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Parental responsibility - child custody and contact rights

 Belgium

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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?

Parental authority is a legal mechanism for protecting and representing children until they reach the age of majority or become independent. It covers both the person and the property of the child. Parental authority is regulated by Articles 371 to 387^{ter} and 203 of the Civil Code (*Code civil*).

Parental authority is automatically exercised by the child’s legal parents, i.e. those people who are regarded as such by the law due to a link of paternity, maternity or co-maternity established by blood, adoption or law. If the biological parents are not recognised by law as the legal parents, they do not hold parental authority.

Children remain under the authority of their father and mother until they reach the age of majority (18 years old) or become independent. Decisions regarding a child’s living arrangements, maintenance, health, supervision, education, training or development are the responsibility of the parents (Article 203 of the Civil Code).

Among the various powers of parental authority, a distinction is made between authority over the person of the child, management of the child’s property and certain prerogatives of parental authority. Authority over the person of the child can be subdivided into ‘custody’, which consists in ‘living’ with the child (i.e. taking care of the child, supervising the child, and taking educational decisions linked to the child’s presence with the parent), and the right to education, which consists in taking decisions linked to the child’s maintenance, education and training. With regard to managing the child’s property, a distinction is made between the right to administer the child’s property and the right to legally use that property. Special prerogatives are the parents’ powers in relation to the child’s marriage, adoption and independence.

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

Parental authority over the person of a minor child is normally exercised jointly by each of the child’s two parents. Whether or not the parents live together and whether or not they are married, if the child’s filiation to each parent is established, they (each) jointly exercise the various prerogatives of parental authority (Articles 373 and 374 of the Civil Code).

If the child’s filiation to either the father or the mother is not established or if one of them is dead, absent or unable to express their will, the other exercises this authority alone.

With respect to third parties (acting in good faith), each parent is deemed to act with the agreement of the other when carrying out an act of parental authority alone (Article 373 of the Civil Code).

If the parents cannot agree on how to organise the child's living arrangements, on important decisions regarding the child's health, education, training and leisure time, or on religious or philosophical questions, or if any agreement appears to be contrary to the child's interests, the family court (*tribunal de la famille*) can entrust sole exercise of parental authority to one of the parents.

In this case, according to set arrangements, the other parent retains (1) a right of supervision, i.e. the right to be kept informed of the child's situation and to refer to the competent family court if he/she believes that the other parent has not acted in the child's interests, and (2) a right of contact. Such contact can be refused only for very serious reasons (Article 374 of the 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 there is neither a father or mother to exercise parental authority, the child will be placed under guardianship (Article 375 of the Civil Code).

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

In principle, the parents' separation or divorce has no effect on the rules regarding exercise of parental authority. The legal principle is that each of the child's two parents jointly exercises parental authority (see point 2). This means that they each exercise, and continue to exercise, the powers of parental authority and that neither parent can make a decision on their own that prevents the other parent from exercising his/her own prerogatives. One parent must therefore obtain the agreement of the other parent, otherwise he/she cannot act. However, with regard to the child's living arrangements for example, the parent with whom the child lives will duly take decisions regarding daily routines, good manners, etc.

The parents can agree on the arrangements for exercising parental authority, provided that this is in the child's interests.

Otherwise, the matter must be referred to the family court, which can decide to entrust sole exercise of parental authority to one of the parents (see point 2).

The child's living arrangements, the place where the child is entered in the population register, and the arrangements for the parents' contribution to the child's maintenance, education and training must all be decided.

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

Parents do not have to go before the family court and can conclude a private agreement resolving the question of parental authority over the child. To help them in this, parents can at any time, including during proceedings, have recourse to an accredited and duly trained mediator (lawyer, notary or other accredited mediator) (Article 1730 of the Judicial Code (*Code judiciaire*)).

If they want to be able to get this decision enforced if necessary, parents must refer this agreement to the competent family court, which will examine whether it is in the child's interests.

In the event of divorce due to irretrievable breakdown of the marriage (see 'Divorce - Belgium' fact sheet), parents can, at any stage of the proceedings, ask the family court to approve the agreement on the provisional measures concerning the children. The judge can refuse to approve this agreement if it is contrary to the children's interests.

In the event of divorce by mutual consent (see 'Divorce - Belgium' fact sheet), the parties must indicate, in their pre-divorce agreements, the measures in relation to parental authority (exercise of parental authority, right of

contact, administration of the child's property) and the arrangements for each parent's contribution to the child's maintenance, education, health, training and development, both during the divorce proceedings and afterwards. The public prosecutor gives an opinion and the family court can remove or amend any provisions that are contrary to the interests of minor children. The family court grants the divorce and approves the agreements in respect of minor children.

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?

When an application is made, the court clerk informs the parties that they can have recourse to mediation, conciliation or any other form of amicable dispute resolution (Article 1253ter/1 of the Judicial Code). In addition, the judge can propose to the parties at any time that they see whether conciliation or mediation is possible. If the parties agree, the judge can postpone the case so that the parties can examine whether agreements can be reached or whether mediation can offer them a solution, or the case can be referred to the amicable resolution section (Article 1253ter/3 of the Judicial Code).

If the parties reach agreement, the court approves this agreement provided that it is not clearly contrary to the child's interests (Article 1253ter/2 of the Judicial Code).

Any party can also propose recourse to mediation regardless of any court proceedings (Article 1730 of the Judicial Code). Any agreement arrived at by an accredited mediator can also be approved under the conditions indicated above.

