

Parental custody and rights of the child



The present brochure deals with a short description of the most important issues around the subject matter parental custody and rights of the child.

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Child Custody and Rights of the Child

What are the rights of the child?

Children depend on grown-ups, therefore they are in need of special protection and support. Rights of the child are special human rights for children under 18 years of age. They have international and national foundations. The rights of the child aim at allowing children to grow up in a strong, secure and healthy manner and to enjoy human dignity by being oriented towards their rights.

What is the significance of the right of the child for parents?

The UN United Nations Convention on the Rights of the Child stresses the central role parents and family play in this respect. The family is designated as the best environment for the child's development, and the parent's support at this task is demanded. Parents are obliged to pay attention to the wellbeing of the child, including its rights, requirements and interests.



Among the rights of the child are the right to best possible care and development, the right to protection from violence or the right to a personal relationship to both parents.

What is the meaning of parental custody?

Parental custody constitutes the **rights and obligations of the parents** towards minors (up to their 18th birthday).

It encompasses care and upbringing, wealth management and the corresponding legal representation.

What does care, upbringing, wealth management and legal representation of the child mean?

Care

The care of the child includes, in particular, preserving and directly supervising the child's bodily wellbeing and health and its direct supervision.



The care includes bathing, clothing and feeding the child, taking it to the doctor, but also just supervising it on the playground.

Upbringing

Upbringing includes the development of physical, mental, emotional and moral capabilities of the child, the promotion of its talents, abilities, preferences and development opportunities, and its school and vocational education.



Upbringing includes, e.g. the selection of schools, of a dancing class for the child, but also just making music or playing football. Upbringing also includes the teaching of rules.

Side note: Determining the place of residence as an element of care and upbringing

The right to determine the place of residence of a child not only includes the determination of the place of residence proper but also the decision when, where and how long the child may reside there (alone). The extent of determining the place of residence is predicated upon the age and maturity of the child.



The right to determine the place of residence includes the decision where the child should reside, but also where and with whom it shall travel on vacation or where it shall just spend the afternoon.

The right to determine the residence of the child is incumbent upon the parent who has parental custody in the area of care and upbringing. Thus, in the case of shared custody, the right to determine the residence of the child is incumbent upon both parents, with the law assuming that there is a consensus of both parents (see below “rule of consensus”). Concerning a **domestic relocation**, the other parent shall be informed in time of such relocation. His/her statements must be taken into account if they better serve the wellbeing of the child.

A **relocation abroad** requires the consent of the other parent or previous court approval so that no child abduction occurs (see also page 9 concerning shared custody).

Side note: Legal representation in maintenance matters

Disposition of a maintenance claim of the child (in particular claiming and recovering it) and disposal of the maintenance amounts received is incumbent upon the parent who has parental custody in the area of care and upbringing.

Wealth management

Parents shall manage wealth (e.g. savings) with the required diligence according to an average benchmark (“diligence of prudent parents”). They must preserve the wealth of the minor, if possible even augment it unless the wellbeing of the child requires otherwise. As an exception, the child’s wealth might be used to finance a study trip undertaken by the child or to bear the costs of special care needs – e.g. after an accident.



Wealth management includes investing wealth inherited by the child or managing donated land property.

Legal representation

In general, legal representation is the authorisation and obligation to perform legal acts on behalf of the child “to the outside” – i.e. relative to other persons.



Legal representation includes, e.g. representing the child with authorities, concluding a membership agreement with a sports club for the child, but in specific cases also giving consent to an operation the child must undergo.

Who shall be entrusted with the custody?

For **children born in matrimony**, custody is incumbent upon both parents (“shared custody”).

For **children not born in matrimony**, the law entrusts custody alone to the mother. But the parents have an opportunity to agree upon shared custody also in such a case.

Can custody also be agreed upon? When and where?

There are two possibilities:

- The parents agree upon shared custody at the civil registry office (for instance, simultaneously with the birth announcement or the naming).
- The parents provide the competent guardianship court with a written agreement about child custody. In this manner, existing arrangements may be changed, or only one parent may be entrusted with custody.

How shall custody be exercised?

