance, it confirms both decisions that indicate a young child, due to their age, does not spend any overnight stays with their non-custodial parent², as well as those³ that favor SPC for young children. We conclude with some suggestions on how to reduce this problem.

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Keywords

Parental separation, shared physical custody; well-being; child best interests; judicial decision; Switzerland.

1. Introduction

The high and increasing rate of parental divorce and separation, along with calls for more gender equality in parental duties and responsibilities, has increased the demand for and the prevalence of shared physical custody (SPC) of children⁴ in Western countries over the last two decades (Bernardi et al., 2021). Although there is no single definition of SPC, in empirical investigations, any custody arrangement in which a child spends from 30% to 70%⁵ of his/her time with each parent is considered SPC (Bernardi & Mortelmans, 2021). In most cases, siblings are not separated except for a particular reason, such as the child's wish or an aspiration to share parental responsibilities more equitably (Hawthorne, 2000; Kaplan et al., 1992).

SPC prevalence varies considerably across countries and contexts. Most recent estimates indicate that it accounts for around 40% of all postseparation custody arrangements in Belgium, Sweden (Steinbach et al., 2021), British Columbia in Canada (Bala et al., 2017), the Netherlands (Poortman & Gaalen, 2017), Norway (Kitterød & Wiik, 2017), and Catalonia in Spain (Flaquer, 2017) as well as 30% in Spain as a whole (de Torres Pérea et al., 2021), but in some countries, such as Switzerland, only “about one-sixth (15%) of separated or divorced parents share the care of their children about equally, and children spend about the same amount of time in each other's home” (OFS, 2020, p. 12).

Parents are more likely to adopt this type of custody arrangement when they have a higher socioeconomic status (SES), lower conflict, and better child–parent relationship quality (Bernardi et al., 2021; Garriga et al., 2021). A supportive legal framework, public policies, and gender ideologies play an important role in supporting SPC prevalence as well as its diffusion across social strata, leading to increasingly diverse parents' socioeconomic profiles (Garriga et al., 2021; Recksiedler & Bernardi, 2020). SPC's prevalence tends to be higher in Nordic countries and some parts of North America, where SPC was legally adopted as the default or preferred childcare arrangement, than in countries where SPC has no or little legal support, such as Switzerland or Germany (Meyer et al., 2017; Recksiedler & Bernardi, 2020). A favorable legal context, coupled with public policies supporting gender equality in parenting during marriage and postseparation and divorce, such as parental and paternity leave or family–work reconciliation policies (e.g., flexible working conditions, qualified part-time jobs for women; flexible and affordable public childcare), supports SPC's prevalence not only among parents with high SES but also those with lower educational attainment, weaker economic resources, and worse conflict management skills (Cancien et al., 2014; Recksiedler & Bernardi, 2020).

Empirical social sciences have long investigated the consequences of parental separation

and children's living arrangements on children's well-being. Only recently, the literature has concentrated on the relative advantage of SPC for children of divorce and separation compared to the more common lone physical custody (LPC). Children with SPC tend to have better outcomes in terms of adjustment (i.e., externalizing and internalizing problems and interpersonal, physical, and academic functioning) and well-being than children with LPC (Bastaitis & Mortelmans, 2016; Bergström et al., 2014; Carlsund et al., 2012; Nielsen, 2018; Turunen, 2017). SPC seems also to be associated with advantages for parents in terms of conflict management (Bauserman, 2012), coparenting (Darwiche et al., 2021), employment and career (Kruyfhooff & Mortelmans, 2011), relational sphere (Emery, 2021), and their general mental health and well-being (Recksiedler & Bernardi, 2020).

Though in general, the benefits of SPC seem to hold despite controls for SES, the majority of studies conducted among parents characterized by high SES show less consensus on whether such effects on the child's well-being are significant in situations of high conflict (Nielsen, 2017) and extremely limited financial and educational attainment (Garriga & Bernardi, 2019; Nielsen, 2018). Given that many studies have reviewed parents with high SES, the evidence from disadvantaged family backgrounds is scattered; therefore, selection effects in the observed results cannot be excluded. In addition, the child's age also plays a role in the relative benefit of SPC versus LPC. For infants and toddlers, the limited number of studies available do not seem conclusive about the potential harmful effects of one custody form over another (Warshak, 2018). A recent systematic review of 50 studies (Vowels et al., 2024) analyzing living arrangements (SPC, LPC, stepfamilies, and intact families) between January 2010 to June 2022 did not support the notion that potential ruptures in the primary caregiving relationship due to moving or the moving itself between parents' homes create stress; rather, due to children's limited perceptions of time and communication abilities, frequent and short home transitions are specifically beneficial for them (Lamb & Kelly, 2001).

In Switzerland, despite a legal provision in favor of SPC since July 1, 2014, implicitly and since July 1, 2017, explicitly, SPC arrangements are still seldom practiced and mostly the result of informal or pre-separation parental agreements rather than a court's decision. Only when parents fail to agree on custody and at least one requires court intervention does the court step in. The general and universally recognized principle in Europe is that custody decisions shall be in the best interest of the child. Similarly in Switzerland, Article 298 al.2ter of the Swiss Civil Code (CC) stipulates that a judge⁶ must evaluate if an SPC regime corresponds to the child's best interests when a parent or the child requests, with the child's well-being as the paramount concern. The best interests of the child is a dynamic concept that emerged from

Article 3 of the Convention on the Rights on the Child (CRC) in 1989, ratified by Switzerland in 1997: In all actions taken by the state, the best interests of the child shall be the primary consideration (Article 3 al.1, CRC⁷). This concept is reinforced in the following alienate stating that the state's objective shall be the child's well-being (Article 3 al.2, CRC⁸). In the context of SPC, the research operationalized a child's well-being as consisting of five types of outcomes: emotional or psychological; behavioral; educational; physical or stress-related physical problems; and relational (Nielsen, 2018).

In family litigation, the best interests of the child encompass two dimensions: a *procedural* dimension, rules that define the court's organization and the decision-making process, and a *material* one that involves establishing hard⁹ and soft¹⁰ laws that help in determining the child's best interest. There is, however, no clear definition of the child's best interests in the CC or the CRC. The objective of the CRC is to enable the law to adapt to the sociological reality of families (Pichonnaz, 2003).

In line with its international commitments, the Swiss FC established *guiding criteria*¹¹ (i.e., reflecting the material dimension of a child's best interest, there are explained in "Socio-legal context" section of this paper) to help judges evaluate whether an SPC regime would create conditions for a child's harmonious development from an emotional, psychological, moral, and intellectual point of view. Given that the findings in the social sciences provide some indications of what circumstances are favorable to a child's well-being, it is crucial to contrast these principles and their application with the evidence.

2. Theoretical framework and Methodology

This paper explores whether the criteria against which judges evaluate the child's best interests in Swiss federal jurisprudence (Schwarzer, 2021) align with findings from social sciences regarding children's well-being related to physical custody arrangements.

To address our research question, we adopt a sociological approach to law "with the law" (Garcia, 2011, p.425). This approach recognizes the interdependence between law and social sciences and highlights the mutual contributions that both fields can offer (Luhmann, 2014). The sociology of law, in this context, aims to translate and interrogate social phenomena considering legal provisions. As researchers, we engage in a process of distancing ourselves from preconceived ideas or conceptions of the judicial system to reflect on possibilities that have been overlooked.

Specifically, we question how the judicial authority, explicitly or implicitly, conceives of

the child's well-being and post-separation family relationships when determining custody. What ideas, concepts, or norms are conveyed and reinforced by the authority's practices, and are they in alignment with scientific advancements regarding the child's well-being in a custody context?

Our methodology consists of comparing:

- 1) the results of the literature reviews on physical custody arrangements and children's well-being, drawing from the fields of demography, sociology, psychology, and law with
- 2) the findings of Schwarzer's studies (2021) on the legal criteria for determining physical custody through 34 federal cases¹² between July 1, 2014, and March 25, 2021.

The findings of Schwarzer's study (2021) show that the judges of the inferior courts have two main ways to interpret the child's best interests. There is a most prevalent "conservative" or static interpretative approach,¹³ according to which the current and pre-separation situations are key to "preserve" the child's well-being. The static approach generally results in favoring the status quo concerning the child's custody. As for the second minoritarian "progressive"¹⁴ or dynamic approach, it considers that the child's well-being and the coparenting practices may evolve over time. There may be emerging opportunities for enhancing the child's well-being in the future, which could not be present in the pre-separation situation (for instance, the presence of a caring stepparent or the father's willingness to be more involved). The dynamic approach requires, in addition to the status quo, a prospective analysis of the family situation. The study stressed that judges' high interpretative autonomy of largely defined legal criteria strongly contributes to a high level of unpredictability in family affair decisions, which in turn may introduce undesirable unequal treatment for children and parents undergoing legal procedures to define custody arrangements. Schwarzer (2021) pointed out that both approaches are generally present within the same judicial decision: sometimes in the arguments and other times in the wording of the criterion or in the terms used. The federal judge, Felix Schoebi, explained "that the Federal Court regularly follows the position (even contradictory) of the lower courts. It is also an expression of the fact that we, judges at the TF (Federal Supreme Court), are not always unanimous with regard to shared physical custody" (Gentiane Schwarzer, 2021, p. iii). One limitation of the analysis is that it did not examine the differences between regions or canton in Switzerland, although it is reasonable to assume that practices vary significantly from one location to another due to the cantonal justice system.

Our hypothesis posits that the prevailing "conservative" or static approach¹⁵ is only weakly

supported by social science findings regarding child’s well-being across living arrangements. In contrast, the progressive or dynamic approach aligns more closely with the latest research findings. This hypothesis arises from the observation that court judges do not have to follow up on situations once the judgement is set. As a result, they often opt for the safer route, making decisions on the current circumstances (a given) rather than considering potential future changes (a possibility).

The study conducted by Schwarzer (2021) was commissioned by the *Coordination romande des organisations paternelles et de coparentalité (CROP)*¹⁶. Its objective was to gain a better understanding of the Federal Court's role in clarifying and unifying the law, particularly regarding the criteria for physical custody allocation in federal jurisprudence (as detailed in the sub-section “The role of the FC in custody decisions”). The cases presented to the Federal Court are complex situations that could not be resolved by the first and second instance authorities. We hypothesize that one contributing factor to these unresolved cases is the ambiguity surrounding the definition of custody allocation criteria.

The study selected a random sample of judgements¹⁷ made between July 1, 2014, and March 25, 2021. This methodology ensures that each element studied has an equal chance of being included in the sample. A random sample is chosen when the population under study is clearly defined and known, as the rulings are selected at random.

A systematic content analysis of the Federal Court's judgements was then conducted. This method, which has its origins in the social sciences, is an increasingly popular approach aimed at putting the law into action. Through a deductive approach, that is, based on the results of social science research on factors related to child well-being and legal research on judicial decisions, Schwarzer coded the concepts related to child well-being, family, parenting, and co-parenting. The codification, which create the theoretical framework is explained below and summarize in a table.

2.1 The dominant “conservative” or static approach

This approach associates the child’s well-being with a *narrow definition of family*, a *gendered model of parenthood*, and *static coparenting practices*, which result in giving priority to the prevalent postseparation status quo—that is, one-parent (mother) custody.

Narrow definition of family: The family model of reference is the nuclear family consisting of two biological heterosexual parents and their child/children. Various types of families, such as blended families and their members, are not or are hardly ever considered by the judges in

analyzing the child's well-being in custody arrangements. *Gendered parenthood*, the model of reference for parenthood in which the division of roles between parents and their relevant importance for the child are defined by gender. The mother, who is in most situations the custodial parent, is considered central to the child's well-being in the case of infants and young children but also in the case of school-age children. As for the nonresident parent, mostly the father, his contribution to the child's well-being is perceived as limited or at least secondary, even more so as the father is more likely to be full-time employed and has fewer opportunities to care for the child (through part-time work, working at home, or self-employment). This fact alone, according to the judge, does not facilitate coparenting. *Static coparenting*: The judge perceives coparenting—the way parents work together to find solutions and support or undermine each other regarding their parental duties (McHale & Irace, 2011)—as being relatively static throughout time. He considers that parents' communication and cooperation skills, and thus their ability to resolve conflicts, are barely evolving; the pre-separation situation would be a strong indicator of the post-separation situation. Moreover, very good communication and collaboration between parents in all child-related matters are considered fundamental for the establishment of shared custody. *Preference for the status quo*: Finally, a judge considers that when family instability is greater, the child is worse off. It might partially explain why the status quo of the situation is almost systematically chosen as to whether it concerns a sole or shared physical custody situation.

2.2 The minority "progressive" or dynamic approach

This approach associates the child's well-being with a *broad definition of family*, a *nongendered model of parenthood*, and a *dynamic vision of coparenting practices*. In this approach, to decide, judges must consider how the situation is likely to evolve in addition to analyzing the status quo: "The child's best interests (*bien de l'enfant*) are not only determined by his or her current well-being, but also objectively by considering its future development" (Federal Swiss Court' judicial decision [FSC], 5A_771/2018, 28 March 2019 consid. 5.2.2.).

Large definition of family: The family is mainly defined from the child's perspective, considering his/her multiple attachment figures (e.g., half-brother/sister, stepparents, grandparents). The role and relationships with other figures of attachment, such as the biological mother and father, are acknowledged and considered while evaluating the physical custody that best responds to his/her best interests. *Ungendered parenthood*: Both parents are considered important attachment figures for the child in the case of school-age children and

infants. Even if there might be a primary attachment figure, which is usually the mother, the attachment with the other parent is not considered less effectively significant. Ungendered parenthood implies the recognition of present and future working setup opportunities for both parents that facilitate the child's care (e.g., part-time work, work at home, self-employment status). *Dynamic coparenting*: Coparenting—the way parents work together to find solutions and support or undermine each other regarding their parental duties (McHale & Irace, 2011)—is perceived as a process that can be discontinuous, meaning that events, such as a separation or the physical custody arrangement per se, can modify coparenting practices. It implies that the judge should conduct prospective assessment and even reassess the coparenting dynamic years after the separation or divorce. Moreover, in view of the importance attributed to the ties between the child and both parents, coparenting limited to the essential aspects of the child's life organization is sufficient for the establishment of SPC. Parental conflict of low to medium intensity, and, depending on the circumstances, even of high intensity, is not considered to hinder the possibility of SPC arrangement.

The table summarizes the main differences of the two approaches of the child’s well-being in the context of the judge’s evaluation of physical custody:

Concepts	Conservative/static approach	Progressive/dynamic approach
Child’s well-being	The child’s well-being must be preserved.	The preservation of the child’s well-being must be contrasted with potential opportunities for enhancing his/her well-being.
Family assessment method	Current and preseparation factors. One assessment.	Preseparation, current, and prospective factors. Prospective assessment and reassessment throughout the years.
Definition of the family	Adult’s perspective. Nuclear family/biological parents.	Child’s perspective. Large definition of family. Recognition of the role and relationships of multiple attachment figures (e.g., half-brother/sister, stepparents, grandparents).
Parenthood	Gendered parenthood. The mother is considered central to the child’s well-being, and the father limited or at least secondary. It implies the status quo of the situation even in terms of involvement in the labor market.	Ungendered parenthood. Both parents are considered affectively significant attachment figures, even if one might be primary. It implies the recognition of present and future working setup opportunities for both parents.
Coparenting:	Static coparenting over time.	Dynamic coparenting.

