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# Parental responsibility - child custody and contact rights

 Germany

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

The term ‘parental responsibility’ refers to all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care (custody). Parents have the duty and the right to care for their child. Parental care involves taking care of the child and his/her property, and representing the child; the right to make decisions for the child is therefore in principle associated with parental care. Parental responsibility also includes contact with the child and the duty to provide maintenance for the child.

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

As already commented under question 1, the term ‘parental responsibility’ covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child.

In principle, joint parental custody is possible if:

1. the child is born to married parents,
2. the parents marry after the birth of the child,
3. the parents declare that they wish to care jointly for the child (custody declarations),
4. the Family Court (*Familiengericht*) grants them joint custody of the child.

Custody declarations must be certified in due legal form. This can be done by the Youth Welfare Office (*Jugendamt*), a notary or, in certain circumstances, by German diplomatic missions abroad. If the parents do not issue a custody declaration and are not married to one another, the mother will have sole custody of the child. However, the Family Court can, at the request of one of the parents, grant joint custody to both parents, as long as this is in the best interest of the child. It is presumed that joint custody is in the best interest of the child if the other parent does not provide any reasons for not granting joint custody and no such reasons are otherwise apparent. During the court proceedings, custody declarations may also be made orally at the hearing for discussion of the case and recorded by the court (Section 155a(5) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* – FamFG)).

The child has a right to contact (first sentence of Section 1684(1) of the Civil Code (*Bürgerliches Gesetzbuch*)). German law assumes that it is generally in the child’s best interest to have contact with both parents (first sentence of Section 1626(3) of the Civil Code). In addition, both parents are entitled and obliged to maintain contact with their child.

Right of access first and foremost gives parents the right to see and speak to their child at regular intervals. Access includes contact by mail and telephone, in addition to face-to-face contact, as well as contact via modern communication channels, such as video calls and social media.

It is generally the duty of both parents to guarantee maintenance is provided. Parents can themselves choose the way in which they provide maintenance for their children. They can, for example, decide to provide maintenance in kind, predominantly in the parental home (accommodation, food, clothes, etc.).

The different areas of parental responsibility are separate from each other. In principle, a parent who does not hold parental custody therefore remains entitled and obliged to maintain contact with his/her child and remains obliged to provide maintenance.

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

The term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). The following comments refer to parental care (custody).

A child is assigned a legal guardian if he/she is not cared for by his/her parents. This may be the case if the parents are dead or are not entitled to represent the child in matters related to the child or his/her property, because, for example, the parents have been deprived of custody. The child is assigned a legal guardian by the Family Court.

If the parents are unable to provide certain aspects of parental care, because, for example, they have been only partially deprived of custody or there is an obstacle that prevents them from representing the child in respect of those aspects (first sentence of Section 1629(2) in conjunction with Sections 1795 and 1796 of the Civil Code), the Family Court will appoint a carer for the child for those aspects (Section 1909 of the Civil Code).

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

The term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). The following comments refer to parental care (custody).

If the parents hold joint parental custody and then separate, they will continue to have joint custody of the child, regardless of whether they are married to one another or not. However, the Family Court can grant custody to one parent at the request of one of the parents. Such a request will be granted if the other parent agrees, unless the child is at least 14 years old and objects, or if revoking joint custody and granting custody to one parent is deemed to be in the child's best interest. Even if the parents divorce, a decision of this kind is made only at the request of one of the parents, unless the child's wellbeing is at risk.

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

The term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). The following comments refer to parental care (custody) and access.

It is generally for the parents to decide how to manage joint parental custody of their child and there are no legal requirements as to what form it must take. However, changing the joint parental custody arrangements is not

possible only by agreement, but always requires a decision to be taken by the Family Court. If the parents live apart, the Youth Welfare Office can help them to draw up a mutually acceptable parental care plan. This plan can be used as the basis for court decisions on parental custody. In matters relating to parental custody of a child in the event of separation or divorce, the court should aim to achieve a mutually acceptable outcome for the parties concerned at every stage of the proceedings, as long as this is in the child's best interest.

