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Parental responsibility - child custody and contact rights



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European Judicial Network
(in civil and commercial matters)

1 What does the legal term “parental responsibility” mean in practical terms? What are the rights and obligations of a holder of parental responsibility?

Custody (parental responsibility) is the duty and right of parents. It includes caring for and raising the child, managing the child’s property and representing the child, in addition to other matters (Section 158 of the Austrian Civil Code – *Allgemeines Bürgerliches Gesetzbuch*).

Under Section 160 of the Austrian Civil Code, caring for a child means primarily looking after his/her physical well-being and health and directly supervising the child, and raising a child includes, in particular, ensuring the child’s physical, mental, emotional and moral development, and promoting the child’s talents, abilities, preferences and development potential and his/her schooling/vocational training. Care also includes children’s medical treatment and raising the child also includes deciding on the child’s place of residence (Section 162 of the Austrian Civil Code) and therefore also, for example, taking decisions on foreign travel, selecting schools and choosing or changing the child’s religion. The right of the parents to raise the child also implies the right to name the child.

Parents must contribute on a proportional basis according to their capacity to meet the needs of the child commensurate with their circumstances, taking into account the child’s talents, abilities, preferences and development potential. Section 164 of the Austrian Civil Code states that parents must manage the child’s property ‘with the care of decent parents’.

‘Legal representation’ of the child is defined as the right and obligation to handle legal matters for the child. This includes representing the child in cases where rights or obligations are assigned directly to the child or granting consent on behalf of the child. Legal representation can refer to caring for and raising the child and managing the child’s property in the ‘external’ sense (e.g. concluding a medical treatment contract with a doctor, agreeing to curative treatment for the child) as opposed to actually performing these tasks ‘internally’ (e.g. administering medication, changing a baby’s nappy, monitoring the completion of homework). Legal representation also applies outside of these areas (in the ‘pure’ sense of the term), such as when changing the child’s name or nationality, requesting recognition of extramarital paternity and exercising the child’s personal rights.

2 As a general rule, who has the parental responsibility over a child?

As a rule, if the child is born in wedlock or if the parents marry one another subsequent to the child’s birth, both parents will have custody of the child (Section 177(1) of the Austrian Civil Code). If the child is born out of wedlock, by law only the mother will have custody of the child (first sentence of Section 177(2) of the Austrian Civil Code).

The second sentence of Section 177(2) of the Austrian Civil Code states that unmarried parents may, after being informed of the legal consequences, declare in person before the registrar that they are both responsible for the child's custody, as long as custody has not already been settled in court. If the parents do not live in a single household and both have custody of the child, they must come to an agreement on which parent will be the child's primary carer. Alternatively, the parents can enter into an agreement before the court or submit such an agreement to the court (Section 177(3) of the Austrian Civil Code). The court can also grant custody to both parents (Section 180(2) of the Austrian Civil Code).

Joint custody can only be terminated by means of a court decision. The court must then seek an amicable settlement. If this is unsuccessful, the court will grant custody to one parent or again to both parents (Section 180 of the Austrian Civil Code). If the court awards joint custody, it must also stipulate the household in which the child will primarily be cared for. In these decisions the court will always prioritise what is in the child's best interest.

If only one parent is awarded custody, the other will be granted the right to personal contact with the child and the rights to information, expression and representation as defined in Section 189 of the Austrian Civil Code.

3 If the parents are unable or unwilling to exercise parental responsibility over their children, can another person be appointed in their place?

If both parents are prevented from exercising custody, the court must decide which grandparents (or, failing that, grandparent), or which foster parents (or foster parent) should be awarded custody of the child. If the grandparents or foster parents are to be granted custody, a couple will generally take precedence over one grandparent or foster parent, unless this is not in the child's best interest. If both parents are prevented from providing some aspect of care, this will apply accordingly. The child's well-being is always the primary criterion when custody is being awarded.

If the parent with sole custody is prevented from exercising custody, the court must decide whether in that case full or partial custody should be awarded to the other parent, to grandparents or a grandparent, or to foster parents (or a foster parent). The other parent will take precedence over grandparents and foster parents as long as the child's well-being can be guaranteed with that parent.

If there are no parents, grandparents or foster parents who can be awarded custody, another suitable person can be awarded custody of the child (Section 204 of the Austrian Civil Code). The well-being of the child is the decisive factor when choosing this person; the child's wishes and those of the parents must also be taken into consideration (Section 205(1) of the Austrian Civil Code). Relatives are the first to be considered, followed by other persons close to the child, and finally other suitable persons, such as child or youth welfare organisations (Section 209 of the Austrian Civil Code).

