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Parental responsibility - child custody and contact rights

Luxemburgo

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-----inglés

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

On a point of terminology, in Luxembourg the term ‘parental authority’ is used in preference to ‘parental responsibility’. This concept encompasses all the rights and obligations assigned by law to parents in respect of the person and property of their dependent minor children for the purpose of fulfilling their duties of protection, upbringing and maintenance.

Both parents have parental authority with a view to protecting their children’s safety, health and morality and to ensuring their upbringing and permitting their development with the respect due to their person. Parents have the right and duty to supervise their child’s maintenance and upbringing. Parental authority is not an absolute and discretionary right of parents: it must be exercised in the best interests of the child.

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

In principle, if filiation has been established in respect of both parents, they exercise parental authority jointly, whether or not they are married, in a civil partnership, separated or divorced. If filiation has not been established in respect of one of the parents or if one of them is deceased, absent or unable to express his/her wishes, the other exercises parental authority alone.

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

If parents die or are unable to take care of their children, a guardian (*tuteur*) must be appointed. The last surviving parent can choose the guardian. If no such choice has been made, a guardian is appointed by a formal meeting of the family (a ‘family council’, *conseil de famille*) or, failing that, by the family judge (*juge aux affaires familiales*).

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

In principle, the separation or divorce of the parents does not alter the arrangements for the exercise of parental authority, which continues to be exercised jointly by the two parents. Following their separation, they must continue to act together to make any important decisions relating to the child’s life. With respect to third parties acting in good faith, each parent is deemed to be acting with the agreement of the other when carrying out alone an ordinary act of parental authority relating to the person of the child.

It is only when it is in the best interests of the child that the court may entrust the exercise of parental authority to just one of the two parents. In this case, the parent designated to assume parental authority makes the decisions concerning the child alone. However, the other parent nevertheless retains the right to be informed and to monitor the child’s maintenance and upbringing. Subject to exceptions for serious reasons, he/she also has access and residence rights.

In exceptional circumstances, the court can decide to place the child with a third party who will exercise parental authority over him/her.

When the child has, with the agreement of the parents, been placed with a third party, parental authority continues to be exercised by the parents. However, the person with whom the child has been placed carries out all the ordinary acts relating to the child’s supervision and upbringing. The court may place the child with a third party temporarily and decide that this third party must apply for guardianship.

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

Any agreement between parents on the question of parental authority is legally binding only if it is approved by the competent court.

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 have recourse to family mediation.

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

The family judge can decide on the following issues:

Applications relating to the exercise of parental authority, excluding those relating to the withdrawal of parental authority: this includes the arrangements for the exercise of joint parental authority by the parents, whether or not they are married, separated or divorced. Only when it is in the best interests of the child will the court entrust the exercise of parental authority to just one of the two parents.

The exercise of the access and residence rights of a parent deprived of parental authority: this right can be refused only for serious reasons.

The right of the child to maintain contact with his/her relatives in the ascending line: this right can be disregarded only in the best interests of the child. In that case, the arrangements for contact between the child and the relative are determined by the court.

The access and residence rights of other persons, whether or not relations: the court awards such rights in exceptional circumstances.

The obligation to contribute to the child’s maintenance and upbringing while the parents are living together: in the event that the parents separate, this obligation can take the form of a child support payment, determined according to the child’s needs and the ability of each parent to contribute; it can continue after the age of majority if the child is unable to support himself/herself.

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?

In principle, the separation or divorce of the parents does not alter the arrangements for the exercise of parental authority, which continues to be exercised jointly by the two parents. They must continue to make any important decisions relating to the child’s life (maintenance, upbringing, education, etc.) together.

It is only when it is in the best interests of the child that the court will entrust the exercise of parental authority to just one of the two parents. In this case, the parent designated to assume parental authority makes the decisions concerning the child alone. However, the other parent nevertheless retains the right to be informed and to monitor the child's maintenance and upbringing. Subject to exceptions for serious reasons, he/she also has access and residence rights. Thus, in the event that the parents separate, each of them must maintain a personal relationship with the child and respect his/her relationship with the other parent.

If a parent deprived of parental authority believes that the other parent is not exercising parental authority in the interests of the child, he/she can refer the matter to the appropriate court to resolve the dispute. In this case, the court can, if necessary, make a change to the award of parental authority or to the arrangements for exercising it.

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

Joint parental authority presupposes, in the event that the parents separate, that there is a broad understanding and consensus to ensure continuous and constructive cooperation in the parents' decisions relating to the exercise of parental authority and to the child's maintenance and upbringing. The decisions of the family judge are always guided by the best interests of the child.

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 applicant can bring the matter before the family judge, by means of an application to the district court (*tribunal d'arrondissement*). The application must state the date and purpose of the request, the surnames, first names and addresses of the parties, and their dates and places of birth. If the applicant does not live in Luxembourg, the application must indicate an address for service there. The parties do not have to be represented by a lawyer. The court registry (*greffe*) summons the parties within 15 days, except if the time limit is extended on account of distance as provided for by the New Code of Civil Procedure (*Nouveau Code de procédure civile*).