The parents can also agree how to manage access rights, since there are no requirements, although such an agreement is not enforceable. Children and young people, as well as mothers and fathers, are entitled to receive advice and support from the Youth Welfare Office in relation to the exercising of access rights. In matters relating to access rights to a child, the court should also aim to achieve a mutually acceptable outcome for the parties concerned at every stage of the proceedings, as long as this is in the child's best interest. If an arrangement on the exercising of access rights is recorded in a settlement before a court and approved by the court, the access arrangement is binding and, where necessary, is enforceable.

## 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?

If the parents are unable to resolve their conflicts on their own, they can contact the Youth Welfare Office or the support services of voluntary youth welfare support service (*Freie Jugendhilfe*) organisations (see the second sentence of Section 156(1) FamFG). They provide advice to parents and help them overcome their problems. A database of all such support services can be found at <http://www.dajeb.de>. Mediation can also help parents to reach an amicable settlement. More information on family mediation can be found at <http://www.bafm-mediation.de/>.

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

Depending on the request or proposal, the judge can decide, as part of the proceedings, on all matters relating to parental custody (including surrender of the child), access and child maintenance. The judge must aim to resolve conflicts in a manner which is acceptable to both parties at all stages of the proceedings. Upon application by one of the parents, the Court may also give one parent power to make decisions on their own (*Alleinentscheidungsbefugnis*) in relation to a custody-related matter that is important for the child, if the parents disagree on this point only.

If the child's wellbeing is at risk, the Court can also, at any time and of its own motion, order any measures necessary in order to avert any such risk. The Court may also decide on access arrangements of its own motion and is not bound by any proposals put forward in this regard.

## 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 term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). The following comments refer to parental care (custody) and access.

With regard to parental care, the question must in general be answered in the affirmative. The parent without custody does not have any right to be involved in decisions. He/she does, however, have access rights and can request information about the child's personal situation from the other parent as long as the request is legitimate. While the child is residing with the parent without custody, on the basis of either the consent of the parent with custody or a court ruling (e.g. in the context of access rights being exercised), the parent without custody may make decisions on their own for matters relating to caring for the child (e.g. food).

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

The term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. There is no legal basis for the granting of full parental responsibility by a court. The court can make decisions on parental care, which also covers the right of representation, and on access rights. The following comments refer to parental care (custody).

If parents have joint custody of their child, they must reach mutually acceptable solutions on all issues relating to parental care. If the parents live apart, they only have to do so in relation to matters for which it is of considerable importance for the child to have arrangements in place. On everyday matters, the parent with whom the child lives, with the consent of the other parent or on the basis of a court ruling (second sentence of Section 1687(1) of the Civil Code), has the right to make decisions on their own.

## 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?

The term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). The law does not provide for applications relating to the granting of full parental responsibility. However, each parent may request the granting of parental custody and the arrangement of access rights. The following comments refer to parental care (custody) and access.

Family Courts (divisions of Local Courts (*Amtsgerichte*)) have jurisdiction for proceedings related to parental custody and access. If a request to launch proceedings is required, for example in proceedings for the granting of sole custody where the parents are living apart, grounds must be provided for this request. The facts and evidence of the case should be provided and the persons who can be considered the parties to the proceedings should be named. Any documents referred to should be enclosed. The request should also indicate whether the parties have already attempted mediation or another out-of-court conflict resolution procedure. Legal representation is only necessary in exceptional cases, e.g. for requests made within the context of divorce proceedings. If legal representation is not obligatory, a request can be made directly to the competent court. There are court offices (*Rechtsantragstellen*) at the Local Courts for this purpose, where applications and other statements can be recorded. However, the request may also be submitted in writing.

If the parents are not married to one another when the child is born, the custody declaration (in the case of joint custody) may be certified by the official responsible for documentation at the Youth Welfare Office (*Jugendamt*), a notary or, under certain circumstances, German diplomatic missions abroad. During court proceedings on the granting of joint parental custody (Section 155a FamFG), custody declarations may also be made orally at the hearing for discussion of the case and recorded by the court.

Joint parental custody may be established in this way; on the other hand, a court ruling is required to assign sole custody to one of the parents (see above).