When exercising custody, parents shall be guided by the **wellbeing of the child**. The parents’ paramount task is to further the wellbeing of their child. The law considers wellbeing of the child to be inter alia adequate supply (with food, medical and

sanitary care, housing and education), parental care, sense of security and protection of the child against violence (both from own experience and from watching violence against other important reference persons), taking into account the opinion of the child, reliable contacts of the child with both parents/secure relationships, avoidance of loyalty conflicts and feelings of guilt.



As a case in point, the child's wellbeing would be endangered if the child is being neglected or if the contact to the other parent is being prevented after a separation.

If parents **endanger** the child's wellbeing, the court may restrict or withdraw custody.

Furthermore, the law requires the parents to "behave well" when exercising custody ("**rule of well-behaving**"). They must refrain from doing anything which would impair the relationship of the child to other persons who are entitled to exercise custody and/or are entitled to have contacts with the child, or which would make the exercise of their tasks difficult.

In an extreme case, violating the rule of well-behaving may also lead to parental **custody being withdrawn**.



According to the rule of well-behaving, the other parent may not be vilified, for that matter.

What is the meaning of shared custody in practical life?

The law assumes that parents in principle act consensually – as far as possible ("**rule of consensus**") when exercising shared custody. Yet for legal representation even with shared custody, the **principle of sole representation** prevails. This means that either parent may act alone on behalf of the child. Therefore, legal acts are also effective if the other parent does not agree.



For instance, a visit to the doctor may be organised by one parent alone, without the consent of the other parent needing to be presented.

Which legal acts require, in fact, the consent of both parents?

But in the case of shared custody, some important acts of representation require the consent of **both parents who exercise custody**.

They include:

- changing the given name or family name
- joining or leaving a church or religious society,
- transfer to external care,
- acquiring or renouncing citizenship,
- prematurely dissolving an apprenticeship or training contract or a contract of employment and
- recognising the paternity of child out of wedlock

Moreover, wealth-related matters going beyond normal business transactions (i.e. going beyond day-to-day disposal of money), not only require the **consent of both parents** but also the **approval of the guardianship court**.



Wealth-related matters going beyond normal business transactions, are, e.g. renouncing a right of succession, absolutely accepting or renouncing an inheritance, accepting a donation linked with financial burdens or suing on behalf of the child.

When reaching 14 years of age, a child may decide about its religious confession. When reaching 10 years of age, the child shall be heard in this matter, and when reaching 12 years of age, its religion may no longer be changed against its will.

What happens in the case of a separation?