<p>communication and collaboration, parental conflict</p>	<p>SPC arrangement is compatible with:</p> <ul style="list-style-type: none"> • good or even very good communication and collaboration between parents regarding all aspects concerning the child is fundamental for establishing SPC. • very limited parental conflict in terms of frequency and intensity. 	<p>Possibly a discontinuous process (impact of events on coparenting). SPC arrangement is compatible with:</p> <ul style="list-style-type: none"> • limited communication and collaboration on essential aspects of the child’s life organization. • parent conflict of low to medium intensity and, depending on the circumstances, even of high intensity.
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Since the key findings of the study (Schwarzer, 2021) have been presented, we can conceptualise them alongside empirical research from the social sciences regarding physical custody arrangements and their impact on children’s well-being.

Given that separation and divorce are ongoing challenges, it is essential to understand how to achieve the best possible outcomes for children in postseparation living arrangements. To address this, we first outline the Swiss socio-legal context related to SPC. Next, we summarize the results of the literature reviews on physical custody arrangements and children’s well-being, drawing insights from the fields of demography, sociology, psychology, and law. In the second part of the study, we compare findings from social science research on children’s well-being across various custody arrangements with a content analysis (Schwarzer, 2021) of the legal criteria for determining physical custody in 34 federal cases between July 1, 2014, and March 25, 2021.

The comparison offers insights into how judges, both in the FC and lower courts, interpret child welfare in the context of custody arrangements. This will enable us to provide recommendations for refining the criteria used to determine physical custody, ensuring they better reflect the best interests of the child, along with suggestions for future research.

3. SWISS SOCIO-LEGAL CONTEXT

The most recent figures available show that in 2013, 12.1% of separated parents living in

Switzerland opted for SPC, whether voluntarily or following a court decision. Following the easing of legal access to SPC in 2017, the percentage of SPC arrangements rose slightly to 14.1 % in 2018, suggesting that the influence of social class on the selection of SPC may have started to diminish (Recksiedler & Bernardi, 2020).

Despite the new legislation, and even though more recent data are needed to fully grasp the consequences of the change, SPC remains a small proportion of custody arrangements in Switzerland, and its adoption will probably be slow due to two main reasons: first, social norms that display a low level of gender equality, which translates into weak family policies and a marked gender division of labor with parenthood, and second, the weak and supposedly traditional or nuclear family-oriented legal framework when it comes to SPC implementation. An unequal gender system, stronger in Switzerland than in other Western countries, supports the “traditional family” with a bread-winning father, a stay-at-home mother (Lamb, 1999), and LPC arrangements after separation and divorce (Recksiedler & Bernardi, 2020).

3.1 Low levels of gender equality

In Switzerland, the low level of the state’s involvement in family affairs, considered a private matter by principle, translates into a low level of gender equality in family policy support that indirectly endorses the “traditional family,” a family in which the mother is exclusively or mainly in charge of the child, and the father, the family income (Lamb, 1999).

In fact, “Swiss social policies and their shortcomings in terms of childcare, but also the functioning of institutions that thought out of family policies, even though they govern gendered forms that families take (for example, school hours or administrations and businesses opening hours) are thus entrusted with a not insignificant responsibility for the ways in which parents live and practice gender equality” (Fassa, 2019, p. 159). Nontraditional family forms, which involve any variation from the traditional family form, receive less or no support from the state.

Despite some reforms, such as the recent extension of paternal leave from 2 days to 2 weeks (on January 1, 2021), and current discussions at a cantonal level about establishing parental leave, there is very little supply of public childcare. When childcare is available, it is generally expensive in comparison with the Organisation for Economic Co-operation and Development average (OECD, 2023) and results in the demand for widespread part-time jobs among mothers.

Part-time jobs are often widespread and less career-oriented among women, whether during marriage or postseparation, due to gender-biased employment practices in the labor market and individual preferences (Stähli et al., 2009). All these elements contribute to perpetuating

traditional family roles both pre- and postseparation (Bernardi et al., 2013).

3.2 The legal change in January 2017 and the legal criteria for deciding about custody

Swiss family law on postseparation matters has been substantially and regularly updated over the last 20 years, placing the child's best interests at the center of divorce and separation cases. This principle is articulated in General Comment No. 14 of the CRC, which states that it is the child's right to have his or her best interests considered as a primary consideration in judicial decisions (Article 3, February 2013, para. 1). Given a child's right, the judge must assess all custody arrangements, regardless of any explicit request or agreement by the parents. Since joint parental responsibility became the rule in Switzerland on July 1, 2014, for all parents regardless of their marital status and became explicitly stipulated in the law on January 1, 2017 (Article 298 2ter, SCC), the judge must evaluate whether SPC is in the child's best interests. This is one condition that one of the parents, as holders of joint parental authority, or the child can request, which is contrary to the CRC.

To evaluate a child's best interests and decide custody arrangements, the FC established seven (or eight) criteria (i.e., reflecting the material dimension of the child's best interests). Such criteria are deemed necessary for the child's harmonious development from emotional, psychological, moral, and intellectual perspectives.

The criteria, the exact titles of which sometimes differ across court decisions, reflect differences in interpretation (we note with the words in parentheses):

- I. the existence of (good) parenting skills in both parents, a prerequisite criterion;
- II. the (stability and) possibility for a parent to care for the child personally;
- III. the stability a pre-separation situation can bring to the child;
- IV. the parents' ability (and willingness) to cooperate and communicate;
- V. the geographical location and distance between parental homes;
- VI. belonging to a sibship or social circle; and
- VII. the child's wishes.

The last criterion in the jurisprudence, "the ability and willingness of each parent to foster contact between the other parent and the child," is mostly mentioned in the context of a request for LPC (Schwarzer, 2021). Thus, it is unclear whether the latter represents a criterion of SPC. The quality of the relationship between the child and both parents is one of three key protective

factors for the child’s well-being following parental separation. If the custodial parent is unable or unwilling to foster contact between the child and the other parent, in the context of sole custody, it is in the child’s best interests for the judge to analyze the possibility of SPC, which is more conducive to a quality relationship between the child and both parents.

The criteria are not hierarchically organized, and their relative importance depends on a judge’s discretionary power. Judges evaluate the importance of the criteria while considering the circumstances, the child’s age, and degree of maturity, with the child’s well-being as the paramount concern. The extent to which a judge weighs each criterion against the other or considers is discretionary and not based on the relative importance the criteria seem to have in empirical studies analyzing the complex interaction effects among them (e.g., between parental skills, parental conflict, and SPC benefits). In the field, namely court, the judge determines the vague definition of what constitutes the child’s best interests.

Despite the criteria, there are challenges in their application with regard to judges’ competencies and the public debate context on coparenting. First, being rather general, the criteria are sensitive to interpretation when applied in court. Far from an easy exercise, an unbiased interpretation requires substantive knowledge of family psychology and sociology (Cottier et al., 2018), which is not a requirement in a judge’s background. Second, the political and emotional debate about the necessity for children to maintain the relationship with both parents after parental separation or divorce and the emerging norm of coparenting (Bernardi et al 2021; Harris-Short, 2010) further affect a judge’s discretionary margins on matters of custody arrangements.

3.3 The role of the FC in custody decisions

The FC, the highest judicial body in the Swiss Confederation, plays an important role in “ensur[ing] a uniform application of federal law by the cantonal and federal courts” (Tribunal fédéral, 2016, p. 1), as granted by its mandate. Its decisions, which constitute the core of Swiss jurisprudence, serve as “a point of reference when laws or ordinances are subject to interpretation or when new situations are not yet regulated by law” (Tribunal fédéral, 2016, p. 4). The FC clarifies or unifies the interpretation of the law by annulling or validating a judgment of the cantonal judicial authority when he “has deviated without reason from the principles established by doctrine and jurisprudence, when he has based himself on facts that should play no role in the solution of the case in question, or when, on the contrary, he has not taken into

account circumstances that should imperatively have been taken into consideration” (FC 5A_771/2018, March 28, 2019, consid. 5.2.2). The judges of the lower courts and the FC refer not only to the jurisprudence but also the doctrine, none of which is superior to the other. The legal doctrine is also a source of inspiration for interpreting the law, stemming from the body of work devoted to the law by practitioners (magistrates, jurists, lawyers, notaries, and civil servants) and theorists (teachers and researchers; De Theux et al., 1995). The doctrine, which is composed of various doctrinal approaches and whose legitimacy is under permanent construction, refers among others to social science research. In the decision 5A_888/2016, April 20, 2018, consid. 3.1, or even 5A_834/2012, February 26, 2013, consid. 4.1. of the FC, social science research concerning a child’s well-being in the context of postseparation is in fact used as reference. However, decision 5A_425/2016, December 15, 2016, consid. 3.2.3, mentions, “Nothing can be deduced from the various psychological or psychiatric studies on the subject that pronounce absolutely in favor or against the introduction of such a model of care (SPC), since they do not take into account all the parameters that come into play in practice.”¹⁸ This does not imply a rejection by the FC of the role of social science research, but it tends to emphasize the importance of the judge’s discretionary power within each situation.

The FC’s decisions are supposed to clarify law subject to interpretation, such as the legal SPC criteria; the expectation is that judgments would then not be totally dependent on the respective judge or court but would be adapted to the families’ realities as well as the latest social science findings on the matter.

After having presented the Swiss socio-legal context, we discuss, in the following section, the research findings, the consensus, and controversies of the determinants of a child’s well-being in the context of shared and sole physical custody.

4. THE EMPIRICAL STUDIES ON SPC AND CHILD WELL-BEING

Before presenting the three key protective factors of a child’s well-being, which are more favored in an SPC than in an LPC context, we discuss the specificity of SPC as a family form, the role of the welfare state in SPC prevalence, and diffusion and the association between SPC and a child’s well-being.

4.1 The specificity of SPC as a family form

Family forms and living arrangements are changing rapidly throughout Europe, with lone

parenthood and blended families becoming the reality for an increasing number of families (Bernardi et al., 2018). SPC families are adopting and developing new practices in terms of family roles, duties, and responsibilities. Separated fathers with SPC are more involved in childcare, and mothers are more active in the labor market and the repartnering scene (Klunder & Meier-Gräwe, 2018; Schoppe-Sullivan & Fagan, 2020).

Understanding the main characteristics of new family forms and living arrangements (Thomson & Turunen, 2021) for SPC families requires analyzing the adequacy of the jurisprudence on SPC. It implies grasping and acknowledging the relationships between the child and both of his/her parents; the degree of involvement of all family members, such as the stepparents, half-siblings, and kin families; the dynamics of family relationships and their impact on co-parenting (Widmer et al., 2014); and the changes in the SPC parenting plan over time. The literature on the matter is limited, as researchers have mainly focused on the child's and parents' outcomes in terms of well-being in different custody situations in cross-sectional comparisons. Future research focusing on short- and long-term dynamics of SPC families' characteristics and parenting plans¹⁹ is needed.

SPC families redefine family roles and family boundaries because several of their structural features are challenging to traditional nuclear families. First, the parents do not coreside but are equally responsible for the daily care of their child, which challenges gendered parental roles. In SPC, each parent is fully involved, from waking to bedtime, in principle participating equally to provide comfort and discipline to the child. The child might even spend more time with both parents than if he/she was living together with both. In fact, parents who both value their identity as caretaker and earner tend to opt more for SPC than parents with traditional gender roles. Some authors describe this as a *gender revolution*, as children who experience this more equal division of labor may promote gender equality when they reach adulthood (DeRose et al., 2019).

Second, SPC is a challenge because it implies multiple socialization environments and an enlarged network of primary relationships. Distinct contexts are created by SPC arrangements in which new obligations for family members as well as relationships between the child and the family and kin take place. SPC provides more opportunities for a child to create and reinforce his/her relationship with the mother's and father's stepfamilies, his/her half-siblings, and both parental kin families, compared to an LPC arrangement (Kalmijn, 2013; van Houdt et al., 2018). Nielsen (2018) observed that in 24 out of 25 studies that assessed family relationships, the child's relationships with his/her parents, stepparents, and grandparents were better in SPC than LPC. According to Pelletier (2016), SPC positively impacts a child's sense of belonging to both

families. In this childcare arrangement, the child does not seem to demarcate his/her family in terms of households, as when he/she lives with both or one parent, but the family instead, which might include more family members. On the other hand, the composition of the family might be more exposed to changes, with new stepparents and half and stepsiblings.

Third, a typical SPC structural element is how often children commute from their parents' homes. The literature shows that commuting weekly is the most common, usually in conjunction with the weekend so that the child lives schooldays and leisure time with both parents, which positively contributes to a quality parent–child relationship (Berman, 2015; Lamb & Kelly, 2001). The parents' households are usually not far away from each other and close to the school to facilitate the SPC organization and help the child in maintaining close contact with his/her friends (Poortman, 2021; Walper et al., 2021). The geographical constraints of the parents not moving far away from each other seem to contribute positively to the stability of the child's households as well as his/her school environment (Pelletier, 2016).

Fourth, SPC is most commonly practiced with children aged 3 to 12 years old (Sodermans et al., 2013). For infants and toddlers, parents and judges are less likely to choose SPC because they tend to consider LPC more adequate in responding to the high need for stability (Hyst & About, 2007). Beyond 12 years old, SPC rates tend to decline, probably due to the importance of continuity and proximity in peer relationships for adolescents (Spruijt & Duindam, 2010) or extracurricular activities or specific schools they attend that might not be close.

Fifth, although parents who voluntarily opt for SPC have fewer conflicts than in SPC arrangements resulting from a court decision (Sodermans et al., 2013), SPC parents are more satisfied than LPC parents (Recksiedler & Bernardi, 2020). SPC creates more opportunities for communication and conflict resolution than LPC (cf. meta-analysis of Bauserman, 2012)

Sixth, SPC arrangements might induce higher costs than LPC, as the child's personal belongings are usually doubled and the child might have a room in each household (the latter might also be the case in LPC). Economic and organizational constraints, as well as often too-rigid implementation modalities, might lead to halting this care arrangement (Pelletier, 2016; Smythe et al., 2008). Flexibility in the parenting schedule seems to be crucial to responding to the child's and parents' evolving needs, contributing positively to the child's satisfaction (Nielsen, 2018). Further research on the dynamic of this childcare arrangement over time, especially on the percentage but also the grounds that lead to halting it, and the impacts on the child's well-being are needed. Pelletier (2016) warns that the change in childcare arrangements might be negatively associated too easily in terms of the child's well-being.

Achieving gender equality in parenting requires supportive legal regulations and public

policies, which have been increasing throughout Europe in the last two decades (Garriga et al., 2021).

4.2 The role of the socio-legal context in SPC prevalence and diffusion

The state and its legal framework, public policies, and gender ideologies play an important role in supporting the prevalence of SPC as well as its diffusion across social strata (Garriga et al., 2021).