In proceedings concerning access arrangements legal representation is not obligatory and such proceedings are initiated by the court of its own motion. It is sufficient to submit a proposal, in which the arrangement of access rights is requested, to the competent Family Court; this also means that the person concerned does not need to have capacity to participate in proceedings.

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

The principle of 'ex officio investigation' (*Amtsermittlungsgrundsatz*) applies in procedures relating to parental custody and access rights. According to this principle, the court has to investigate all relevant facts of its own motion, and is not bound by the arguments of the parties.

Custody and access arrangements fall under parent and child matters in accordance with Section 151 FamFG. Unless Sections 151 ff. of this Act contain special provisions, the Act's general procedural rules apply. In accordance with Sections 49 ff. of the Act, a temporary injunction may be issued, as long as there is substantive justification for it and there is an urgent need for immediate action.

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

Citizens who, because of their personal and financial situation, are unable to cover the costs of the proceedings, are only able to cover a portion of the costs, or can only pay in instalments, can obtain legal aid, including for custody and access proceedings heard by the Family Court. A prerequisite for this legal aid is that the intended legal action or defence should have sufficient prospects of success and should not appear frivolous. This also gives people with fewer financial resources access to the courts. Under the legal aid process, the State will, depending on the available income or assets of the person entitled to aid, cover his/her share of court costs and, if a lawyer has been appointed to him/her, the lawyer's fees, either in full or in part.

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

The term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). There is no legal basis for the granting of full parental responsibility by a court, but the courts can make decisions on parental care, which also covers the right of representation, and on access rights. The following comments refer to parental care (custody) and access.

It is possible to appeal against court decisions on parental custody/access. It does not matter whether a decision was reached as part of a standalone procedure or whether it was taken as part of ancillary proceedings to a divorce. Appeals are admissible in both cases. The appeal must be lodged within one month of the decision being published in writing.

Special rules apply to temporary injunctions. If the decision was issued without an oral hearing, a new decision must be made on the basis of an oral hearing, upon application to this effect (Section 54(2) FamFG). It is also possible for the decision made in the temporary injunction matter to be revoked or modified (Section 54(1) FamFG). In such cases the court may suspend or restrict enforcement of the temporary injunction (Section 55(1) FamFG). Lastly, an alternative arrangement that is not merely temporary may be requested in the main proceedings. Appeals may only be brought against temporary injunctions on parental custody that were issued on the basis of oral exchange (second sentence, point 1, of Section 57 FamFG). The appeal must be lodged within two weeks (Section 63(2)(1) FamFG).

## 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?

The term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). The following comments refer to parental care (custody) and access.

If a German enforcement order on the surrender of persons and the regulation of access is breached, the court may issue the obligated party with a fine and, if this cannot be recovered, may order imprisonment (first sentence of Section 89(1) FamFG). If issuing a fine is likely to be unsuccessful, imprisonment may also be ordered directly (second sentence of Section 89(1) FamFG). The decision ordering the surrender of the person or the regulation of access will outline the consequences of breaching the enforcement order (Section 89(2) FamFG). The maximum fine for one person is EUR 25 000 (first sentence of Section 89(3) FamFG) and the maximum term of imprisonment six months (second sentence of Section 89(3) FamFG in conjunction with the first sentence of Section 802j(1) of the Code of Civil Procedure (*Zivilprozessordnung*)). Another potential means of enforcement is the order of force to be used on the obligated party (Section 90 FamFG). The obligated party

must be heard before penalties are determined. This also applies to orders of force, unless doing so would prevent or significantly impede enforcement (Section 92(1) FamFG). It is not permissible for force to be used on a child if he/she needs to be surrendered in order to allow the right of access to be exercised. Use of force on a child is only allowed if this is in the child's best interest and it is not possible to enforce the obligation by less severe means (Section 90(2) FamFG).

## 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?

The term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). The following comments refer to parental care (custody) and access.

In relation to Denmark, the recognition and enforcement of measures are based on the 1996 Hague Convention on Protection of Children.