4 If the parents divorce or split up, how is the question of parental responsibility determined for the future?

Joint custody continues to apply following divorce or the annulment of a marriage. However, if the parents wish to maintain joint custody as before, they must submit an agreement to the court within a reasonable period of time specifying the parent with whom the child will primarily reside. The court must approve this agreement if it is in the best interest of the child. Parents are not allowed, however, to share custody in a way which would mean, for example, one parent being solely responsible for caring for and raising the child, while the other only deals with managing the child's property and representing the child; the parent with whom the child primarily resides must always have full custody. If such an agreement is not submitted within a reasonable period of time following the dissolution of the marriage, or if it is not in the best interest of the child, the court must decide, if an amicable agreement cannot be reached - where necessary after counselling or mediation, which parent will have sole custody of the child in the future.

The parents can also specify that only one parent should retain custody of the child after the dissolution of the marriage. An agreement stipulating the parent with whom the child will primarily reside is clearly not needed in such cases. This not only applies to cases in which the marriage is dissolved, but also to instances in which the parents of a child are still married but live permanently apart. In such cases the court will only decide at the

request of one of the parents.

The above information on custody following dissolution of the parents' marriage also applies to cases in which life partners separate. The parents of a child born out of wedlock can therefore be awarded joint custody by the court if the joint household has been abolished or even if such a household never existed, provided that there is an agreement on residence in place which is in the child's best interest.

5 If the parents conclude an agreement on the question of parental responsibility, which formalities must be respected to make the agreement legally binding?

See question 4.

6 If the parents cannot come to an agreement on the issue of parental responsibility, what are the alternative means for solving the conflict without going to court?

Parents can contact child welfare or youth services (family counselling) or private organisations for advice. Alternatively, parents can attend mediation, couple's counselling or parental counselling or make use of other counselling services.

7 If the parents go to court, what issues can the judge decide upon relating to the child?

The judge in the Guardianship Court (*Pflegschaftsgericht*) is only able to officially initiate and adjudicate in proceedings relating to custody and access rights. If there is an acute risk to the child's well-being, child and youth welfare services must be notified. If the child is in imminent danger, they can take appropriate measures, including the withdrawal of custody in the most serious cases.

Child maintenance can only be decided at the request of the child's legal representative or the person of legal age entitled to maintenance, it cannot be decided by the court of its own motion. Child maintenance must be claimed as part of non-contentious legal proceedings (*Außerstreitverfahren*). This also applies to children of legal age. Judicial officers (*Rechtspfleger*) are responsible for this.

8 If the court decides that one parent shall have sole custody of a child, does this mean that he or she can decide on all matters relating to the child without first consulting the other parent?

The parent without custody has the right to be informed in a timely manner of important matters affecting the child and planned measures which require collective representation in the case of joint custody (Section 167(2) and (3) of the Austrian Civil Code) by the person with custody and to comment on this information (right to information and expression). The comments should be taken into consideration if the wishes expressed better serve the interests of the child. These rights also extend to less important matters (provided they are not merely everyday matters) if, despite the willingness of the parent without custody, he/she does not have regular face-to-face contact with the child, for example because circumstances do not allow this or because the child refuses contact (Section 189(3) of the Austrian Civil Code).

If the parent with custody persistently fails to comply with these obligations, the court can issue appropriate injunctions upon request and, if the child's well-being is at risk, of its own motion (Section 189(4) of the Austrian Civil Code). The court can, for example, issue specific orders to the parent who is failing to comply, or authorise the parent without custody to obtain information himself/herself from the doctor or school. If the behaviour of the parent with custody puts the child's well-being at risk, custody may be withdrawn either partially or in full pursuant to Section 181 of the Austrian Civil Code.

The right to information and expression can be restricted or withdrawn by the court if the exercise thereof seriously endangers the child's well-being. The same applies if the parent concerned abuses these rights or exercises them in a way which is unacceptable to the other parent. They also cease to exist if the parent himself/herself refuses contact with the child without justification (Section 189(2) of the Austrian Civil Code).

Custody must always be exercised in a manner which best serves the interests of the child. When determining what the best interests of the child are, the child's personality and needs, especially his/her talents, abilities, preferences and development potential, and the living conditions of the parents should be taken into account.

All persons with custody (parents, grandparents, foster parents, others) and persons who have other rights and obligations in relation to a child (e.g. access rights) must, in order to safeguard the well-being of the child, refrain from anything which could undermine the child's relationship with other persons who have rights and obligations in relation to the child or which could make it more difficult for such persons to perform their duties (good conduct requirements [*Wohlverhaltensgebot*], Section 159 of the Austrian Civil Code).