In countries where SPC was legally adopted as the default or preferred childcare arrangement, its prevalence tends to be higher than in countries where SPC has no or little legal support (Recksiedler & Bernardi, 2020). For example, when SPC was introduced as the legally preferred physical custody in Sweden in 1992 and in Belgium in 2006, the rate subsequently increased up to around 40% in Sweden (Steinbach et al., 2021) and Belgium (Vanassche et al., 2017). In contrast, the prevalence of SPC remains low in countries where supportive legal legislation has not been adopted. In Germany, the rate is around 3.3% (Walper et al., 2021).

The legal framework may also influence the sustainability of care arrangements (Pelletier, 2016). According to Pelletier (2016), who studied postseparation parenting arrangement dynamics among Quebec children born in the late 1990s, SPC's implementation modalities tend to offer little space for adjustment, especially those resulting from a court decision, which in turn contributes to its cessation. The judicial system must reflect the dynamic character of parenthood postseparation and the child development needs by foreseeing and facilitating the adjustment of childcare arrangements.

The prevalence and sustainability of SPC also seem to depend on the acknowledgment of child–family network in law (Pelletier, 2016). In some countries, stepparents have achieved some legal recognition, such as in France and Sweden (Stewart & Timothy, 2020) making them more readily perceived as additional resources in the child's upbringing. This recognition is likely to positively influence the judge when evaluating childcare arrangements. Furthermore, legal acknowledgement of stepparents in the child's education may enhance household stability regarding separations and divorces. Additionally, parental and paternal leave, legally established in many Western countries have increased the amount of time that fathers report spending with their children over the last two decades, an indirectly SPC (Cancien et al., 2014; Recksiedler & Bernardi, 2020). Nevertheless, a supportive legal framework alone is insufficient to influence the prevalence of SPC and its diffusion across social strata, favorable public policies are also required.

SPC seems to counterbalance the negative effects of separation or divorce on children; most research has reported that children's well-being is positive overall. However, although there is a trend toward its diffusion across social strata in many countries, SPC seems to increase social inequalities among children due to a double pattern. First, parents with greater resources are more likely to opt voluntarily or via the court for SPC than other parents (Bauserman, 2012; Steinbach, 2019). Second, separation and divorce are on the rise and particularly affect families from a low SES background (Garriga & Cortina, 2017, Kennedy & Thomson, 2010). More affluent parents tend to live more stable family lives, whereas those with less educational attainment have more chance to experience lone parenthood, family dissolution, and complex family settings. Because of these diverging destinies (McLanahan, 2004), the increased risk of separation for families with lower SES might not compensate SPC diffusion and its benefit across social classes. This stratification in family lives leads to persisting and maybe even increasing social inequality among children of separated families (Garriga et al., 2021).

4.3 Well-being as a multidimensional and dynamic concept

Parental separation or divorce are challenging events for the child's adjustment and well-being that can last for years. The impact can be aggravated through risk factors or moderated due to resilience factors. Loss or minimal parental resources, loyalty conflicts, numerous family transitions, or loss of friends might negatively impact the child's well-being, whereas quality parenting, strong bonds between the child and both parents, good cooperation between parents as well as parental figures, or equal parental participation in the child's life can protect their well-being (Amato, 2003; Classens & Mortelmans, 2021; Lamb, 2012). Empirical studies have shown that family structure—married or divorced families and two-parent, single-parent, or blended families— Independently explains only a small portion of variance in a child's adjustment once the effects of family processes, such as parenting, parent-child relationships, parent-parent relationships, or the dynamics of parenting, are considered (Amato, 2005; Lamb, 2002; Lamb & Kelly, 2009).

A child's well-being is a multidimensional concept that encompasses many aspects, including social, psychological, and physical well-being. In the context of SPC, the research operationalizes it as consisting of five types of outcomes: a) emotional or psychological (e.g., life satisfaction, mood, anxiety, depression), b) behavioral (e.g., conduct problems at home or school, hyperactivity, use of substances), c) educational (e.g., cognitive skills, school/academic performances), d) physical or stress-related physical problems (e.g., obesity/overweight,

psychosomatic, sleep or digestive problems), and e) relational (e.g., the quality of the parent–child relationship; the quality of the relationship with extended family and peers; Nielsen, 2018). Child adjustment is an umbrella term referring to diverse aspects of psychological well-being. Well-adjusted children have sufficient social skills to maintain relationships and perform well in various contexts. Maladjustment can lead to behavioral issues and poor social skills (Lamb, 2012).

Social science research on the consequences of parental separation and divorce tends to show that children in intact families have better outcomes in terms of well-being and adjustment than children in postseparation living arrangements (Amato, 2003; Vowels et al., 2024). Among children of separated families, although selection mechanisms influence the results, children living in an SPC arrangement do better than children living in one-parent families (LPC) (Nielsen, 2018; Vowels et al., 2024). Vowel et al.’s (2024) results of their systematic review of 50 studies comparing SPC, LPC, or/and stepfamilies (either in an LPC or SPC arrangement) with two-parent intact families suggested that “policies should support families to choose and maintain an SPC arrangement and it may even be possible to achieve similar outcomes compared to intact families” (p. 20). There is increasing proof that the parents’ socioeconomic background’s selectivity, which is characterized by higher income, good coparenting, and better child–parent quality relationships compared to other parents, is not sufficient to explain that SPC children tend to have better outcomes than LPC children (Bauserman, 2012; Meyer et al., 2017; Steinbach, 2019). Research on intact families and separated/divorced families seems to agree on three important relational mediators or factors²⁰ of a child’s well-being and adjustment, which are worth measuring.

4.4 The determinants of children’s well-being in postseparation arrangements

There are three main determinants of children’s well-being in postseparation arrangements that are relational aspects rather than material or sociodemographic aspects: a) the quality of parenting (Mahrer et al., 2018, Sandler et al., 2012), b) the quality of the child’s relationships with their parents (Lamb & Kelly, 2001; Vrolijk & Keizer, 2021) and/or other parental figures (Lamb, 2012; McHale & Irace, 2011), and c) the quality of the relations between the parents and other parental figures, which includes the degree of coparenting (Leclair et al., 2018) and of conflict (Amato, 2010; Bergström et al., 2021; Lamb & Kelly, 2001). In addition, economic, social, and physical resources, including those coming from other parental figures, support a

healthy adjustment. On the contrary, poverty and social isolation, as well as frequent and long commuting between households, are associated with maladjustment.

We present the research findings, the consensus, and controversies of these determinants of a child's well-being in the context of shared and sole physical custody to analyze the guiding criteria a judge uses when deciding whether SPC is best for the child. We also address the benefit of SPC for infants, toddlers, and adolescents, considering many controversies on the matter. We discuss whether frequent travel between each parent's home and school, which is more frequent in SPC than in LPC settings, is in the child's best interest. Finally, we present the impact of different living arrangements on the parents' well-being, as it often relates to that of their children's.

4.5 The quality of parenting

The quality of parenting is a broad term that includes the quality of the parent-child relationship, (e.g., closeness, acceptance, responsiveness, support, encouragement), parental involvement in the child's activities, and the use of effective discipline (e.g., consistency, age-appropriate rules and expectations that are clearly communicated, appropriate monitoring and consequences (Mahrer et al., 2018; Sandler et al., 2012). These three parameters—the quality of the parent-child relationship, the parent's involvement in the child's life, and the effectiveness of discipline—can be measured by a wide range of methods.

Research (Baumrind, 1971; Steinberg & Silk, 2002) shows that authoritative parenting, which is a combination of parents' warmth, moderate control, and respect for their children's autonomy and capacity for self-control, is associated with self-confidence, greater persistence and effort, better performance, and fewer behavioral problems at school (Amato & Fowler, 2002; Collins et al., 2000; Lamb & Lewis, 2011). Warm and engaged parents, who set clear limits and explain their reasons, have more socially competent youth in their interactions with adults and peers. By contrast, authoritarian parents, who also set similar limits but do not explain their disciplinary logic, have less socially competent children, whose behavior is similar to that of children whose parents set few or no limits.

Research agrees on the finding that men and women have the capacity to be good parents (Carter, 2005; Fleming, 2005; Gettler et al., 2011; Lamb, 2010). Parenting is a learning and dynamic process dependent on multiple factors within and outside the family. Numerous factors affect it, including parental characteristics (e.g., depression), interpersonal factors (e.g., social

support), child characteristics (e.g., temperament), and family dynamics (e.g., divorce). Parenting support programs can improve the quality of parenting (Sandler et al., 2016).

Many studies on LPC, and specifically on the parent with custody, have demonstrated that high quality parenting by the custody parent is associated with better children's well-being after separation/divorce, as it helps protect the child from stress (Amato & Keith, 1991; Hetherington et al., 1998). However, only a few studies have analyzed the role of quality parenting on a child's well-being in an SPC context, especially in high-conflict families. Mahrer et al. (2018), in a review of 11 studies, pointed out a clear association between high-quality parenting (i.e., the child's self-report on the closeness of their relationship with their parents) by at least one parent and better child adjustment in a high-conflict situation.

Another key protective factor of a child's well-being is the quality of the parent-child relationship.

4.6 Quality of the father-child relationship

Research agrees that the quality of the child's relationships with their parents (Lamb & Kelly, 2001; Vrolijk & Keizer, 2021) and/or other parental figures (Lamb, 2012; McHale & Irace, 2011) is a key protective factor. The quality of the parent-child relationship is usually measured by the degree to which parents offer "(...) love and affection, emotional commitment, reliability and consistency as well as the extent to which the parent 'read' their children or adolescents effectively and provided appropriate stimulation, guidance and limit-setting" (Lamb, 2012, p. 100).

Following a separation or divorce, when the mother has sole custody, the quality of the father-child relationship tends to be weaker than when they were living together (Peters & Ehrenberg, 2008). Lamb and Kelly (2001) reported that many fathers who have played or are capable of playing a significant role in their children's lives find their role minimized by judicial decisions that often lead to a partial or complete withdrawal of their children's lives. The general finding is that SPC is beneficial for maintaining a quality relationship between the child and his/her father and that the relationship is generally stronger in SPC than in LPC (Baude et al., 2016; Bauserman, 2012; Carlsund et al., 2013; Nielsen, 2018; Vanassche et al., 2017).

Two main factors contribute to stronger father-child relationships in an SPC than in an LPC context. The first factor is a *high level of father's involvement* in various aspects of the child's life and school (e.g., helping with homework, talking about problems and difficulties, taking part in leisure activities, going to parents' evenings) (Lamb & Kelly, 2001; Vrolijk & Keizer,

2021). Research suggests that when the child spends more time with his/her parents, the relationship is stronger (Cashmore et al., 2008; Fabricius et al., 2010; Nielsen, 2018). Overnight stays allow a father to fulfil a caregiving role instead of just a recreational one, which the father might have by seeing the child only during the daytime (Cashmore et al., 2008).

One question that might arise is whether overnight stays are more important for *infants and toddlers* regarding the father's involvement than for older children. There are conflicting findings on this topic, and only a few studies have focused on this target audience. The main issue in the matter is the development of secure attachment and the need for a stable and predictable environment. Some researchers (Main et al., 2011; McIntosh et al., 2013) have concluded that infants and young children should spend limited time away from their primary attachment figure (the mother) to promote secure attachment, limit the risk posed by attachment insecurity for children's future mental health, and ensure a good, long-term mother-child relationship. They consider that infants form a single relationship before all others, and that this attachment must be strong and stable enough before developing other attachments. However, others (Kelly & Lamb, 2000; Nielsen, 2018; Vowel et al., 2024; Warskhak, 2001) have claimed there is no solid empirical evidence that SPC, and therefore overnight stays at both parents' homes for infants and toddlers, is linked to negative outcomes. Although there is often a main caregiver in the first years of life, who the primary attachment figure is and children's attachment to the other parent are no less affectively significant. Moreover, due to their limited perceptions of time and communication abilities, frequent and short parents' home transitions are specifically beneficial (Lamb & Kelly, 2001). Finally, long-term relationships with both parents are better among those who spend up to and including equal numbers of nights at each parent's home during early childhood (Fabricius & Woon Suh, 2017).

In sum, there is little or no reliable empirical evidence for the presumption that one primary attachment figure is more important than others for infants and toddlers and that separation from the primary attachment figure has a negative impact on both a secure attachment and future mother-child relationship. However, this belief seems to be widely held among judges, custody evaluators, and clinicians (Lamb & Kelly, 2001; Schwarzer, 2021).

Another question that arises on the role of a father's involvement in the child's life is whether it is as important for *adolescents* as for other children and, if so, whether it is particularly fostered in an SPC compared to an LPC context. Adolescence is the period of life between childhood and adulthood, between approximately 10 and 18, characterized by many physical and identity changes, an increased need for peer interaction, and an increased quest for independence. Adolescents face many challenges, including a risk of engaging in certain

unhealthy behaviors, which is increased if they had or are experiencing parental separation (Amato, 2000; Jablonska & Lindberg, 2007). Most studies on adolescents' psychological well-being conclude that psychological adjustment is better in an SPC than in an LPC setting. Many researchers (Bergström et al., 2014; Nielsen., 2018) have reported that youth exhibit fewer internalized and externalized disorders than adolescents living in LPC. Self-esteem is higher (Turunen et al., 2017), they have fewer headaches and sleep problems (Bergström et al., 2015), and their stress levels are lower (Turunen, 2018) than their peers in LPC. SPC seems also to have a positive impact on adolescents' social integration, mainly because SPC children's travel times are generally shorter for them than those of LPC children (Poortman, 2021). In comparison, adolescents living in LPC are more likely to exhibit behavioral problems, be smokers, or have sex before age 15 (Carlsund et al., 2012). In sum, studies on this segment of the population often put forward two elements as explaining the improved psychological well-being of adolescents in SPC compared to LPC: a) the importance of maintaining the bond with both parents and b) the greater involvement of these parents in the life of the adolescent favored by this type of custody (Bastaitis & Pasteels, 2019; Bjarnasson & Arnarsson, 2011; Laftman et al., 2014).

The second important factor influencing the father–child relationship is *coparenting* (Vrolijk & Keizer, 2021), which refers to the way parents work together—supporting or undermining each other—with respect to their parenting responsibilities (McHale & Irace, 2011). More insights will be provided in the following section, as it represents the third key protective factor of the child's well-being.

4.7 Quality of coparenting relationships (and interparental conflict)

Coparenting is associated with the first and second key protective factors of the child's well-being: the quality of parenting and the parent–child relationship. In fact, if parents can communicate with each other in a respectful and open manner, each parent feels strengthened in their parenting role (Lamb, 2012; McHale & Lindahl, 2011, Teubert & Pinquart, 2010). Coparenting also influences how free the child feels to express their feelings toward their parents or parental figures. If both parents express a positive feeling toward the absent parent, they support the child's attachment to each parent (Afifi & Schrodt, 2003). Moreover, the quality of postseparation coparenting during the child's life influences the quality of the relationships with their family and extended family (e.g., grandparents, stepparents, stepsiblings) (Ahrons, 2007; Widmer et al., 2014).