The following applies to decisions issued in EU Member States other than Denmark in court proceedings initiated before 1 August 2022:

Decisions on parental responsibility, and in particular on parental custody and access, issued in other Member States of the EU (except Denmark) in court proceedings initiated before 1 August 2022 continue to be recognised in Germany on the basis of Regulation (EC) No 2201/2003 (Brussels IIa Regulation) and therefore no special procedure is required for this purpose. However, it is also possible in Germany to apply for recognition of such decisions at the competent Family Court. This recognition applies with regard to all parties.

Before a decision on parental custody from another Member State can be enforced in Germany, an application must be made for a declaration of enforceability, as set out in the Brussels IIa Regulation, i.e. the decision must be approved for enforcement in Germany. In accordance with Section 16(1) of the Act to Implement Certain Legal Instruments in the Field of International Family Law (*Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des Internationalen Familienrechts* - IntFamRVG), this is done by appending the enforcement order to the decision in question, upon application. The application must be made to the local Family Court in whose district a Higher Regional Court (*Oberlandesgericht*) has its seat. The application for enforcement should be accompanied by a copy of the decision and a certificate from the court in the original Member State using the standard form provided in Annex II to the Regulation. Applicants need not be represented by a lawyer. However, applicants living in another Member State must appoint an authorised representative to accept service in Germany. The Family Court will come to a decision without a prior oral hearing. The registrar of the court will then issue the enforcement order on the basis of this final decision. Appeals against the decision of the Family Court can be lodged with the Higher Regional Court. Appeals against the decision of the Higher Regional Court can be filed with the Federal Court of Justice (*Bundesgerichtshof*) if the Higher Regional Court allows it. In Germany, only 22 of more than 650 Family Courts are responsible for applications for recognition and enforceability declarations. Their addresses can be found at <http://www.bundesjustizamt.de/sorgerecht> - 'Zuständige Gerichte' (German) and <http://www.bundesjustizamt.de/custody-conflicts> - 'Competent German courts' (English).

It should be noted that certain decisions of Member States, issued in proceedings initiated before 1 August 2022, on access rights and the return of children who have been wrongfully removed or retained can be recognised and enforced in Germany under the Brussels IIa Regulation without the need for a declaration of enforceability and without the option to challenge this recognition. Nevertheless, in such cases the holders of parental responsibility are also free to formally request the enforceability declaration for such decisions through the German courts.

The following applies to decisions issued in EU Member States other than Denmark in court proceedings initiated on or after 1 August 2022:

Decisions on parental responsibility, and in particular on parental custody and access, issued in other Member

States of the EU (except Denmark) are recognised in Germany on the basis of Regulation (EU) No 2019/1111 (Brussels IIb Regulation) and therefore no special procedure is required for this purpose. However, it is also possible in Germany to apply to the competent Family Court for a decision that there are no grounds for refusal of recognition. This recognition applies with regard to all parties.

Unlike in Germany, where decisions on custody arrangements merely determine status and have no enforceable content, in many other EU Member States the parent with an entitlement under the decision can also demand the surrender of the child, and if necessary also enforce this, without a separate court order. If the decision in the State of origin has such an effect, it must also be possible to enforce the surrender of the child in Germany. Under the aforementioned Regulation, in Germany a declaration of enforceability is no longer required to enforce a decision on parental custody issued in another EU Member State (except Denmark). Its enforcement is based on national law, unless otherwise stipulated in the Regulation. This Regulation provides for minimum harmonisation of the grounds for suspending and refusing enforcement. An enforcement order is not required. The application for enforcement should be accompanied by a copy of the decision and a certificate from the court in the original Member State using the relevant standard form provided in Annexes III and VI to the Regulation. Applicants need not be represented by a lawyer.

In Germany, only 22 of more than 650 Family Courts are responsible for applications for a decision that there are no grounds for refusal of recognition and for the enforcement of decisions from other EU Member States on the surrender or return of persons and the regulation of access. Their addresses can be found at <http://www.bundesjustizamt.de/sorgerecht> -'Zuständige Gerichte' (German) and <http://www.bundesjustizamt.de/custody-conflicts> -'Competent German courts' (English). The application must be made to the Local Court (Family Court) in whose district a Higher Regional Court has its seat, this Higher Regional Court district being the place where

- the respondent or child is normally resident at the time when the proceedings are instituted; or
- where no such jurisdiction applies, a manifest interest in the determination arises or a need for care is known at the time when the proceedings are instituted;
- otherwise the Pankow Family Court in Berlin is competent.