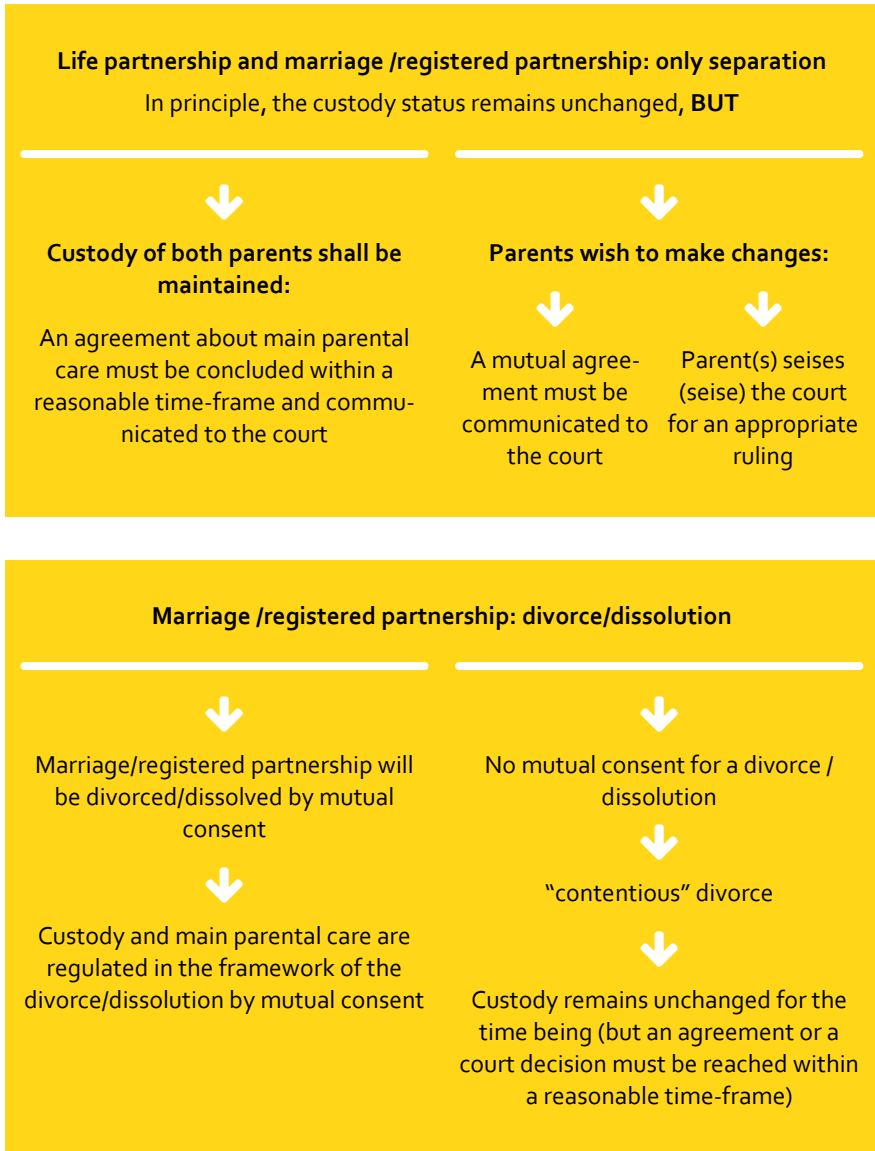
Upon **separation of the parents** (regardless whether they were married or unmarried) any existing (or agreed) shared custody of both parents shall continue in principle. But there is also the option of agreeing differently or in the case of a disagreement to seize the court to take a decision (in this context see: <https://portal.justiz.gv.at/at.gv.justiz.formulare/Justiz/ObsorgeKontaktrecht.aspx>).

In the course of a **divorce by mutual consent** (or dissolution in the case of a registered partnership) the court must also reach a mandatory agreement about custody, contacts and child maintenance.

Prior to a mutual agreement about the consequences of the divorce, the parents shall seek advice from a suitable expert or organisation with regard to the specific needs of their minor children resulting from the divorce (in this context see: www.bmffj.gv.at/familie/trennung-scheidung/beratung-einvernehmliche-scheidung.html).

If no mutual consent about the divorce can be reached, after introducing legal action, during “contentious” **divorce proceedings** it must be decided whether the marriage should be divorced or not. In such proceedings, however, no decisions about custody, contacts and child maintenance shall be made by the court; these issues have to be resolved in separate court proceedings.

What happens with custody in the case of a separation? (Overview)



Right to determine the place of residence after a separation

(about the general right to determine the place of residence see page 2)

Sole custody:

The right to determine the place of residence of the child is incumbent upon the parent who has been assigned sole custody. The other parent, however, must be informed about any planned relocation (domestic or abroad). His/her comments concerning the wellbeing of the child have to be taken into account.

Shared custody:

If the parents **live separately**, the parent in whose household the child is mainly taken care of by mutual consent (or on the basis of a court order) (**supervisory parent**) has the exclusive right to relocate the place of residence of the child. But such relocation – frequently also a domestic relocation – is an important matter in the meaning of Section 18g, paragraph 1, subparagraph 1 Austrian Civil Code, of which the other parent must be informed (in advance) so that he/she can voice an opinion. Failing to inform the parent who has the right of co-custody constitutes a “breach of the right of custody” in the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.

Rights of the parent not having the right of custody or living separately

Right to personal contacts (visiting contacts)

If a parent – whether having the right of custody or not – does not live in the same household as the child, such parent, as well as the child, have a right to regular personal contacts according to the needs of the child (“**right of contact**”). The exercise of such contacts shall be agreed by the parents and the child by mutual consent. If such agreement is not possible, an application may be lodged with the court to

provide a ruling about such contacts (in this context see: <https://portal.justiz.gv.at/at.gv.justiz.formulare/Justiz/ObsorgeKontaktrecht.aspx>).