Coparenting can be measured in terms of conflict and cooperation between parents (Leclair et al., 2019). Cooperation refers “the extent parents exchange information about their child, support and respect each other as parents, as well as communicate to the child a climate of mutual loyalty (Teuber & Pinquart, 2010, p.287), while conflict “is defined as the extent of parental arguments or fights over childrearing as well as the extent of undermining the other parent through criticism, disparagement, or blame (Teuber & Pinquart, 2010, p.287).

It is important to note that cooperation and conflict can coexist. Widmer et al. (2014), by comparing intact families to blended families, discuss the concept of "unitary" coparenting, meaning that both parents engage in the child's education in a constructive manner. In blended families, researchers find that unitary coparenting is inseparable from conflictual coparenting. In these families, a greater involvement of the non-custodial parent in the child's upbringing leads to a higher level of conflict between parents, but it also results in fewer difficulties for the child. In contrast, in intact families, cooperative coparenting and conflictual coparenting appear to be antithetical.

A predominance of positive coparenting dynamics, reflected in engagement, equitable distribution of tasks, and elements of cooperation and support, fosters the child's development. Conversely, antagonisms manifested through frequent and repeated conflicts predict difficulties for the child (Leclair et al., 2018; Widmer et al., 2014)

The ability of separated or divorced parents to be coparents represents a major criterion for the judge when evaluating a physical custody arrangement (Nielsen, 2018). Supportive or positive coparenting has a facilitating role in the custody agreement process (Sullivan, 2008). As described in the empirical part of this study, judges have different appreciations of the degree of coparenting quality that they consider necessary to set up a successful SPC. Some judges consider that coparenting skills must be good enough to enable parents to collaborate on all aspects concerning the child, whereas others consider that the collaboration on the main aspects (e.g., school, health) is sufficient.

With coparenting being a key criterion of the custody arrangement's evaluation, one question that arises is related to *the period to which the judge refers* to assess whether an SPC or LPC arrangement is best for the child. As highlighted by Darwiche et al. (2021), the quality of the parental couple, which is more important to the child's well-being than the marital couple, can be static but also evolve depending on the parental couple and life's event. Coparentality can be a *continuous process*, which means that the coparenting “style” during the marriage does not change after marriage, and, in that case, it might be relevant to assess the situation based on the relationship before separation or divorce and consider that positive coparenting is a

protective factor, whereas conflictual coparenting is a risk factor. Coparenting can also be a *discontinuous process*, meaning that coparenting is modified by the separation, an event (e.g., repartnering, increase of workload), therapy, and even the physical custody arrangement per se. In such a case, it is more relevant to conduct a prospective assessment of the coparenting dynamic and, to be more accurate, to reassess, years after the separation or divorce, the effect of the physical custody agreement on it. Moreover, marital distress may spill over to the coparenting relationships (Stroud et al., 2015), but not necessarily. Even in the presence of acute marital and personal distress during a separation process, positive coparenting can coexist and be strengthened (Darwiche et al., 2021).

Two further questions arise regarding the assessment of coparenting in the context of child custody assessment: First, what are the *degrees of a quality coparenting and parental conflict* (i.e., severity, frequency, and duration) associated with positive child well-being in SPC and LPC living arrangements?

Findings often show that *interparental conflict* (IPC) has negative effects on children, no matter the type of custody and independently of divorce and separation (Emery, 2021). However, most of the research on the association between the quality of coparenting and child's outcomes have been conducted on intact families. We do not have enough empirical justification to conclude that coparents in conflict should not choose SPC or would not have a successful SPC arrangement (Leclair et al., 2018; Nielsen, 2017). Additionally, studies exploring the association between child custody arrangements and postseparation coparenting have yielded inconsistent results. Leclair's meta-analysis (2019) attributes this inconsistency to the lack of systematic differentiation between the concepts of cooperation and conflict, which has led to contradictory results. She concludes that parents in SPC arrangements provides more mutual coparenting cooperation compared to those in LPC. However, she also notes that the type of custody does not significantly influence the degree of conflict between parents.

Be the limited research comparing coparenting and parental conflicts in various living arrangements and their consistency with the best interests of the child, the current evidence provides guidance on factors that must be considered by the judge when assessing families during physical custody evaluations.

First, regarding the *nature of conflict*, substantive research on the association between parental conflict and the child's well-being in "intact families" shows that not all conflicts are negative for the child's well-being: Destructive conflicts are related to poor child well-being, whereas constructive conflicts are positively associated. In fact, when parents face conflicts, they might not only use "bad" strategies (i.e., withdrawal, anger, verbal hostility, and physical

aggression) but also “good” tactics that help to resolve them in the long run, such as problem-solving and verbal and physical affection (Cummings et al., 2003; Goeke-Morey et al., 2003). The nature of the conflict is influenced by its severity (which can range from verbal disagreement to verbal abuse), frequency, and child exposure (increasing the child’s chances of being trapped in a loyalty conflict), as well as if there is one parent who particularly fuels the conflict. If one parent is the primary driver of the conflict, consideration should be given to reducing the opportunities for exposing their child to conflict (Nielsen, 2017). The nature of the conflict should be identified in order to be able to evaluate the consequences on the child’s well-being.

A second parameter is the *conflict’s temporality*. As coparentality, parental conflict is likely to evolve over time. Many parents experience IPC while they are separating or divorcing and in the following years, yet conflicts of low and high intensity decrease over time for many of them. The rate of families facing high conflict drops to 50% in the early period after the divorce to around 25% several years after (Fischer et al., 2005; Hetherington & Kelly, 2002). In this regard, researchers tend to agree that the duration of conflict plays a role pertaining to the child’s well-being (cf. Mahrer et al.’s [2018] meta-analysis of 11 studies on the associations between parenting time, parenting quality, and high-IPC families). Conflicts occurring 2–3 years after the separation do not influence child-adjustment processes, whereas conflicts over several years do. This parameter implies the importance of conducting a prospective evaluation to determine if the IPC is likely to end postseparation or divorce or to last for years (Hetherington & Kelly, 2002).

A third factor important to assess is the *importance of the two other key protective factors of the child’s well-being*—the quality of parenting and the parent–child relationship—particularly when the quality of coparenting is low. Research shows an association between at least one high-quality parenting and better child adjustment in a high-conflict situation (Lamb, 2012; Mahrer et al., 2018; Sandler et al., 2013). Furthermore, research tends to agree that parental conflict of low to medium intensity, as well as conflicts that are relatively short lived, should not be considered a hindrance to the possibility of the SPC arrangement, as the quality of the relationship between the child and both parents is favored more in an SPC than in an LPC context (Fabricius et al., 2012; Lamb, 2012b; Nielsen, 2017). In cases of highly conflictual coparenting relationships, however, there are conflicting recommendations. Some (e.g., Symth et al., 2016) hold that in high-IPC families, more time with the father creates more opportunities for the child to be exposed to IPC and, therefore, poses more adjustment problems. However, others (Fabricius et al., 2012; Gunnoe & Braver, 2001; Lamb, 2012b; Warshak, 2014) support

that more time with the father, even in high-IPC families, predicts better child adjustment because it increases, compared to LPC, the benefit of the support (i.e., benefit of time or/and the quality of parenting) the father provides. Findings therefore suggest that low-quality coparenting and conflict, at least of low to medium intensity, should not be as heavily weighted as other key protective factors. Regarding whether high IPC should hinder the chance of a successful SPC arrangement, there are conflicting findings. Warshak (2014) warned that a practice of systematically denying SPC in such contexts might have negative effects on the child and encourage conflict. Furthermore, judges might wrongly misunderstand the nature of the conflict by assuming that both parents sustain the conflict.

An additional question that is relevant to investigate *is how coparenting evolves over time in SPC and LPC contexts*. Does one childcare arrangement promote, or negatively impact, the development of a quality coparenting relationship more than the other? Studies tend to show that SPC promotes more positive feelings and emotional support between parents compared to LPC (cf. Bauserman's [2012] meta-analysis of 32 studies on parental satisfaction in postseparation living arrangements). An SPC living arrangement seems to offer more opportunities for parents to communicate, make joint decisions, and find solutions instead of letting difficulties grow as might be the case in LPC. One indirect explanation of higher coparenting relationship quality among SPC than LPC parents might be the *positive effect of SPC on parents' well-being*. Sharing parental responsibilities is in fact associated with reduced workload and more time for leisure, especially for mothers, and a stronger father–child bond, which in turn influence their well-being (Sodermans et al., 2015).

4.8 The dynamics of parental figures and relationships within blended families

Family forms are changing, more and more children live in blended families, and coparenting becomes multifaceted. Research on child well-being in separated families is increasingly focused on the role of the relationship between the child and extended family members (stepparents, half-siblings, and de facto sisters/brothers) and between the family members themselves. In view of the diversity of family forms, parenthood is no longer solely or always provided by the biological father and mother (Bachmann et al., 2006). Nonbiologically affiliated individuals, such as stepparents and grandparents, perform caregiving and nurturing tasks and represent attachment and socialization figures for the child (McHale, 2007; Minuchin et al., 2007). From this perspective, coparenting is a specific

psychological and relational dynamic between not only parents but all adults in charge of the child (Favez, 2017). Research on families in the distant past (i.e., multigenerational families) and in various cultures has demonstrated that there are a variety of family structures, and that the child can be raised well in a myriad of family forms with various coparenting systems. Research tends to show that the relationships and dynamics between the child and his/her family members (extended included), and among the members themselves, are more important than family structure (Ahrons, 2007; McHale & Irace, 2011; Napp-Peters, 2005). One reason is that healthy and unhealthy relationships between the child and family members are present in all family structures (McHale & Irace, 2011). Although the family systems theory (Bastaitis et al., 2012) suggests that frequent changes in the family environment, such as those induced by SPC arrangements or the presence of a stepparent, are associated with more opportunities for conflict between parents or between adults, children's outcomes in stepfamilies are often equal to or better than those in LPC arrangements (Vowles et al., submitted; Nielsen, 2018). The second reason is that the child develops multiple attachments enhancing his/her social-emotional development. Healthy families recognize these attachment figures and respect the child's emotional bonds with various family members. The dynamics of coparenting in two-parent nuclear families, but also in more complex postseparation family systems (Ahrons, 2007; Napp-Peters, 2005), therefore influence children's coping skills and well-being (Cook et al., 2009; Fivaz-Depeursinge et al., 2007; McHale, 2007). Nevertheless, professionals supporting families tend to not recognize or neglect the importance of these potential attachment and socialization figures in the child's life. Stepparents are often not consulted by professionals (Minuchin et al., 2007) or included in sessions dedicated to coparenting. As McHale et al. (2002) highlighted, most professionals continue to define the family on the basis of the status of adults (i.e., legal marriage, separation, divorce) instead of also adopting a child-centered family focus, which would include all family caregivers and attachment figures who respond to the child's needs of support and nurturance.

All types of coparentality and attachment figures should therefore be acknowledged. A low-level coparenting quality, characterized by conflict of low to medium intensity, should not be a factor against the implementation of SPC. A thorough pre-, current, and prospective analysis of the parental figures' abilities to communicate, collaborate, and manage conflict, as well as of the two other key protective factors of the child's well-being, should be undertaken with the support of experts.

In the context of SPC, but also of LPC, a question arises on the association between the child's well-being and split custody, which involves the separation of siblings so that each

parent has custody of at least one child. The main reasons for adopting such an arrangement are the child's wish, a particularly strong or fragile bond between the child and one parent, the aspiration to share parental responsibilities more equitably, or conflict between siblings (Hawthorne, 2000; Kaplan et al., 1992).

Research tends to support the view that the quality of the bond between siblings is strengthened if they live together, offering each other support, comfort, and caretaking by older siblings, which is particularly important in the context of parental separation (Bryant, 1992; Kaplan et al., 1992; Stewart, 1983). Separating siblings can pose a risk to the quality of the relationships when this type of arrangement creates or reinforces negative alliances between children and parents (Greif, 1990). However, some researchers have concluded that split custody might better meet the child's need for individual attention from one parent (Hawthorne, 2000; Thorpe & Swart, 1992) and may help to reduce sibling rivalry, particularly in conflictual families (Stock, 1993). Split custody also offers the opportunity for both parents to become more involved in the upbringing of the dependent child (Bray, 1991). However, an important factor in the success of split custody seems to be close geographical distance between parents' homes to enable regular contact with the other parent and separated siblings (Hawthorne, 2000). Keeping the families' boundaries open might also enable information to flow and the child to feel part of one complete family, which is beneficial for his/her well-being (Kaplan et al., 1992).

Finally, research indicates benefits and risks in courts collecting *child's perceptions and opinions* on parental separation and custody arrangements. On one hand, the child may feel listened to and respected and gain a greater sense of control over his/her life (Washark, 2003). When the wording is adapted to their age and the environment is reassuring, most children seem to be able to give clear answers (Saywitz et al., 2010). In addition, children want to be heard, informally or formally, when their parents separate (Cashmore, 2011; Cashmore & Parkinson, 2008), particularly if they have not been able to discuss this due to parental conflict (Block et al., 2010; Simpson, 1989). Finally, parents and professionals may make more informed decisions when the child is heard, because they are more aware of the impact of the separation on the child, as well as his/her stage of development and maturity, and they tend to focus more on his/her needs (McIntosh et al., 2008).

On the other hand, there are risks when requesting the child's opinion in parental separation proceedings (Ballard et al., 2014; Emery, 2003; Simpson, 1989). First, the child may not want to express him-/herself, worrying about the possible consequences for his/her parents or him-/herself (Cashmore, 2011). Second, being placed at the center of custody disputes and in a decision-making role may impact the child's well-being if he/she ends up bearing the brunt of

the decision. Third, his/her opinion may not correspond to the child's best interests if, for example, he/she would prefer the more permissive parent or the one who is more likely to pull him/her up against the other (Warshak, 2003). Finally, the explicit influence of parent(s) and interviewer(s) or the capacity and accuracy of the child may affect his/her testimony (Bala et al., 2000; Pezdek & Hodge, 1999). Given these risks, children interviews seem to require courts and judges to collaborate with professionals knowledgeable in child psychology, parental conflict dynamics, and domestic violence (Moloney, 2008).

Although further research is needed to clarify the check and balance of children's hearings, the potential risks and conditions required to moderate the risks to allow respectful and careful participation may explain why children's participation in parental separation proceedings tends to be low (Ballard et al., 2014). These conditions certainly include respecting the child's desire to not express themselves, creating a safe environment by ensuring that the child's participation does not put him/her (further) at risk, ensuring open communication and making it clear that the decision on how the child is cared for rests with the parents (Neale, 2002).

4.9 Parental well-being in postseparation arrangements

With regard to parents' well-being, the degree to which they are affected by the physical custody arrangement per se, and the extent to which parents' well-being affects their children's well-being, it is important that judges also consider the potential side effects of decisions on parents. Studies highlight the link between family structure and disparities in health and well-being (Nomaguchi & Milkie, 2020; Osborne et al., 2012). LPC parents, in particular, are at risk for poorer health and well-being due to exposure to multiple stressors, such as parenting alone, loss of emotional support, and economic decline. However, the question of whether SPC parents also suffer from health and wellness disparities or whether they are protected from them has not yet been clearly answered.

