Moving/settling abroad with children

Austria

1 Under what circumstances may a parent lawfully remove the child to another state without the other parent's consent?

1.1 Reference should first be made to the comprehensive amendment of the law governing the parents-child relationship by the 2013 Act amending the law governing the parent-child relationship and the law on names (*Kindschafts- und Namensrecht-Änderungsgesetz* 2013) (BGBl I 2013/15), which entered into force in Austria on 1 February 2013. Since then, rules on residence are to be found in section 162 of the General Civil Code (*Allgemeines bürgerliches Gesetzbuch* – ABGB), although these rules should not be read in isolation, but in the broader context of other provisions of the law governing the parent-child relationship.

1.2 A parent may in any case remove the child to another State without the consent of the other parent if the parent removing the child firstly has been awarded sole custody; secondly, has notified the other parent in advance; and, thirdly, the remaining parent did not then express opposition within a reasonable time and did not accordingly petition the court for withdrawal or restriction of custody. If the other parent does petition the court, the court must decide whether or not removal is lawful. To safeguard the decision on the change of residence, the court may also impose a prohibition on departure with the child (Section 107(3), fourth sentence, Conflict Resolution Act (*Außerstreitgesetz* – AußStrG)).

A statement made by the parent not awarded custody concerning the move abroad must be taken into consideration by the other parent if the wish expressed in that statement is more in line with the child's best interests.

If the parent awarded sole custody of the child has not notified the other parent of the planned move – he or she is obliged to give notification in essential matters (Section 189(1), first sentence, ABGB, which in any case includes moving abroad) – or if he or she moves abroad in spite of significant opposition expressed by the other parent, this is nevertheless (in the absence of legal custody of the other parent) not a breach of custody law within the meaning of Article 3 of the Hague Convention on Child Abduction, but only an infringement of the provisions of Austrian family law governing the internal relationship between the parents, which may entail consequences under family law (from simple caution to switch of custody).

1.3 If the parents have both been awarded custody, they must, as far as is feasible and possible, exercise custody by mutual agreement (Section 137(2), last sentence, ABGB).

A distinction has to be made between situations in which the child is removed abroad by (a) the parent in whose household the child is mostly looked after or (b) the other parent in whose household the child therefore is not mostly looked after. A parent in whose household the child is not mostly looked after in any case acts unlawfully within the meaning of Article 3 of the Hague Convention on Child Abduction. For the parent in whose household the child is mostly looked after, the legal situation is more complex:

Section 189(1), first sentence, ABGB, cited above, on the obligation to notify the other parent in essential matters, also applies where both parents have been awarded custody (Section 189(5) ABGB). As for whether failure to notify the other parent, who has also been awarded custody, in accordance with Section 189(5) in conjunction with Section 189(1), first sentence, ABGB is sufficient on its own to constitute a breach of custody law within the meaning of Article 3 of the Hague Convention on Child Abduction, expert opinions are divided. The Austrian Supreme Court of Justice has recently confirmed that this is the case (6Ob 170/16t).

The statement of the parent in whose household the child is not looked after must also be considered here, if the wish expressed in it is more in line with the child's best interests. Irrespective of being termed an unlawful breach of custody law within the meaning of the Hague Convention on Child Abduction, the failure to provide notification may constitute conduct in the internal relationship which is in breach of Austrian family law and entail the above-mentioned consequences.

1.4 If both parents have been awarded custody, without it being established in whose household the child is to be mostly looked after, the agreement of the other parent must be obtained. In the absence of the consent of the other parent, application for a decision may be made to the guardianship court (*Pflegschaftsgericht*) with jurisdiction. In its decision, the court has to take into account both the best interests of the child and the rights of the parents to protection from violence and to freedom of movement and freedom to pursue a professional activity (Section 162(3) ABGB). Here too, however, vis-à-vis third parties, each parent has powers of representation only for as long as the custody (in the field of the right to determine the child's residence) has not been finally or provisionally revoked.

2 Under what circumstances is the other parent's consent necessary for the child's removal to another state?

In any case, the consent of the other parent is necessary if the parent removing the child either (a) has not been awarded custody or (b) has been awarded custody, but the child is not mostly looked after in his or her household.

In cases where (a) the parent in whose household the child is mostly looked after or (b) the parent with sole custody wishes to move to another State with the child, he or she must comply, in the internal relationship, with the obligation to notify pursuant to Section 189 ABGB (see response to question 1) and consider the view of the notified parent, if it is more in line with the best interests of the child.

3 If the other parent does not consent to the child's removal to another state, though it is necessary, how can the child be removed lawfully to another state?

3.1. If the parents have both been awarded custody, without it being established in whose household the child is to be mostly looked after, the parent wishing to transfer his or her residence abroad, without the consent of the other parent, must apply to the guardianship court with jurisdiction. In its decision on authorisation, the court has to take into account both the best interests of the child and the rights of the parents to protection from violence and to freedom of movement and freedom to pursue a professional activity (Section 162(3) ABGB).

3.2. If the parent wishing to move abroad with the child has not been awarded custody at all or if the child is not cared for mostly in his or her household, he or she may apply to the court for withdrawal or restriction of the custody of the other parent (and the – possibly also only partial – transfer of custody to himself or herself). Especially as a less severe remedy compared to revocation of custody, the court could also revoke legally necessary rights of consent and approval or substitute a legally necessary consent or approval, if there are no justified reasons for the refusal (Section 181(1) ABGB).

3.3. The parent awarded custody, in whose household the child is mostly cared for, must notify the other parent and give him or her the opportunity to express his or her view (Section 189 ABGB), but notifying him or her and consent are not a prerequisite for departure.

4 Do the same rules apply to temporary removal (e.g. holiday, healthcare etc.) and permanent removal? If applicable, please provide relevant consent forms.

Also in relation to a temporary removal in the case of joint custody, the parents must, as far as is feasible and possible, exercise custody by mutual agreement (Section 137(2), last sentence, ABGB). However, evidence of this mutual agreement is not a prerequisite for departure.
However, the requirement for mutual agreement could entirely lawfully not apply, for example if a spontaneous weekend visit to grandparents abroad were to be made and the other parent in any case did not intend to have any contact with the child during this time (here it would not at all be feasible to reach a mutual agreement).

The same applies in cases where the other parent merely has to be informed (Section 189(1) ABGB), but it depends on the circumstances of the individual case (for instance the duration, destination and purpose of the trip) whether the temporary removal is to be considered an essential matter at all.

Last update: 05/06/2023

The national language version of this page is maintained by the respective EJN contact point. The translations have been done by the European Commission service. Possible changes introduced in the original by the competent national authority may not be yet reflected in the translations. Neither the EJN nor the European Commission accept responsibility or liability whatsoever with regard to any information or data contained or referred to in this document. Please refer to the legal notice to see copyright rules for the Member State responsible for this page.