An exception applies in Lower Saxony, where jurisdiction for all three higher regional court districts according to these criteria is concentrated centrally in the Local Court of Celle.

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

The term 'parental responsibility' covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). The following comments refer to parental care (custody) and access.

In relation to Denmark, the (non-)recognition and (non-)enforcement of measures are based on the 1996 Hague Convention on Protection of Children.

The following applies to decisions issued in EU Member States other than Denmark in court proceedings initiated before 1 August 2022:

The 22 courts mentioned in the response to question 15 also have special competence in this instance. Applications for the non-recognition of a decision on parental custody or access must be made to the Family Court in whose district a Higher Regional Court has its seat, this Higher Regional Court district being the place where

- the respondent is normally resident at the time when the proceedings are instituted; or
- where no such jurisdiction applies, a manifest interest in the determination arises or a need for care is known;
- otherwise the Pankow Family Court in Berlin is competent.

An exception applies in Lower Saxony, where jurisdiction for all three higher regional court districts according to these criteria is concentrated centrally in the Local Court of Celle.

The initiation of this procedure will generally lead to the competence for all matters relating to the child in question (custody, access and surrender of the child) being concentrated in one place, i.e. one German court – with special international competence – will decide on all matters relating to the child that have already been brought before the courts in Germany or are brought while the procedure to establish non-recognition under the Regulation is being considered. In this way, contradictory decisions are avoided and use is made of the expertise of the court specialising in cross-border proceedings.

Decisions on recognition or non-recognition only apply in the Member State in which they were issued. Nevertheless, a procedure to establish non-recognition can still be carried out in Germany, even as a precautionary measure, regardless of whether a corresponding procedure is already being considered or has already been decided on by a court in another EU Member State.

With regard to this procedure, the provisions governing authorisation of enforcement shall apply accordingly in the first instance and in any appeals proceedings.

The following applies to decisions issued in EU Member States in court proceedings initiated on or after 1 August 2022:

The 22 courts mentioned in the response to question 15 also have special competence in relation to applications to refuse recognition or suspend or refuse enforcement of decisions on parental responsibility and to enforce the surrender/return of a child or a decision on access. The applications must be made to the Family Court in whose district a Higher Regional Court has its seat, this Higher Regional Court district being the place where

- the respondent is normally resident at the time when the proceedings are instituted; or
- where no such jurisdiction applies, a manifest interest in the determination arises or a need for care is known;
- otherwise the Pankow Family Court in Berlin is competent.

An exception applies in Lower Saxony, where jurisdiction for all three higher regional court districts according to these criteria is concentrated centrally in the Local Court of Celle.

The initiation of this procedure will generally lead to the competence for all matters relating to the child in question being concentrated in one place, i.e. one German court will decide on all matters relating to the child that have already been brought before the courts (see the comments on the procedure to establish non-recognition above in the response to question 16).

The court will come to a decision on the application to refuse recognition. An appeal against this decision may be filed immediately with the Higher Regional Court, whose decision may in turn be challenged by appealing to the Federal Court of Justice.

Parties who wish to appeal against enforcement may avail themselves of the legal remedies provided for under national law and new EU legislation.

## 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?

The term ‘parental responsibility’ covers all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care; parental responsibility also includes contact with the child and the duty to provide maintenance for the child (see the comments under question 1). The following comments refer to parental care (custody) and access.

The applicable law is based on the 1996 Hague Convention on Protection of Children. In accordance with this Convention, by law it is in principle the laws of the State in which the child habitually resides that apply to the assignment, removal and exercise of parental custody and the right of access. In principle, parental custody

arising under the laws of the State of habitual residence of the child will continue even if the child's place of residence changes (Article 16 of the 1996 Hague Convention on Protection of Children). If the German judicial and administrative authorities which have international jurisdiction by virtue of the child's place of residence issue provisions on parental custody and access (=measures intended to protect the child within the meaning of the 1996 Hague Convention on Protection of Children), these will in principle be governed by German law (Article 15 of the 1996 Hague Convention on Protection of Children).

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