Some researchers have concluded that shared parenting can allow both parents, especially fathers, to spend time with their children and maintain positive connections with them (Steinbach, 2019; Vogt Yuan, 2016). In addition, SPC parents may have more time for activities other than parenting, such as work, repartnering, and leisure, which may decrease parenting stress and role pressure for mothers and fathers compared to LPC parents (Bonnet et al., 2018; Nomaguchi & Milkie, 2020). These factors could, in turn, support the health and well-being of SPC parents. Others, on the contrary, argue that SPC also incurs high costs such as potentially more frequent travel between homes, the possible maintenance of a room in each home, or the

duplication of materials related to childcare, as well as the cost of more constant communication with the other parent, who might offset the potential health and well-being benefits of reduced parenting. In particular, this may be the case for parents with few resources to draw on or for couples in conflict, who have become more likely to also opt for SPC in countries strengthening SPC legislation (Fehlberg et al., 2011; Sodermans et al., 2013).

These contrasting outcomes might in part be explained by the unequal distribution of time in SPC (e.g., 30–70%), which in most situations, still leaves one parent with the majority of childcare costs and responsibilities (Steinbach, 2019). Recksiedler and Bernardi (2020), who studied the effects of the 2017 legal change in favor of SPC practices in Switzerland, concluded that this childcare arrangement has many positive effects for parents, but the unequal distribution of time between parents practicing SPC diminishes the positive effects on their health and well-being. Part-time employment is mainly practiced among mothers, hindering the diffusion of SPC and equal (50–50%) shared parenting.

Therefore, facilitating legal access to SPC is not enough to promote parental health and well-being. It must be accompanied by measures that promote fathers' involvement in childcare (e.g., longer paternal and parental leave, flexible and part-time jobs) and mothers in their professional lives, especially in less generous welfare contexts where one's family is considered a private matter. In addition, in a context where access to SPC is facilitated, the proportion of SPC parents facing conflicts is increasing, and it can be detrimental to parents' health and well-being. Policies that encourage mediation and coparenting during the physical custody determination process can help parents find a timetable and reduce tensions between them.

4.10 The role of spatial mobility

An important debate is whether the frequent travel between each parent's home and school, respectively, which characterize SPC more than LPC arrangements, might be too stressful for children. Research tends to agree that the benefits of keeping frequent contact with both parents bypass the drawback of commuting for older children, whereas the number of studies on infants and young children is much too limited to provide a reliable answer. Poortman (2021), using the large-scale New Family in the Netherlands Survey (2012/2013),²¹ involving children aged 4–17 years, examined the interplay between these parameters on multiple children's outcomes: psychological well-being, educational performance, and social integration (i.e., child's friendships). Overall, the study concluded that SPC children have significantly better psychological well-being than LPC ones, but there is no difference in specific outcomes

(educational performance and social integration). These effects tend to disappear if the distance between parents in SPC increases. Frequent travel is only a problem if associated with long distances. Long-distance and frequent commuting increase the share of travel time over the contact time with parents. This finding is in line with previous findings (Soderman et al., 2014; Westphal, 2015). Long-distance and frequent commuting also mean that the child sees his/her friends less often (Jensen, 2009; Schier, 2015). Longer travel time negatively affects psychological well-being, as it induces stress. However, long distance per se is positively associated with educational performance (Kalil et al., 2011; Rasmussen & Stratton, 2016), possibly because these trips are more frequently planned during weekends and do not disrupt school routines.

In sum, existing research indicates that spatial mobility should not be an argument against SPC when the children are of school age and the parents do not live far from each other. When the distance between the parents' homes is large, the benefit of frequent contact with the parents diminishes. As for young children, research on the impact of spatial mobility is limited and inconclusive.

Given the above analysis we can summarize the main findings in the following:

1. Quality parenting is essential for safeguarding child's well-being, mitigating the impacts of both separation and conflict (Amato & Keith, 1991; Hetherington et al., 1998; Mahrer et al., 2018).

2. A strong relationship with both parents, influenced by the nature and frequency of contact, is a key protective factor, with benefits being greater in SPC than LPC contexts (Bauserman, 2012; Carlsund et al., 2013).

3. The child can develop multiple significant attachments without diminishing the quality of his/her primary attachment (Kelly & Lamb, 2000; Nielsen, 2018).

4. For infants and toddlers, there is no conclusive evidence that one primary attachment figure is more important than others, and children in SPC often maintain closer ties with extended family (Nielsen, 2018).

5. Low to moderate conflict in co-parenting should not prevent SPC arrangements (Fabricius et al., 2012; Nielsen, 2017). Even in high-conflict situations, SPC can be beneficial if one parent exhibits strong parenting skills, though more research is needed in these cases. Conflicts often decrease after separation, and strategies like mediation can help reduce tensions.

7. Siblings should generally remain together in custody arrangements unless there are

compelling reasons to separate them. While social belonging is important for adolescents, maintaining strong relationships with both parents is crucial during this stage, making SPC a recommended option.

8. Hearing the child’s wish can empower him/her, but it may also jeopardize his/her well-being by involving him/her in parental conflicts.

5. The case study: The Swiss federal tribunal judgements

In this empirical section, we highlight key results from Schwarzer’s study (2021) regarding the legal criteria developed by the FC to identify the child’s best interests when determining physical custody, and we compare them with the findings of social sciences research.

To summarize, the findings indicate that the judge of the FC interpret the child’s best interests through two main approaches. The dominant “conservative” or static approach focuses on maintaining the current and pre-separation circumstances to “preserve” the child’s well-being, often favoring the existing custody arrangement, which is most frequently LPC arrangement. In contrast, the less common “progressive” or dynamic approach acknowledges that a child’s well-being and co-parenting practices can evolve over time, presenting new opportunities for improvement that were not available before separation, such as a father’s desire for increased involvement. This dynamic approach requires a forward-looking analysis of the family’s situation in addition to considering the existing circumstances.

Our hypothesis posits that the prevailing “conservative” or static approach²² is only weakly supported by social science findings regarding child’s well-being across living arrangements. In contrast, the progressive or dynamic approach aligns more closely with the latest research findings.

To further clarify the various approaches, we cite in this study a few additional decisions, prior to and after the period of analysis covered by Schwarzer’s study (2021), from July 1, 2014 to March 24, 2021.

5.1 Seven legal criteria for establishing physical custody arrangements

There are seven legal criteria²³ that guide the judges in deciding which physical custody arrangement is best for the child. Their wording may vary, reflecting differences in interpretation or at least uncertainty about the meaning of these criteria (Schwarzer, 2021). We present them according to the order of importance given by the judges to the criteria, thanks to

or because of their discretionary power (Schwarzer, 2021). Judges are not obliged to analyze all of the criteria if some of them are sufficient to determine the type of custody considered compatible with the child's best interests.

5.1.1 Parenting skills

Vagueness of the jurisprudence on parenting skills

For the judge to consider a SPC arrangement, both parents must have (sufficient or good) parenting skills. It is a premise criterion (FSC 5A_534/2019 (f), January 31, 2020, consid. 3.1).

Although it is a precondition for analyzing the possibility of a SPC arrangement, this criterion is not explained in the Swiss federal jurisprudence (Schwarzer, 2021). There is no clear definition of what “parenting skills” are, what degree of skill is required, or even how it should be assessed. This legal vagueness seems to stem from the fact that the judges consider that all parents have sufficient or good parenting skills unless they suffer from psychological, physical, or addictive disorders.²⁴

However, when it comes to determining which childcare arrangement is best for the child, several questions may arise. For example, what is the quality of the parents' educational skills? Which adults does the criterion refer to; only the biological parents or some or all attachment figures? How are parenting skills defined and measured? Do parenting skills represent a protective or a risk factor for the child's well-being in this case?

There are relevant questions given that research shows that high-quality parenting is one of three key protective factors of the child's well-being in situations of parental separation (Lamb & Kelly, 2001; Vrolijk & Keizer, 2021). High-quality parenting by at least one biological parent or attachment figures (McHale, 2007; Minuchin et al., 2007) protects the child from the stresses of parental separation and is associated with improved well-being (Amato & Keith, 1991; Hetherington et al., 1998). Even in families with a high level of parental conflict (i.e., families who litigate custody or show conflicts in their interactions), SPC arrangements might be beneficial if one parent has high parenting skills (Mahrer et al., 2018). Adequate affection and discipline and limited child exposure to conflict substantially reduce the impact of parental conflict.

Provided that both parents are considered to have sufficient parental skills, the judges must next assess the other criteria relevant for defining the child custody.

5.1.2 (The stability) and the possibility for a parent to personally care for the

child

Static approach to childcare

The criterion “the stability and the possibility for a parent to personally care for the child” is mainly used by judges taking a static approach. As we mentioned, the static approach rests on a gendered *unequal model conception of parenthood and conceives the mother* (in most situations, the custodial parent) as central to the child’s well-being. The nonresident parent, generally the father, ideally contributes to the child’s well-being accessorially, even if he is employed part-time and has the opportunity to take care of the child personally. The term “stability” is very often added to the title of this criterion (Schwarzer, 2021) and represents a strong indication of the judge’s preference for the status quo. In addition, the fact that stability is associated with the possibility for a parent to personally care for the child gives the parent of reference or primary caregiver²⁵ more value as a stabilizer and as essential to the child’s harmonious development.²⁶ The indicators to identify which parent is the one of reference are a) having been caring for the child on a daily basis since the separation;²⁷ b) having acted as the main caregiver during preseparation;²⁸ and c) having part-time employment.²⁹ In sum, the static approach considers that there is a sole parent of reference. The role of the secondary parent or the overall stability of the socioeducational context (other family members) is barely considered unless a de facto SPC is already implemented (Schwarzer, 2021).

Consequently, concerning a status quo preference, a judge with a static approach usually does not recognize the availability of the nonresident parent in the postseparation scenario. Present or prospective part-time work,³⁰ working from home³¹ self-employment,³² availability during evenings and weekends,³³ family support (i.e., new partner, grandparents),³⁴ and the help of a third person or an institutional childcare structure do not favor the nonresident parent’s chances to see their request for SPC met, especially in the case of infants or young children³⁵, but also often regarding school-age children.³⁶ This criterion seems to lose importance for teenagers, the sixth criterion (“belonging to a sibship or social circle”) and the seventh criterion (“the child’s wishes regarding their care”) becoming predominant.

Paradoxically, similar elements, such as having a part-time job, family support,³⁷ home office,³⁸ and self-employment, are generally recognized as conditions in favor of the parent requesting sole custody. Similarly, when SPC is in place, the help of a third person or institutional childcare is perceived as positive if the parent is available during off-peak or marginal hours (mornings, evenings, and weekends)³⁹ and/or the child has no specific needs related to physical and/or mental conditions.

The view that there is only one parent of reference leads to a second consequence: Regular and even short-term contacts with the nonresident parent are considered more appropriate than SPC.⁴⁰ Visiting rights without overnights for infants and small children might even be called “ideal.”⁴¹ It is also argued that there is no undisputed principle of law stating that, from the moment a child enters nursery school, visiting rights must always include overnight stays.⁴² According to the dominant static approach, the SPC setup does not support a child’s well-being because it implies a prolonged and/or repeated absence of the primary caregiver.⁴³ Even longer periods of separation from the primary caregiver during the summer holidays must remain exceptional.⁴⁴ Meier and Stettler (2019, p. 76) warned that “(...) taking this criterion into account has the effect of favoring the status quo and therefore of ‘rewarding’ the policy of the ‘fait accompli’. For example, the mother leaves with the children and keeps the matrimonial proceedings going: the more time that passes, the more likely it is that the de facto custody she enjoys will be confirmed by the judge, in the name of the stability of the relationship). In the same vein, the decision made on protective measures (art. 176 CC) or on provisional measures (art. 276 CPC) largely influences the judge of the divorce or legal separation.”

Dynamic approach to childcare

On the contrary, the *dynamic approach* (Schwarzer, 2021) considers that both parents are important attachment figures for a child, no matter the age. Even if there might be a primary attachment figure (usually the mother), attachment to the other parent is considered no less affectively significant and should therefore be weighted. In fact, the term “stability” in the criterion’s title does not only refer to the stability of the relation with one parent but with both,⁴⁵ as well as with their family at large⁴⁶ and in the socioeducational context.⁴⁷ For example, one parent’s full availability to take care of the child should not be considered a factor in judging against SPC.⁴⁸ Parents’ involvement in the child’s daily life during school and leisure days is also seen as beneficial to the child.⁴⁹ All these parameters should be considered, not only for school-age children but also infants. This approach challenges the notion that the parent of reference is always the mother in the case of infants and toddlers. According to the judicial decision, FSC 5A_271/2019, 9 December 2019 (f), consid. 3.4.2, the conception that the parent of reference is always the mother is not unanimous, as it has not been confirmed by large-scale empirical studies but by the author’s clinical experiences in this specific case.

The *dynamic approach* also recognizes present and future working setup opportunities for both parents that facilitate the child’s care (e.g., part-time work, working at home, self-employment status).⁵⁰ In fact, the criterion’s title, “the possibility for a parent to personally care

for the child,” does not always start with the term “stability and.”⁵¹ The judges in this sense recall that “future facts cannot be strictly proven.”⁵² This approach considers that not only must the pre-separation and current situation be assessed, but that prospective assessments must also be conducted to “choose the solution that, in view of the situation, is best able to provide the child with the stability of relationships necessary for harmonious emotional, psychological, moral, and intellectual development.”⁵³

Social sciences research supports the dynamic approach, as it rests on a *less gendered model of parenthood* and a more *inclusive definition of family* and attachment figures than the static approach, and recognizes that the *child’s needs*, the *parents’ abilities to take care of the child*, *coparenting* and *parental conflict* can evolve.

In fact, research supports that the idea that a quality parent-child relationship with both parents is a key protective factor for the child’s well-being. It supports that both relationships tend to be significant for the child (Lamb & Kelly, 2001; Vrolijk & Keizer, 2021). It is demonstrated that the more time a child spends with his/her nonresident-parent, usually the father, the stronger the relationship is (Cashmore et al., 2008; Fabricius et al., 2010). These findings align with the recurrent observation that, when custody arrangements are contrasted, the father-child relationship is generally stronger in SPC than in LPC (Baude et al., 2016; Bauserman, 2012; Carlsund et al., 2013; Nielsen, 2018; Vanassche et al., 2017). For infants and toddlers, there is little or no reliable evidence for the presumption involved in the static approach that one primary attachment figure, usually the mother, is more important than the others and that separation from the primary attachment figure has a negative impact on secure attachment and the future mother-child relationship (Nielsen, 2018; Vowel et al., 2024; Warkhak, 2001).

Secondly, the dynamic approach aligns itself with the findings of social sciences by recognizing the *changing norms regarding gender equality* in terms of family and professional life. Not recognizing the future possibilities for parents to adapt their working conditions to take care of their children goes against many families’ realities and the search for the most suitable solutions for the child.