9 If the court decides that the parents shall have joint custody of a child, what does this mean in practice?

The principle of sole representation applies to legal representation, i.e. each parent is entitled and obliged to represent the child alone. Legal action taken by one parent is therefore still legally valid even if the other parent does not agree with it (Section 167(1) of the Austrian Civil Code). The agreement of both parents authorised to represent the child is only required in the cases listed under Section 167(2) of the Austrian Civil Code (e.g. when changing the child's first name or surname, choosing or changing the child's religion, transferring the child to outside care, etc.)

The approval of the other parent authorised to represent the child and consent of the court are required when the child is represented or consent is given on behalf of the child in property-related matters not subject to ordinary enterprise (Section 167(3) of the Austrian Civil Code). These include, for example, the divestment or mortgaging of property, the waiver of a right to inheritance, the unconditional acceptance or waiver of succession, and the acceptance of gifts with encumbrances.

In civil proceedings each parent is entitled to represent the child on his/her own. If the parents cannot agree or the court has not designated either of them or a third party as the child's representative, the representative will be the parent who completed the first procedural step (*Verfahrenshandlung*) (Section 169 of the Austrian Civil Code). Parents must observe the good conduct requirements (see question 9).

10 To which court or authority should I turn if I want to lodge an application on parental responsibility? Which formalities must be respected and which documents shall I attach to my application?

Under Section 109 of the Act on court jurisdiction (*Jurisdiktionsnorm* – JN), the competent court is the District Court (*Bezirksgericht*) of the district in which the child has his/her habitual residence or, in the absence of such a residence in Austria, his/her (actual) residence. If the child has no residence in Austria, the competent court is that of the district in which the legal representative has his/her habitual residence. If there is no such residence in Austria, it is the court of the district in which one parent has his/her habitual residence, otherwise it is the Vienna Inner City District Court (*Bezirksgericht Innere Stadt Wien*). The habitual residence differs from the (simple) residence in that it is usually the place of residence for a specific, continuous period of time (approximately six months).

Applications for the transfer of sole custody or participation in custody can be made in writing by post or in person at the District Court on what are known as 'office days' (*Amtstage*), which take place at least once a week, usually on Tuesday mornings. The parties do not need to be represented by a lawyer. If they do wish to be represented, however, they may only be represented by a lawyer ('relative requirement for legal representation' [*relative Anwaltpflicht*] under Section 101(1) of the Act on non-contentious proceedings).

The application must contain a description of the case, the names, surnames and addresses of the applicant and his/her representative and, if necessary, the names and addresses of the other parties known to him/her, and in

matters pertaining to civil status also the date and place of birth and the nationality of the parties (Section 10(3) of the Act on non-contentious proceedings).

If the form or content of the application is incorrect or incomplete in a manner which hinders further procedural steps, the Court must not dismiss or reject it immediately but should first seek to have it rectified (Section 10(4) of the Act on non-contentious proceedings).

11 Which procedure applies in these cases? Is an emergency procedure available?

The non-contentious procedure applies in these cases, in accordance with the Act on non-contentious proceedings.

In accordance with the best interests of the child, the Court must award or withdraw custody and the right to personal contact, especially in order to maintain reliable contact and to establish legal clarity, and must sometimes do so on a provisional basis as part of an emergency procedure (provisional parental responsibility). This may be necessary, in particular, after the dissolution of the parents' marriage or joint household (point 1 of Section 180(1) of the Austrian Civil Code). This decision is provisionally binding and enforceable, unless otherwise decided by the Court.

12 Can I obtain legal aid to cover the costs of the procedure?

In accordance with Sections 63 to 73 of the Code of Civil Procedure (*Zivilprozessordnung* - ZPO), legal aid is granted in civil proceedings on request if a party is unable to meet the costs of the proceedings without finding himself/herself below the necessary subsistence level. In accordance with Section 7(1) of the Act on non-contentious proceedings, these provisions must be applied accordingly in non-contentious proceedings (such as in proceedings relating to child maintenance).

The necessary subsistence level, in abstract terms, lies between the statistical average income of an employed person and the minimum subsistence level. It is deemed to be at risk if the party and his/her family entitled to maintenance would be unable to lead even a modest life, taking into account any usable assets or the possibility of accumulating savings during longer proceedings. Partial legal aid may also be granted.

Legal aid will only be approved if the intended legal action or defence does not appear to be manifestly frivolous or futile. Legal aid can be granted to both natural and legal persons. The nationality of the party is irrelevant.