The contacts are supposed to preserve or secure the existing close relationship or – if such a relationship does not exist (any longer) – to establish such a contact in the first place. If possible, such contacts shall include contacts during caregiving times of leisure and during times of everyday life of the child. Age, needs and wishes of the child and previous intensity of caregiving shall be particularly taken into account.



The law does not foresee any minimum or maximum number of contacts. Such numbers shall be determined in each individual case in accordance with the development of the child.

If during the exercise of the right of contact the rule of well-behaving (see above) is violated, or violence or the like occurs, the right of contact may be restricted or suspended. The benchmark here is also the child's wellbeing.

Rights of every day representation

During any time in which the child legitimately resides with the parent who does not have custody, this parent shall represent the parent who has the right of custody in **all matters of custody of everyday life**, unless this has not been prohibited and the circumstances require it. He/she is authorised and obligated to exercise care and upbringing of the child during such time.



As a case in point, the parent who does not have custody shall take the child to the doctor in the case of an accident or an acute illness during such a visit. The same is true for any necessary signatures in the communication booklet of the school/ children's shelter.

Right of information and right of voicing an opinion

The parent having custody shall inform the parent not having custody in time about important child-related matters. The parent not having custody has the right to voice an opinion in these matters. This opinion shall be taken into account if the wish expressed therein would better serve the child's wellbeing.



As a case in point, the parent not having custody shall be informed about a planned tonsil operation or about the result of an entrance exam for specific education.

Rights of the minor

In all matters related to the minor, the child's wellbeing shall be the guideline.

Right to contacts with both parents

After a separation of their parents, children are entitled to have regular contacts with both parents. This autonomous right of the child is also included in the Federal constitutional law on the rights of the child.

It is the task of the parents to agree on the timing of such contacts.



The wishes and needs of the child shall be taken into account. Minors older than 14 years of age cannot be forced to have contacts against their will if they refuse to have such contacts.

Rights of being heard

From the age of ten, children have to be heard by the court in proceedings on custody or rights of contact. Younger children should also be questioned, if possible; such questioning may be performed by the court, by a court-appointed expert or by a family court advisor.

The wishes of the child become more important with the advancing age of the child, yet in case of doubt, the child's wellbeing prevails over any wishes voiced by the child. In principle, the older the child, the more should the wishes of the child be complied with.

Right of application

From the age of fourteen, children have the right in custody proceedings to file their own applications with the court, independent of a parent.

Child legal advisor

In proceedings about custody or contact rights, the court may appoint a child legal advisor. A child legal advisor is a psychologically trained guide for children up to the age of 14. His/her task is to establish a relationship of trust with the child, to inform the child about the proceedings and to give the wishes of the child weight and voice before the court. The legal advisor may only communicate the content of the discussions with the child to the parent or to the court if the child has agreed to such communication.

What are the needs of children, whose parent have separated or divorced?

In such a very stressful situation of a separation or divorce of their parents, children above all need attention, emotional security and a stable relationship with both parents. It is not only important to be loved, but also "to be allowed to love". A parent who is not present still remains an invisible companion for the child. Children experience great emotional stress if they are expected to reject one parent (and thus also a part of themselves).



Expert support may be helpful both for children and parents. The offered services range from counselling, mediation and therapy to support groups of persons affected. Children are in need of a secure and protected environment in which they can discuss their experiences, thoughts and feelings.

Useful links

- Forms
<https://portal.justiz.gv.at/at.gv.justiz.formulare/Justiz/ObsorgeKontaktrecht.aspx>
- District courts
www.justiz.gv.at
- Comprehensive information about separation and divorce
www.trennungundscheidung.at
- Mandatory parenting advice pursuant to Section 95, paragraph 1a Conflict Resolution Act
www.kinderrechte.gv.at/elternberatung-vor-scheidung
- Mediation in civil legal matters
www.mediatorenliste.justiz.gv.at
- Child legal advisor
www.jba.gv.at/kinderbeistand
- Child and youth ombudsman Austria
www.kija.at