Thirdly, social sciences empirical research support also the dynamic approach’s *inclusive definition of family*. A child’s well-being is indeed reinforced when all the child’s attachment figures and emotional bonds are respected (Ahrns, 2007; McHale & Irace, 2011; Napp-Peters, 2005), which is more likely in an SPC than an LPC setting (Nielsen, 2018).

Moreover, the dynamic approach also recognizes the *child’s evolving needs* and, therefore, the necessity to reevaluate the child’s best interests when different interests are introduced.

Finally, it aligns with research findings on *coparenting* (Darwiche et al., 2021) and *parental conflicts* (Hetherington & Kelly, 2002), which show that they may evolve postseparation, requiring a prospective analysis and reevaluation of the situation when significant changes are directly or indirectly related to the child.

5.1.3 The stability the pre-separation situation can bring to the child

Static approach to the pre-situation

In underlining the importance of stability, the reference parent is given a paramount role. According to the static view, there can be only one reference parent, which is determined by the amount of time spent with the child. The reference parent is the one who has primarily taken care of the child after the separation, which normally coincides with the main caregiver prior to separation. This third criterion is used specifically when decisions concern infants and small children⁵⁴, but it also applies to school-age children.⁵⁵

Having worked 80% of a full-time schedule after the birth of the child is interpreted as a condition against SPC,⁵⁶ despite the fact that having one day off might be similarly used in LPC and SPC situations. One argument in favor of the static interpretation is that the quality of the parent's relationship with the child would be less significant when the parent has only one day off. The presumption is that "shared physical custody will be established more easily when both parents were already taking care of the child alternately before the separation" (FSC 5A_11/2020, May 13, 2020 [f], consid. 3.3.3.1).

Social science findings do not support this static view of parenting roles reflected in this criterion. Research demonstrates that separation is a process and that both parents' employment and caregiving may adapt along the way. With separation and the transition to lone motherhood, even in Switzerland, women maintain the same level or increase their labor force participation (Struffolino & Bernardi, 2017). In addition, separated fathers may be more willing to invest in the childcare postseparation. This indicates that work-family schedules are likely to evolve from what they were before separation, and presuming stability based on pre-separation practices is simply inaccurate.

This criterion and the previous one, "(the stability) and the possibility for a parent to personally care for the child," favor a theoretical status quo and a gendered division of tasks. They are the most commonly documented criteria in the Swiss federal jurisprudence, giving a clear indication of the custody arrangement supported by the judges, as LPC is most commonly practiced in Switzerland.

5.1.4 The parents' ability (and willingness) to cooperate and communicate

The criterion “the parents’ ability (and willingness) to cooperate and communicate” (FSC 5A_488/2017, 8 November 2017 [f], consid. 3.1.1) refers to the quality of *coparenting*—that is, the extent to which parents support or undermine each other in their parental responsibilities (McHale & Irace, 2011). Research findings reveal that quality coparenting is one of the three key protective factors of a child’s well-being during marriage as much as in postseparation or divorce situations (Lamela & Figueiredo, 2016; McHale & Lindahl, 2011), affecting the child’s models of satisfaction and support or promoting their emotional self-regulation. The two other key protective factors of a child’s well-being, quality parenting (Feinberg, 2003) and child–parent relationships, are strongly associated with it (Vrolijk & Keizer, 2021).

Static approach and coparenting

This criterion is largely involved in the static approach called *static coparenting* (Schwarzer, 2021). According to the static approach, parents’ communication, cooperation skills, and ability to resolve conflicts are perceived as hardly evolving, considering the preseparation situation as a strong indicator of how parents might interact once separated. Only parents who have good (even “irreproachable”)⁵⁷ levels of cooperation on all child-related matters are seen as being able to establish a successful SPC arrangement.⁵⁸ Conversely, occasional parental conflicts or conflicts of low to medium intensity are seen as a disadvantage for SPC. A “marked and persistent”⁵⁹ or “serious” parental conflict⁶⁰ is perceived as definitively contrary to the interests of the child.⁶¹

Dynamic approach and coparenting

On the contrary, the dynamic approach considers that *coparenting* can evolve over time (Schwarzer, 2021). Parents’ willingness to improve their collaboration and communication with each other is valued. Accordingly, the title occasionally includes the term “willingness” (e.g., “the parents’ ability [and willingness] to cooperate and communicate and the possibility for a parent to personally care for the child”).⁶² The dynamic approach also highlights the need to contextualize parental conflicts and warn against the negative effect of tensions that can be created by the legal procedure and by the uncertainty surrounding parental rights.⁶³ SPC arrangements are perceived as being compatible with fragile, limited collaboration and communication on some aspects of the child’s education or life organization, such as visiting

rights or extracurricular activities.⁶⁴ A judge would rather suggest accompanying measures to promote conflict reduction or collaboration and communication empowerment, such as the child's transfer to the other parent at school rather than at their home,⁶⁵ a mediation process,⁶⁶ the support of a guardianship of personal relations⁶⁷ (art. 308 al. 2 in fine CC), or a guardianship of educational assistance (art. 308 al. 1 CC).⁶⁸ Parental conflict may be present, but as long as it does not impact the child's well-being, it is not considered deleterious to successful SPC establishment.⁶⁹ The judge might refer to qualified professionals⁷⁰ to monitor indicators and measure the impact of parental conflict on a child's well-being.⁷¹ Parental conflict is distinguished from marital conflict, the latter being irrelevant in assessing the situation.⁷² Finally, the judge must be aware that in a context of parental conflict, parents may make false allegations intending to influence the custody arrangement.⁷³

Research supports the dynamic approach by, first, demonstrating that coparenting can evolve positively or negatively after separation or divorce (Darwiche et al., 2021; Kitzmann, 2000; Stroud et al., 2015). Significant life events, such as separation, along with critical life-course changes in parents' professional (e.g., workload increase, career development, or stagnation) and personal lives (e.g., repartnering) can influence parents' dispositions toward custody arrangements and the interaction with one another. Notably, while there are limited studies comparing coparenting across custody living arrangements, a meta-analysis demonstrated that SPC arrangements are associated with positive feelings and emotional support between parents, compared to LPC. This is likely because SPC seem to provide more opportunities for parents to communicate and find solutions (Bauserman, 2012).

Furthermore, social science findings also support the dynamic approach by suggesting that even if parents are able to communicate and collaborate on limited aspects concerning the child, and despite occasional parental conflict, it may still benefit the child's well-being in SPC contexts (Bergström et al., 2021; Leclair et al., 2018). Although most research on parental conflict has focused on intact families, the evidence offers valuable insights for judges assessing parental conflict. A comprehensive investigation on several parameters is recommended: *the nature* of the conflict (i.e. severity, frequency, child's exposure, whether one parent exacerbates the conflict, distinguishing parental conflict from domestic violence) (Nielsen, 2017; Symths et al., 2016); its potential *causes* (i.e. anger, unresolved grief, uncooperative coparenting, verbal and physical altercations, legal conflict) and its *duration* (Fischer et al., 2005; Hetherington & Kelly, 2002; Maher et al., 2018). Understanding the characteristics of parental conflict provides insights into the potential harm it may or may not inflict on the child. Research suggests that when parental conflict is of low to medium intensity and is relatively short-lived, the quality of

coparentality should not be as heavily weighted as other key protective factors, particularly concerning the child–father relationship, which tend to be strengthened in SPC arrangements (Fabricius et al., 2012; Lamb, 2012b; Nielsen, 2017). The dynamic approach acknowledges this finding by considering SPC in situations where conflict is low to moderate and by recognizing that parental conflict may further reduce over time.

In contrast, findings from social science research regarding high conflict coparental relationships are more ambiguous. Warshak (2014) warned that systematically refusing SPC in such contexts could have detrimental effects on the child and may inadvertently exacerbate conflict. Additionally, the judge may misunderstand the nature of the conflict by assuming that both parents are equally responsible for its perpetuation.

Last but not least, research increasingly includes the *positive role of all types of coparenting*, including those involving stepparents (Lamb, 2012; McHale, 2007; Minuchin et al., 2007). However, the interpretation of the criterion on coparenting is strictly limited to biological parents (both for the static and the dynamic approach). Nevertheless, the dynamic approach acknowledges actual or potential attachment figures in its interpretation of the second criterion, “the stability and the possibility for a parent to personally care for the child” (Schwarzer, 2021) aligning with the emerging literature.

5.1.5 The geographical location and distance between parental homes

The criterion considers “the geographical location and distance between parental homes” to assess the consequences of frequent travel between parents’ homes on the child’s well-being. This criterion is often invoked if parents already practice shared custody and have regular contact; frequent commutes are considered unproblematic for the child’s well-being.

Both approaches align if SPC or a broad visitation right is already in place

The jurisprudence provided some guidance, usually when SPC or a broad visitation right are practiced, regarding *the distance* (duration and kilometers) considered adequate in relation to the child’s age (Schwarzer 2021). Generally, in these contexts, both approaches agree on the parameters of this criterion, as it is considered that the child has two parents of reference.

The appropriate *distance between parents’ homes and school* depends on the child’s age. Between 30 and 45 minutes of travel between each parent’s home and the school seems to be adequate for a child of about 10 years of age or older.⁷⁴ If the child is younger, the duration should be shorter. Moreover, the child’s traveling mode is also considered.⁷⁵ The possibility to

accompany the child, especially if they are young, and to travel by car, if the geographical situation requires it, are also factors facilitating the granting of SPC.⁷⁶

The jurisprudence also seems to agree on the *frequency of changes of domicile* compatible with the child's best interest. Age matters in these contexts: Shorter separations from the reference parents are generally supported for infants and young children, despite entailing frequent residential moves. The younger the child, the shorter the separation time between the child and the parent should be. As for older children, the jurisprudence tends to agree on limiting the frequency of domicile changes.⁷⁷

The two approaches disagree if LPC is in place

If LPC is in place at the time of the request for SPC, the two interpretative approaches do however not agree on the length of time that the child can be away from the reference parent or the frequency of the changes of residence that are appropriate for the child, given his/her age.

Differences are grounded in the definition of the “reference” parent (Schwarzer 2021). The static approach tends to defend the important needs of infants and toddlers, but also of school-age children, for frequent contact with the one considered the sole reference parent. From that perspective, SPC is considered inadequate.

In contrast, the “progressive” or dynamic approach tends to give weight to the role of both parents in the child's life, therefore relativizing the importance of close, frequent contact with the custodial parent. Depending on the approach, school vacations (particularly summer vacations) are seen as favorable, unfavorable, or irrelevant to the child's becoming accustomed to longer separations from the custodial parent and, therefore, to the implementation of SCP. For example, in the decision FSC 5A_534/2019 of January 31, 2020 (f), consid. 3.3.2, habituation to longer periods of separation from the reference parent due to the summer holidays was considered irrelevant in view of the lower recurrence. However, in the decision FSC 5A_34/2017 of May 4, 2017, consid. 5.4., the habituation of a child born in 2010 to longer separations from the reference parent thanks to school vacations favored SPC.

Research tends to support the dynamic approach. First, it demonstrates that frequent travel have overall positive effects on children's well-being regardless of age because, again, both parents are equally involved in the child's life (Soderman et al., 2014; Westphal, 2015). The most common situation of families practicing SPC is to commute weekly, usually in conjunction with the weekend, which enables the child to spend school days and leisure time with both parents, contributing to a quality parent-child relationships (Berman, 2015; Lamb & Kelly, 2001). Frequent travel also indicates that parents are flexible about the child's need for contact

with the other parent. Nevertheless, this is true when parents live near each other. As the distance between homes increases, the benefits to the child’s psychological and social well-being decrease. Regarding the effects of overnight stays and spatial mobility on infants’ and toddlers’ well-being, there are limited and nonunivocal results from reliable studies. Therefore, it remains unclear on what basis the static approach concludes that separation from one parent to spend time with the other parent may be detrimental to the well-being of infants and toddlers, as well as to the future mother–child relationship.

5.1.6 Belonging to a sibship or social circle

“Belonging to a sibship or social circle” is used very rarely in the court decisions, compared to the weight given to the static interpretation of the criteria of *stability and availability*⁷⁸ and *coparenting*⁷⁹ (Schwarzer, 2021). In addition, to complicate its interpretation, this criterion mixes “belonging to a sibship,” which is considered important at any age,⁸⁰ with “belonging to a social circle,” considered particularly important during adolescence.⁸¹

Belonging to direct and indirect sibship

Concerning *siblings*, the jurisprudence generally supports not separating them in the case of SPC. The preference is argued to be a way to maintain the emotional link between them and to favor their common education.⁸² However, the importance of this criterion is moderated by various considerations: a great difference in age between the children, if they are in their teens, and/or their paths separate due to divergent wishes, education, interests, or friends.⁸³

Research generally supports the prevailing practice of both approaches to avoid separating siblings (Bryant, 1992; Kaplan et al., 1992; Stewart, 1983). Living together has been shown to foster a strong bond, which is particularly important in contexts where support and comfort serve as protective factors against the stress of parental separation. However, some studies suggest that separating children (split custody) may offer advantages by addressing a child’s specific need for attention (Bray, 1991) and reducing rivalries when conflictual relationships already exist (Stock, 1993). Additionally, in cases of separated sibling, studies indicate that geographical proximity between parents’ homes can facilitate regular contact with both the other parent and the separated siblings, thereby supporting the success of such arrangements (Hawthorne, 2000).

The jurisprudence devotes little attention to the relationship between a child and his/her half-siblings, stepsiblings, or de facto siblings (i.e., considered as such by the child; Schwarzer,

2021). In some rare judgements, these relationships are considered in determining the custody arrangement.⁸⁴ FSC 5A_627/2016 (d), 28 August 2017, consid. 5.5.1 mentions that relationships between extended siblings should be taken into consideration only if the half- or stepsiblings live with the parent requesting SPC. Due to the dominant static approach in the jurisprudence and its narrow definition of the family (valuing nuclear and biological parents), it is not surprising that relationships between a child and his/her half-siblings, stepsiblings, or de facto siblings are barely mentioned. Furthermore, no reference to the stepparent is made under this criterion.

Research however highlights the significance of relationships and dynamics between the child and his/her family members, including extended family. These relationships are often more important than the family structure itself (nuclear vs blended family, one-parent vs two-parent family) for the child's well-being (Ahrons, 2007; McHale & Irace, 2011; Napp-Peters, 2005) and tend to be of higher quality in SPC than in LPC. It is recommended to conduct evaluation from both adults' and children's perspectives to gain a better understanding of family relationships and dynamics, as well as the needs of children (McHale et al., 2002).

Belonging to a social circle

The jurisprudence does not pay much attention to the fact that custody may disrupt a young child's social circle, given the presumption that social integration is particularly important starting in adolescence (Schwarzer, 2021). This is grounded on the argument that adolescent children tend to identify increasingly with their peers and their larger social environment rather than with the custodial parent.⁸⁵ Most judges, independently from the approach, seem to consider LPC more appropriate than SPC for adolescents, whose opinions are also considered.