Legal aid includes in particular a provisional exemption from the payment of court fees, and fees for witnesses, experts and interpreters, as well as payment of the party's travel costs if he/she needs to appear in person. If representation by a lawyer is required by law (such as in disputes involving amounts over EUR 5 000 or in proceedings before regional courts [*Landesgerichte*]) or if it appears necessary in the light of the circumstances of the case, the party will be provisionally provided with an Austrian lawyer free of charge. The lawyer will give the party legal advice prior to the proceedings with a view to settling the dispute out of court.

Section 71 of the Code of Civil Procedure stipulates that parties receiving legal aid will be required to repay part or all of the amounts from which they were provisionally exempt and which have not yet been repaid. Furthermore, they will have to pay the lawyer assigned to him/her the established rates if and as soon as they are able to without risking their necessary subsistence. After a period of three years following the conclusion of proceedings the repayment obligation can no longer be imposed. In order to check whether the conditions for repayment have been met, the court can ask the party to submit a new declaration of assets (*Vermögensbekanntnis*) together with reasonable evidence within an appropriate period of time.

13 Is it possible to appeal against a decision on parental responsibility?

Decisions by the court of first instance on parental responsibility can be appealed against (Section 45 of the Act on non-contentious proceedings). The deadline for the appeal is 14 days from the date on which the written copy of the decision is served (Section 46(1) of Act on non-contentious proceedings). As a rule, it is the court of second instance that will decide on the appeal.

In certain cases, appeals on a point of law (*Revisionsrekurs*) can be filed with the Supreme Court (*Oberster Gerichtshof*) against a decision issued by the appeal court (*Rekursgericht*) as part of appeal proceedings (cf. Section 62 of the Act on non-contentious proceedings). Such appeals are only permissible if they resolve a legal question of considerable importance for the maintenance of legal unity, certainty or development. On some matters, however, such appeals are not admissible, such as on matters relating to legal aid, costs and fees. The deadline for appeals on a point of law is 14 days from the date on which the decision of the appeal court is served (Section 65(1) of the Act on non-contentious proceedings). The appeal must be signed by a lawyer or notary (point 5 of Section 65(3) of Act on non-contentious proceedings).

14 In certain cases, it may be necessary to apply to a court to have a decision on parental responsibility enforced. Which court should I use in such cases and which procedure applies?

Under Section 110(2) of the Act on non-contentious proceedings, decisions cannot be enforced in accordance with the Enforcement Code (*Exekutionsordnung*). Under Section 79(2) of the Act on non-contentious proceedings, the Court must order appropriate binding measures upon request or of its own motion. These measures include fines, detention of up to one year, compulsory attendance, inspection of documents, information and other moveable goods and the appointment of trustees who must take reasonable action at the expense and risk of the person in default. Rulings concerning personal contact must also be enforced against the will of the parent who does not live in the joint household with the child. The court can also enforce rulings concerning custody using appropriate direct force.

Under Section 110(3) of the Act on non-contentious proceedings, the court can, of its own motion, only refrain from pursuing enforcement if and as long as it jeopardises the well-being of the child. In addition, when enforcing custody rulings by the court or approved by the court, the court may seek assistance from child and youth welfare services or from the Family Court, especially in relation to the temporary care of the child if this is required in order to ensure his/her well-being. However, only judicial bodies may use direct force to enforce court rulings. They may request assistance from the police.

15 What should I do to have a decision on parental responsibility that is issued by a court in another Member State recognised and enforced in this Member State?

In accordance with Article 30 of the Brussels IIb Regulation, decisions from other Member States will be recognised without any special procedure being required.

16 To which court in this Member State should I turn to oppose the recognition and enforcement of a decision on parental responsibility issued by a court in another Member State? Which procedure applies in these cases?

Requests for the non-recognition of a custody decision taken in another Member State (Article 30(3) of the Brussels IIb Regulation) fall under the competence of the District Court in whose district the child has his/her habitual residence or, in the absence of such a residence, his/her residence in Austria. If the child does not have a residence in Austria, the competent Court will be the one in the district in which the legal representative has his/her habitual residence or, in the absence of such a residence in Austria, and as long it relates to a child, the Court in whose district one of the parents has his/her habitual residence. Otherwise, the competent Court will be the Vienna Inner City District Court (Section 109a of the in Act on court jurisdiction in conjunction with Section 109 of this Act).

17 Which law does the court apply in a proceeding on parental

responsibility where the child or the parties do not live in this Member State or are of different nationalities?

If Austrian courts are deemed competent under the Brussels IIb Regulation or the 1996 Hague Convention on protection of children, they will primarily apply Austrian law.

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