Lastly, the parties can always consult experts (social workers, psychologists, child psychiatrists) to obtain an informed opinion or ask for an expert to be appointed in the court proceedings. In those proceedings, the public prosecutor can ask social services for information on the children and the family court will take account of the children's views (Article 1253ter/6 of the Judicial Code).

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

If no agreement or only partial agreement is reached between the parents or if the agreement is contrary to the child's interests, the family court decides on the exercise of parental authority, taking into account the wishes expressed by the parents, and by the child if he/she is old enough, as well as the situation and circumstances of the case. Questions that can be submitted to the court include:

- the joint or sole exercise of parental authority (see point 2);
- the place where the child will be primarily entered in the population register (= domicile);
- the child's living arrangements (in the absence of agreement and in the case of joint parental authority, equality in the child's living arrangements is preferred if at least one of the parents requests this. If this is not the most appropriate solution, extended residential time or other formats may be envisaged. The family court will take account of the specific circumstances and interests of the child and parents);
- the maintenance contribution (to the extent of their ability, each parent must cover the costs of the child's living arrangements, maintenance, health, supervision, education, training and development).

The family court may also be required to decide on the child's education and training. The parties can also refer specific questions to the court, such as sharing holiday periods between parents, sharing certain costs, enrolment in a school, etc. This depends on each particular case.

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 fact that one of the parents holds sole parental authority does not give him/her *carte blanche* to make decisions regarding the child. The agreements reached in each particular case must be taken into account. In addition (see point 2), the other parent retains the right to supervise the child's education.

Moving house with the child without informing the other parent can affect the child's living arrangements, right of contact, etc. In such a case, the party who has not been notified or who does not agree can apply to the family court (Article 374 and 387*bis* of the Civil Code) or, in an emergency and where absolutely necessary, to the judge hearing applications for interim measures (*juge des référés*) (Article 584, fourth paragraph, of the Judicial Code).

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

(See point 2). This means that they each exercise, and continue to exercise, the powers of parental authority ('custody' of the child, exercise of the child's right to education, exercise of the right to administer legally and use the child's property) and that neither parent can make a decision on their own that prevents the other parent from exercising his/her own prerogatives. One parent must therefore obtain the agreement of the other parent, otherwise he/she cannot act. However, with regard to the child's 'custody' for example, the parent with whom the child lives will duly take decisions regarding daily routines, good manners, etc. With respect to third parties (acting in good faith), each parent is deemed to act with the agreement of the other when carrying out an act of parental authority alone (Article 373 of the Civil Code).

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 Article 572*bis*(4°) of the Judicial Code, the family court hears applications regarding parental authority, living arrangements or rights of contact with regard to minor children. The documents to be attached to the application depend on the action brought.

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

Some cases that fall within the jurisdiction of the family court, such as cases regarding parental authority, living arrangements or right of contact, are deemed to be urgent by law and can be brought by *inter partes* application, summons or joint petition. Such cases are decided by an interim ruling. If the case is brought by summons, the time-limit is at least two days (see Article 1035, second paragraph, of the Judicial Code). In other cases, the initial hearing must take place within a maximum of 15 days from the application being filed with the court registry (Article 1253*ter*/4(2) of the Judicial Code).

In all cases involving minor children, the parties must appear in person not only at the initial hearing, but also at hearings during which questions regarding the children are discussed and at hearings of oral argument (Article 1253*ter*(2), first and second subparagraphs, of the Judicial Code). Furthermore, any minor is entitled to be heard on relevant issues regarding parental authority, living arrangements and right of contact (Article 1004/1(1) of the Judicial Code).

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

The ordinary rules apply in this respect (see 'Legal Aid - Belgium' fact sheet).

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

In the case of a divorce by mutual consent, where the parties have agreed on the arrangements for exercising parental authority, where the public prosecutor has given an opinion and where the family court has approved the agreements and granted the divorce, there are, in principle, no grounds for lodging an appeal.

In other cases, a decision regarding parental authority can be appealed within a time-limit that is normally one month. This time-limit runs from service of the judgment or its notification (appeal against an order made on a unilateral application). Delivery of the judgment is sometimes delayed (for example, at the public prosecutor's request) in order to extend the time-limit.

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 family court that has decided the schedule for a child to live with each parent or that has confirmed a parent's or even a third party's right of contact can subsequently add enforcement measures to its decision (Article 387ter(1), fifth subparagraph, of the Civil Code). The court specifies the nature of these measures and the arrangements for their implementation, taking into account the child's interests, and, if considered necessary, appoints persons authorised to accompany the court officer in enforcing the decision. The family court can set a periodic penalty payment to ensure that the decision is respected.

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?

Since 1 March 2005, pursuant to Council Regulation (EC) No 2201/2003, known as 'Brussels IIA', all decisions taken in a Member State (except Denmark) that concern parental responsibility are, in principle, automatically recognised. However, with the exception of decisions regarding rights of access and return of an abducted child, enforcement presupposes that an application for enforcement has been made to the family court, which will decide by an interim ruling.

This simplified procedure does not, however, apply to decisions given before this date outside of divorce proceedings. In this case, it would be advisable to follow the usual procedure for recognition and enforcement.

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?

Any interested person can apply to the family court to obtain non-recognition of a decision given abroad. The family court can suspend proceedings if the decision in question is under appeal in its country of origin.

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 Belgian courts in principle apply the law of the child's habitual residence.

However, the law of the State of which the child has nationality applies if the law of the habitual residence prevents the child's person or property from being duly protected. Belgian law applies when it is materially or legally impossible to take the measures stipulated by the foreign law in question.

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