Research indicates that SPC is most commonly practiced for children aged 3 to 12 years old (Sodermans et al., 2013). Beyond this age range, the prevalence of SPC tends to decline, possibly due to adolescents placing a higher value on the continuity and proximity of their peer relationships (Spruijt & Duindam, 2010). However, studies emphasize that maintaining quality relationships with both parents is particularly crucial during adolescence. The risk of engaging in unhealthy behaviors at this age is even higher for adolescents experiencing parental separation (Amato, 2003; Jablonska & Lindberg, 2007). Overall, research generally supports that stronger relationships with both parents contribute to more successful psychological adjustment for children in SPC compared to their peers in LPC arrangements. Nevertheless, social integration might be negatively affected when adolescents are required to commute long distances frequently (Jensen, 2009; Schier, 2015).

5.1.7 The child's wish

The last criterion for assessing the establishment of SPC is “the child’s wish regarding his/her own care, even if he/she lacks the capacity of discernment in this respect.”⁸⁶ According to Article 298, Paragraph 1 of the Civil Procedure Code (CPC) (December 19, 2008, Status July 1, 2022), a judge or an appointed third party must personally and appropriately hear the child, provided that age or validate reasons do not preclude it. Furthermore, according to the principles of ex officio investigation and assessment (Article 296 CPC), the judge is obliged to hear the child, not only when the child or the parents request it, but also in cases in which age or good reasons do not prevent it (art. 298 CPC). The child’s wish is not only a material criterion (i.e., related to the content of the child’s wish), but also a procedural one, intended to ensure that any decision concerning the child is in his/her best interest.

Several questions emerge in the context of our study. First, is the child’s wish consistently taken into account unless age, maturity, or a valid reason prevents it? If so, how do the static and dynamic approaches interpret this criterion and what weight is given to the child’s wish in relation to the other criteria? Finally, how does this align with empirical research findings?

Schwarzer (2021) noted that this criterion is not often cited or detailed in the federal jurisprudence. This lack of citation suggests that the child’s wish is not systematically considered, indicating that it is not a widespread practice.

Research shows that children generally want to be heard, whether informally or formally, when their parents separate (Cashmore, 2011; Cashmore & Parkinson, 2008), particularly if they have been unable to discuss the situation due to parental conflict (Block et al., 2010; Simpson, 1989). Additionally, research indicates that gathering the child’s views can empower him/her (Washark, 2003) and help illuminate the child’s needs and the effects of the separation on him/her. It can also facilitate the assessment of the child’s maturity without relying solely on his/her development stage, allowing for a more tailored interview approach.

Nevertheless, research also shows that gathering the child’s views can present risks. For example, the child may worry about the potential consequences for his/her parents and himself/herself (Cashmore, 2001). One may be placed at the center of the conflict and bear the brunt of the decision, or one may make choices that are not in his/her best interests due to influence from one of his/her parent. The judge’s discretion regarding the consideration of the child’s wishes is therefore partially aligned with the findings of empirical research.

Schwarzer (2021), having found that the practice of hearing the child appears to be limited,

indirectly suggests that interdisciplinary collaboration is not widely practiced. However, research emphasizes that to conduct interviews with children effectively – recognizing the potential benefits while mitigating associated risks – the judge should collaborate with professionals knowledgeable about child psychology and family dynamics (Moloney, 2008).

The hearing of the child's wish being not a widespread practice, according to the analysis of the federal jurisprudence (Schwarzer, 2021), this makes it difficult to identify and to compare the two approaches' interpretation of the child's best interests with findings from social sciences on the matter.

Some clarification on the factors guiding the hearing (or lack of one) for the child and the weight to be given to these factors is provided in Swiss law, including in the jurisprudence. We will briefly present these factors and offer some recommendations for further research.

In principle, it is recommended to hear the child from the age of 6 regarding his/her own care, even if he/she is not capable of discernment in this respect, "(...) at least if it appears, in view of his/her age and development, that this is a firm decision on his/her part and that this desire reflects a close affective relationship with the designated parent" (FSC 5A_771/2018, 28 March 2019 [f], consid. 5.2.2). The aim is to help the judge form an opinion.⁸⁷ Furthermore, in the context of a hearing of a child who is not fully capable of discernment, it is advisable "(...) to avoid questioning the child about his/her concrete desire to be assigned, as he/she cannot disregard immediate and external influencing factors and cannot formulate a stable wish" (FSC 5A_547/2017, 26 October 2017, consid. 3.2.2). Not hearing the child could be justified by young age, the mental burden that the hearing could cause,⁸⁸ a possible mental handicap, and the real and well-founded fear that the child would suffer reprisals.

Regarding the capacity for discernment, it is not linked to a specific age threshold. The doctrine describes that the capacity of discernment depends on the importance of the act considered (Meier & Stettler, 2019). When the matter at stake is custody, the child is considered capable of discernment between 11 and 13 years.⁸⁹ If it is doubtful whether the child is capable of discernment, the judge (of the lower judicial authorities) may call upon an expert, if necessary.⁹⁰ Finally, the FC also warned that a child's wish can be influenced by a parent.⁹¹ In the judgement 5A_459/2015, 13 August 2015, consid. 6.3, the FC concluded that a child just under the age of 12 who categorically refused to maintain personal relations with his father was "(...) incapable of discernment in matters involving his affect" in view of the deep distress caused by a severe parental conflict. It then stated that a child's wish must be considered as one criterion among others.⁹²

The child's wish serves as a procedural criterion designed to ensure that any decision

concerning the child is made in his/her best interest. In most Swiss cantons, the authorities responsible for assigning custody vary depending on whether the parents are married, and some Cantons, such as Aargau, have implemented a family court, which may result in a diverse range of practices across Switzerland.

6. Conclusion

This study concludes that the consideration, weighting, and interpretation of each criterion when evaluating physical custody arrangements depend on the judge and not on the relative importance, they appear to have in empirical studies analyzing the effects of complex interactions between them (e.g., between parenting skills, parental conflict, and SPC benefits). Indeed, the Swiss FC only weakly fulfills its mandate to harmonize law open to interpretation, such as the legal criteria for determining physical custody that best responds to the child's best interests (Schwarzer, 2021). The FC also makes little reference to empirical research on children's well-being in a postseparation context, although it recognizes its importance in some judgments (i.e., FC 5A 888/2016, 20 April 2018, consid.3.1; FC 5A, 834/2012, 26 February 2013, consider. 4.1.) The latter therefore depends heavily on the judge's perception of postseparation family ties and the child's best interests, as well as on the judge's expertise in family psychology and sociology. Although both static and dynamic approaches are generally present within the same judicial decision—reflecting that a judge may not consistently adhere to one approach—it would be interesting to investigate how a judge's practices vary according to their gender, age, canton, and political affiliation.

The dominant approach of the child's best interests when deciding on physical custody arrangements in the jurisprudence, the "conservative" or static approach, considers LPC to be better for the child's well-being than SPC (Schwarzer, 2021). This approach is, however, weakly supported by social science findings. The static approach associates children's well-being with a *narrow definition of the family*, a *gendered model of parenthood*, and a *static practice of coparenting*. It gives decisive weight to the criterion "the (stability) and possibility for one parent to personally care for the child" and to the criterion "the stability that the pre-separation situation can bring to the child," as well as a narrow interpretation of the criterion "the parents' ability (and willingness) to cooperate and communicate," with the result that priority is given to the status quo that prevails after separation, i.e., custody by a single parent (the mother). In contrast, the minority approach, the "progressive" (Schwarzer, 2021) or dynamic approach, is generally supported by social science research. It adopts a *broad definition of the family*, a

nongendered model of parenthood, and a *dynamic vision of coparenting practices*. This approach particularly values the criterion “(the stability and) possibility for a parent to personally care for the child” by acknowledging the various attachment figures and their current or future possibilities in caring for the child. An ability or willingness to cooperate and communicate (another key criterion) on essential issues related to the child’s care is sufficient to establish suitable conditions for SPC. This approach deems that prospective and recurring assessments should be carried out in addition to current and pre-separation evaluation, which aligns with the social science research’s findings. Research shows that SPC tends to counterbalance the negative effect of separation or divorce on children’s well-being. Although SPC is practiced more by parents with high socioeconomic resources, who are characterized by higher income, good coparenting, and a better-quality child–parent relationship to begin with, compared with other parents, this is not enough to explain why SPC children tend to have better outcomes than LPC children. Family processes, such as parent–child relationships, parent–parent relationships, and parenting practices, are critical relational mediators worth measuring. In addition, parental well-being, which affects child well-being to some extent, tends to be higher in SPC parents than in LPC parents, the latter having been exposed to multiple stressors such as single parenting, loss of emotional support, or economic decline. However, the unequal time distribution between SPC parents reduces the positive effects on their health and well-being (Recksiedler & Bernardi, 2020). Measures to encourage fathers’ involvement in childcare and mothers’ working lives as well as to facilitate legal access to SPC are needed to promote parental health and well-being.

Therefore, the legal guiding criteria need to be adjusted and defined more precisely to ensure greater consistency with scientific findings and equal treatment of parents and children in family cases.

First, the prerequisite criterion, “the existence of (good) parenting skills in both parents,” should be assessed by judges, as quality parenting is a crucial factor in protecting children’s well-being. Neither the static nor the dynamic approach evaluates the parenting quality of biological parent figures and even less of other current or potential parental figures. Research shows that quality parenting of at least one parent reduces not only the negative impact of parental separation on child well-being (Amato & Keith, 1991; Hetherington et al., 1998) but also of parental conflict (Mahrer et al., 2018). Even in families with high parental conflict (i.e., families that fight over custody or show conflict in their interactions), SPC arrangements seem beneficial if one parent has high parenting skills. More research on high-IPC families is needed, however.

Secondly, “the (stability and) possibility for one parent to personally care for the child” and “the stability that the pre-separation situation can bring to the child” are the two most essential criteria in jurisprudence. They are supported and interpreted by the static approach in a way that favors the status quo of the situation and, therefore, LPC. Judges do not have to follow situations once judgments are issued. We assume that they tend to take the side of security in the current situation (a given) and not potential changes (a possibility). However, the well-being of the child and the family could be improved. Additionally, it is vital to better respond to the findings of social science research, and judges should not only value the stability of the situation but assume that there is a reference parent based on the parent who has primarily cared for the child during the couple’s life and since separation. Research shows that, although a primary parent often cares for the child in the early years, representing their primary attachment figure, attachment to the other parent is no less important from an emotional point of view (Kelly & Lamb, 2000; Nielsen, 2018). Judges must recognize that a quality relationship between the child and both parents is an essential protective factor for the child’s well-being, a relationship that tends to be higher in the context of SPC than in LPC (Bauserman, 2012; Carlsund et al., 2013). For infants and toddlers, there is little or no reliable empirical evidence for the presumption that one primary attachment figure is more important than others and that separation from the primary attachment figure is detrimental to secure attachment and the future mother–child relationship. Judges should, therefore, also consider the possibilities and wishes of the noncustodial parent to become involved in the child’s care. The various possibilities for care by the adults surrounding the child (extended family, institutions) should be balanced with the possibility of maintaining close ties with parents and their extended families. Research also shows that children generally have closer relations with their extended families in SPC (Nielsen, 2018).

The other key criterion of the static approach, “the stability that the pre-separation situation can bring to the child,” ignores that separation is a process and that both parents’ employment and care can be adapted along the way. With separation and single motherhood, even in Switzerland, women maintain the same level or increase their participation in the labor market (Struffolino & Bernardi, 2017). Assuming stability based on pre-separation practices is simply inaccurate and underestimates the potential investment in care that separated fathers are willing to make.

Thirdly, another important criterion is “the parents’ ability (and willingness) to cooperate and communicate.” The social sciences research aligns with the dynamic approach to the quality

of communication necessary for successful SPC. Low-quality coparenting, characterized by conflicts of low to medium intensity, should not hinder the possibility of SPC arrangement (Fabricius et al., 2012; Nielsen, 2017). Judges should give more weight in their assessment to the other two key factors in protecting the child's well-being: the quality of parenting and the stability and possibility for both parents to be involved in the child's life. Judges should recognize that separation and legal proceedings exacerbate parental conflicts, that conflicts tend to diminish, and ways of reducing conflict between parents (e.g., mediation, coparenting work, child transfer strategies, guardianship of personal relationships) should be suggested when necessary. Concerning identifying the conditions under which living arrangements work well or poorly for children in families with high IPC, more opportunities will be provided by the growing jurisdictions that promote SPC.

Fourthly, judges tend to refer to the criterion of “geographical location and distance between parental homes” only if SPC is already practiced (Schwarzer, 2021), which implicitly means that frequent travel is problematic for the child's well-being. However, research indicates that spatial mobility should not be an argument against SPC when children are of school age and parents do not live far from each other (Poortman, 2021; Soderman et al., 2014). It allows the child to benefit from both parents and indicates that the parents are flexible about the child's need for contact with the other parent. Yet, the greater the distance between parents' homes, the lower the benefits of frequent contact with parents. For young children, research on the impact of spatial mobility is limited and inconclusive.

Fifthly, the criterion of “belonging to a sibling or social circle,” barely mentioned in the jurisprudence, should be two criteria in the first place, given the distinct subjects they are. The jurisprudence limits “belonging to a sibling circle” to direct brothers and sisters, barely mentioning half-siblings or de facto brothers and sisters. Yet, the diversity of family forms is growing, and research shows that children's well-being is enhanced when all emotional ties are respected (Ahrons, 2007; McHale & Irace, 2011). Research (Nielsen's systematic review, 2018) has demonstrated that SPC offers better conditions to strengthen the relationship between the child and the whole family as an LPC arrangement. Judges should, therefore, consider the actual and potential relationships between the child and his/her extended family members.

Regarding the separation of direct siblings through split custody, the research concurs with the practice of judges of keeping them together unless there is a particular reason, such as the child's wish or a particularly strong or weak bond between the child and one parent. Concerning “belonging to a social circle,” most judges assume this is more important for adolescents than the relationships with both parents. Research shows, however, that a better quality of

relationship with both parents translates into better psychological adjustment for children living in SPC than for their peers living in LPC (Bergström et al., 2014; Turunen et al., 2017). Therefore, this type of custody arrangement should also be considered in the judge's assessment.

Finally, the child's wish is a criterion not often cited or detailed in the Swiss federal jurisprudence. Yet, research shows that considering the child's views may empower him/her and enlighten parents and professionals about the child's best interests. It may, however, also represent risks for the child's well-being, such as placing the child at the center of the parental conflict. The judge should recognize the benefits while assessing the associated risks by drawing on the expertise of professionals with knowledge of child psychology and domestic violence (Moloney, 2008).

Furthermore, the child's wish is not only a material criterion (i.e., linked to the content of the child's wish) but also a procedural one aimed at ensuring that any decision concerning the child is in his/her best interests. To understand the extent to which a child's right to be heard is respected, it is necessary to evaluate the lower court's decisions. An updated and comprehensive analysis of the procedural rules of Swiss family law should also be undertaken.

Although further research, particularly on the dynamics of SPC childcare arrangements over time, is needed, the current state offers insights into the conditions conducive to a child's well-being in a postseparation context. Therefore, to ensure that judicial decisions better serve the interests of children and reflect new family configurations, regular dialogue and exchange between researchers and Swiss judicial authorities are urgently needed.

Even if the implementation of legal provisions in favor of SPC were to become more favorable, it would not be sufficient to significantly increase the prevalence and diffusion of this type of custody across different social classes. To effectively address this gap, the government must, in addition to the recommendations on custody allocation criteria, adopt proactive public policies that promote gender equality. For instance, ensuring equal numbers of days between parents in case of sick leave or dividing child benefits between parents practicing SPC are measures that can promote gender equality in parenting (Fransson et al., 2018).

Moreover, public policies should aim to support SPC diffusion across social strata, not only among parents from high SES backgrounds but also among those with lower educational attainment, fewer economic resources, and limited conflict management skills (Cancien et al., 2014; Recksiedler & Bernardi, 2020). Research indicates that fathers with a low SES tend to be less involved in their children's education than those with a higher SES, likely due to constraints

such as limited free time resulting from high workload and inflexible working conditions (Garriga et al., 2021).

Given the potential negative consequences of SPC on social equality for children, coupled with the rising rates of divorce and separation in Western countries, the state's role in implementing legal measures and public policies becomes increasingly critical. Furthermore, since low- and middle-income parents tend to experience more custodial disagreements than their higher-income counterparts, legal regulations that empower judges to impose SPC when it is in the child's best interest could also prove beneficial (Garriga et al., 2021).

Footnotes

1. FSC 5A_46/2015, 26.05.2015; FSC 5A_403/2015 (f), 28.08.2015 ; FSC 5A_459/2015, 13.08.2015 (f) ; FSC 5A_72/2016, 02.11.2016; FSC 5A_379/2016, 01.12.2016; FSC 5A_474/2016, FSC 5A_487/2016, 27.10.2016 (d); 5A_34/2017, 4.05.2017 (f) ; FSC 5A_488/2017, 8.11.2017 (f); FSC 5A_512/2017, 22.12.2017 ; FSC 5A_547/2017, 26.10.2017; FSC 5A_620/2016 (d), 07.03.2017; FSC 5A_627/2016 (d), 28.11.2017; FSC 5A_691/2017, 14.11.2017 (f); FSC 5A_775/2016, 17.01.2017; FSC 5A_819/2016, 21.02.2017; FSC 5A_968/2016, 14.06.2017 (d); FSC 5A_665/2018, 18.09.2018 (d); FSC 5A_837/2017, 27.02.2018; FSC 5A_848/2018, 16.11.2018; FSC 5A_888/2016, 20.04.2018; FSC 5A_901/2017, 27.03.2018; FSC 5A_1018/2017, 14.06.2018; FSC 5A_271/2019, 09.12.2019 (f); FSC 5A_312/2019, 17.10.2019 (d); FSC 5A_462/2019, 29.01.2019 (f); FSC 5A_629/2019, 13.11.2019; FSC 5A_771/2018, 28.03.2019; FSC 5A_11/2020, 13.05.2020 (f); FSC 5A_200/2019 and FSC 5A_201/2019, 29.01.2020; FSC 5A_534/2019 (f), 31.01.2020; FSC 5A_821/2019, 14.07.2020 (f); FSC 5A_669/2020, 25.03.2021 (f); FSC 5A_260/2019, 5.11.2019.
2. FSC 5A_968/2016, 14.06.2017 (d), consid 5.1; FSC 5A_620/2016, 07.03.2017 (d), consid. 5.
3. FSC 5A_888/2016, 20.04.2018.
4. Both terms, joint physical custody and shared physical custody, are used in the literature. We prefer the latter, but they can be considered synonymous.
5. Sometimes, the 50% - 50% arrangement is referred to as symmetrical custody and the larger range as asymmetrical SPC (Steinbach, 2019)
6. To facilitate readability, the singular is used to refer to judges.
7. Article 3 al.1, CRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
8. Article 3 al.2, CRC: "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."
9. The term hard law refers generally to legal obligations that are binding to the parties involved and which can be legally enforced before a court.
10. The term soft law denotes agreements, principles, and declarations that are not legally binding.
11. a. the existence of (good) parenting skills in both parents, a prerequisite criterion; 2) the (stability and) possibility for a parent to care for the child personally; 3) the stability a pre-separation situation can bring to the child; 4) the parents' ability (and willingness) to cooperate and communicate; 5) the geographical location and distance between parental homes; 6) belonging to a sibship or social circle; 7) the child's wishes.
12. In twenty-three judgements, the possibility of setting up an SPC arrangement was evaluated, and in eleven judgements, the focus was solely on LPC, but they provided interesting information on the interpretation of custody allocation criteria.
13. FSC 5A_462/2019, 29 January 2019 (f), consid. 3.2.
14. FSC 5A_771/2018, 28 March 2019, consid. 5.2.2.
15. FSC 5A_462/2019, 29 January 2019 (f), consid. 3.2.
16. "Romandie Coordination of Paternal and Co-parenting Organizations"
17. FSC 5A_46/2015, 26.05.2015; FSC 5A_403/2015 (f), 28.08.2015 ; FSC 5A_459/2015, 13.08.2015 (f) ; FSC 5A_72/2016, 02.11.2016; FSC 5A_379/2016, 01.12.2016; FSC 5A_474/2016, FSC 5A_487/2016, 27.10.2016 (d); 5A_34/2017, 4.05.2017 (f) ; FSC 5A_488/2017, 8.11.2017 (f); FSC 5A_512/2017, 22.12.2017 ; FSC 5A_547/2017, 26.10.2017; FSC 5A_620/2016 (d), 07.03.2017; FSC 5A_627/2016 (d), 28.11.2017; FSC 5A_691/2017, 14.11.2017 (f); FSC 5A_775/2016, 17.01.2017; FSC 5A_819/2016, 21.02.2017; FSC 5A_968/2016, 14.06.2017 (d); FSC 5A_665/2018, 18.09.2018 (d); FSC 5A_837/2017, 27.02.2018; FSC 5A_848/2018, 16.11.2018; FSC 5A_888/2016, 20.04.2018; FSC 5A_901/2017, 27.03.2018; FSC 5A_1018/2017, 14.06.2018; FSC 5A_271/2019, 09.12.2019 (f); FSC 5A_312/2019, 17.10.2019 (d); FSC 5A_462/2019, 29.01.2019 (f); FSC 5A_629/2019, 13.11.2019; FSC 5A_771/2018, 28.03.2019; FSC 5A_11/2020, 13.05.2020 (f); FSC 5A_200/2019 and FSC 5A_201/2019, 29.01.2020; FSC 5A_534/2019 (f), 31.01.2020; FSC 5A_821/2019, 14.07.2020 (f); FSC 5A_669/2020, 25.03.2021 (f); FSC 5A_260/2019, 5.11.2019.
18. cf. Salzgeber Joseph, Die Diskussion um die Einführung des Wechselmodells als Regelfall der Kindesbetreuung getrenntlebender Eltern aus Sicht der Psychologie, in FamRZ 2015, p. 2018 ss.
19. A parenting plan, or a child custody plan, establishes how divorced or separated parents will share the responsibilities of childrearing and decision-making regarding the child.

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20. The dynamic character of these factors would be captured best by short-, middle-, and long-term evaluations and pre- and postseparation studies. Although some research uses longitudinal data, most data are cross-sectional and collected at the time of separation and divorce. In addition, any literature review on this subject is limited by the variation in comparison groups, control variables, and measurement tools across studies.
21. New Family in the Netherlands Survey is an internet survey among almost 4,500 parents who divorced or separated from a cohabiting union in 2010.
22. FSC 5A_462/2019, 29 January 2019 (f), consid. 3.2.
23. These criteria are interdependent, and their importance varies according to the case. While considering these criteria, the judge has a broad power of appreciation as he is the most familiar with the parties and the environment in which the child lives (FSC 5A_200/2019 (f) and FSC 5A_201/2019 (f) January 29, 2020, consid. 3.1.2).
24. FSC 5A_34/2017, 4 May 2017 (f), consid. 5.2.
25. FSC 5A_534/2019 (f), 31 January 2020, consid. 3.3.2.
26. FSC 5A_691/2017, 14 November 2017 (f), consid. 4.1.1 and 4.1.2.
27. FSC 5A_534/2019 (f), 31 January 2020, consid. 3.3.2. The term “custody” (garde, Obhut) has been limited in the Swiss Civil Code to the sole dimension of “de facto custody” (garde de fait, faktische Obhut), which translates to “(...) the day-to-day supervision of the child and the exercise of rights and duties related to care and everyday education.” It no longer includes the right to determine the place of residence” (Meier & Stettler, 2014, p. 308).
28. FSC 5A_462/2019, 29 January 2019 (f), consid. 3.3; FSC 5A_534/2019 (f), 31 January 2020, consid. 3.3.2.
29. FSC 5A_665/2018, 18 September 2018, consid. 4.1.
30. FSC 5A_627/2016 (d), 28 August 2017, consid. 4.1.
31. FSC 5A_627/2016 (d), 28 August 2017, consid. 4.1.
32. FSC 5A_534/2019 (f), 31 January 2020, consid. 3.2
33. FSC 5A_462/2019, 29 January 2020 (f), consid. 3.7.1.
34. FSC 5A_627/2016 (d), 28 August 2017, consid. 4.1.
35. FSC 5A_968/2016, 14 June 2017 (d).
36. FSC 5A_534/2019 (f), 31 January 2020
37. FSC 5A_691/2017, 14 November 2017 (f), consid. 4.2.2.
38. FSC 5A_837/2017, 27 February 2018, consid. 3.3.
39. FSC 5A_403/2015 (f), 28 August 2015, consid. 6.
40. FSC 5A_627/2016 (d), 28 August 2017.
41. FSC 5A_968/2016 (d), 14 June 2017, consid. 5.1.
42. FSC 5A_620/2016 (d), 7 March 2017, consid. 5.
43. FSC 5A_968/2016, 14 June 2017 (d), consid. 5.1; FSC 5A_462/2019, 29 January 2019 (f), consid. 3.2
44. FSC 5A_534/2019 (f), 31 January 2020, consid. 3.3.2.
45. FSC 5A_379/2016, 1 December 2016, consid. 3.4.
46. FSC 5A_888/2016, 20 April 2018, consid. 3.1.
47. FSC 5A_271/2019 (f), 9 December 2019, consid. 3.4.2.
48. FSC 5A_888/2016, 20 April 2018, consid. 3.3.2.
49. FSC 5A_888/2016, 20 April 2018, consid. 3.1.
50. FSC 5A_271/2019, 9 December 2019 (f), consid. 3.3.1; FSC 5A_888_/2016, 20 April 2018, consid. 3.3.2.
51. FSC 5A_771/2018, 28 March 2019 (f), consid. 5.2.2.
52. FSC 5A_888/2016, 20 April 2018, consid. 3.3.2.
53. FSC 5A_771/2018, 28 March 2019 (f), consid. 5.2.2.
54. FSC 5A_627/2016 (d), 28 August 2017.
55. FSC 5A_46/2015 du 26 mai 2015, consid. 5.3.
56. FSC 5A_837/2017, 27 February 2018, consid. 3.1.
57. FSC 5A_312/2019, 17 October 2019 (d), consid. 2.2.
58. FSC 5A_312/2019, 17 October 2019 (d), consid. 2.1.2; FSC 5A_627/2016, 28 August 2017 (d), consid. 5.
59. FSC 5A_534/2019, 31 January 2020 (f), consid. 3.1.
60. FSC 5A_627/2016, 28 August 2017 (d), consid. 5.1.
61. FSC 5A_46/2015, 26 May 2015, consid. 4.4.5.
62. FSC 5A_200/2019 (f) and 5A_201/2019 (f), 29 January 2020, consid. 3.1.2.; FSC 5A_771/2018, 28 March 2019, consid. 5.2.2.
63. FSC 5A_771/2018, 28 March 2019, consid. 5.3.
64. FSC 5A_200/2019 and 5A_201/2019 (f), 29 January 2020, consid. 3.2.2 ; FSC 5A_312/2019, 17 October 2019 (d), consid. 2.4.
65. FSC 5A_200/2019 and 5A_201/2019 (f), 29 January 2020, consid. 3.2.2.
66. FSC 5A_72/2016, 2 November 2016, consid. 3.4.2
67. FSC 5A_34/2017, 4 May 2017 (f), consid. 7.3.
68. FSC 5A_629/2019, 13 November 2020, consid. 8.3.2.
69. FSC 5A_888/2016, 20 April 2018, consid. 3.1; FSC 5A_629/2019, 13 November 2019, consid. 8.9.
70. FSC 5A_200/2019 (f) and 5A_201/2019 (f), 29 January 2020, consid. 3.2.2; FSC 5A_629/2019, 13 November 2020, consid. 8.3.3.
71. FSC 5A_200/2019 (f) and 5A_201/2019 (f), 29 January 2020, consid. 3.2.2.
72. FSC 5A_312/2019, 17 October 2019 (d), consid. 2.4.
73. FSC 5A_69/2017, 14 November 2017 (f).
74. FSC 5A_200/2019 (f) and 5A_201/2019 (f), 29 January 2020, consid. 3.2.1; FSC 5A_669/2020, 25 March 2021 (f), consid. 3.2.
75. FSC 5A_200/2019 (f) and 5A_201/2019 (f), 29 January 2020, consid. 3.2.1.
76. FSC 5A_669/2020, 25 March 2021 (f), consid. 3.2; FSC 5A_34/2017, 4 May 2017 (f), consid. 5.2.
77. FSC 5A_34/2017, 4 May 2017 (f), consid. 5.4.
78. “The stability and the possibility for a parent to personally care for the child.”
79. “The parents’ ability (and willingness) to cooperate and communicate and the possibility for a parent to personally care for the child.”
80. FSC 5A_34/2017, 4 May 2017; FSC 5A_669/2020, 25 March 2021 (f), consid. 3.2.
81. FSC 5A_629 et 2019, 13 November 2020, consid. 4.2.
82. FSC 5A_34/2017, 4 May 2017, consid. 5.4.; FSC 5A_669/2020, 25 March 2021 (f), consid. 3.2.
83. FSC 5A_488/2017, 8 November 2017, consid. 3.4.
84. FSC 5A_72/2016, 2 November 2016, consid. 3.3.2

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85. FSC 5A_665/2018, 18 September 2018, consid. 4.1.
86. FSC 5A_462/2019 (f), 29 January 2020, consid. 3.2.
87. FSC 5A_547/2017, 26 October 2017, consid. 3.2.2.
88. FSC 5A_933/2016, 6 December 2016.
89. FSC 5A_488/2017, 8 November 2017, consid. 3.2.1.
90. FSC 5A_312/2019, 17 October 2019, (d), consid. 2.1.2.
91. FSC 5A_819/2016, 21 February 2017 (f), consid. 7.3.
92. FSC 5A_819/2016, 21 February 2017 (f), consid. 7.3.

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