As an exception to the general rule, actions for the total or partial withdrawal of parental authority are not dealt with by the family judge, but fall within the jurisdiction of the district court sitting as a civil court. Such actions have to be brought by the public prosecutor before the district court of the address (*domicile*) or residence (*résidence*) of one of the parents. If the parents have no known address or residence in the country, the action is brought before the court of the district in which the children are located. If the children are not all located within the same district, the action is brought before the district court of the district of Luxembourg. The public prosecutor has an investigation carried out into the situation of the minor's family and the good character of his/her parents. The parents are given notice to submit to the court any comments and objections that they consider appropriate. The application for the withdrawal of parental authority sets out the facts and is accompanied by supporting documents. The court clerk (*greffier*) notifies the parents or relatives in the ascending line against whom the action has been brought and summons them to appear. They do not need to be represented by a lawyer. In any event, the court can, of its own motion or at the request of a party, adopt any interim measures that it considers desirable relating to the exercise of parental authority over the child. The court can also revoke or change those measures. If a parent or guardian wants to recover rights that have been withdrawn from them, they must submit an application to the court of the address or residence of the person to whom these rights have been entrusted.

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

Actions before the family judge are brought by means of an application to the district court by one of the parents or by a minor capable of forming his or her own views acting in accordance with Article 1007-50 of the New Code of Civil Procedure. The parties do not have to be represented by a lawyer, except when the application is submitted in divorce proceedings brought on grounds of irretrievable breakdown of marriage or in legal separation proceedings. In these cases, representation by a barrister (*avocat à la Cour*) is obligatory.

The application must be submitted on ordinary paper to the clerk of the district court with territorial jurisdiction, namely:

1° the court of the place where the family has its address;

2° if the parents live separately, the court of the address of the parent with whom the minor children habitually live, in the case of joint exercise of parental authority, or the court of the address of the parent who exercises parental authority alone;

3° in other cases, the court of the place where the person who did not initiate the proceedings resides.

In the case of a joint application, the competent court is the court of the place where one or other of the parties has their address, as they prefer. For further details, please consult Article 1007-2 of the New Code of Civil Procedure.

When the application is submitted in divorce proceedings brought on grounds of irretrievable breakdown of marriage or in legal separation proceedings, the court with territorial jurisdiction is the court of the place of the spouses' joint address or, failing such an address, of the address of the defendant spouse.

Hearings relating to applications for the determination of or changes to the exercise of parental authority and access and residence rights are held within one month from the summons.

Hearings before the family judge are not public. They take place in chambers. In principle, the judge rules alone, but can refer the dispute to a bench of several judges if the case is particularly complex. The family judge also deals with applications for interim measures.

The family judge personally hears each of the parties and must attempt to reconcile them. He/she can propose a mediation measure. He/she can order an investigation into the family situation (*enquête sociale*) or any other measure of inquiry. When the family judge rules on the arrangements for the exercise of parental authority, he/she can take into consideration among other things the practice previously followed by the parents, any agreements previously reached, the feelings expressed by the child, the ability of each parent to perform his/her duties and to respect the other, and the outcome of the investigations or inquiries carried out.

In the case of an application for a child support payment or an application for a contribution to the child's maintenance and upbringing, the family judge may order the parties, and even third parties, to provide information or to present books of account or accounting documents that establish the amount of the parties' income, debts or earnings.

Any appeal against a decision delivered by the family judge must be brought within 40 days. The application lodging the appeal must be signed by a barrister.

Where the family judge is already considering an application on the merits of the case, and there is absolute urgency, which must be properly substantiated in the application, an application seeking interim measures (*mesures provisoires*) can be brought before him/her in exceptional summary proceedings (*en référé exceptionnel*). The application for interim measures must be submitted to the clerk of the district court with jurisdiction to try the case on the merits. The parties need not be represented by a lawyer.

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

People whose income is regarded as insufficient under Luxembourg law can receive legal aid (*assistance judiciaire*). To receive this aid, they must complete a questionnaire that can be obtained from the Central Social Assistance Department (*Service central d'assistance sociale*) and send it to the chairman of the bar association (*Bâtonnier de l'Ordre des avocats*) of the place, who will take the decision.

Legal aid covers all costs arising from the applications, proceedings or actions for which it is granted. In particular, it covers stamp duties and registration costs; clerks' fees, lawyers' fees, bailiffs' fees and expenses, notaries' fees and expenses, technicians' fees and expenses, witness allowances, and translators' and interpreters' fees; fees for certificates stating the position in foreign law (*certificats de coutume*); travel expenses; duties and fees relating to formalities for registration, mortgage and pledge; and where necessary costs for notices in newspapers.

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

A decision on parental authority can be appealed before the Court of Appeal (*Cour d'appel*). In principle, the time limit for appeal is 40 days. However, the time limit is 15 days in the case of an appeal against a decision of the family judge ruling on interim measures in divorce proceedings brought on grounds of irretrievable breakdown of marriage, in legal separation proceedings, or in exceptional summary 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?

A family judge who has decided the schedule for a child to live with each parent or who has confirmed a parent's or even a third party's right of contact can subsequently add enforcement measures to the decision. He/she specifies the nature of these measures and the arrangements for their implementation, taking into account the child's best interests. He/she can set a periodic penalty payment to ensure that the decision is respected.

Luxembourg law provides for several ways to enforce a decision on parental authority in the event of systematic refusal to comply.

Firstly, there is a civil penalty, namely a periodic penalty payment (*astreinte*), set by the family judge, to force the recalcitrant parent to meet his/her obligation. An action seeking to have a periodic penalty payment imposed has to be brought before the district court for the child's place of residence.

In the case of repeated failure of one of the parents to comply with court decisions on rights of access and residence or alternating residence, the family judge can propose family mediation. If non-compliance continues, the judge can, at the request of the wronged parent, make a change to the award of parental authority or to the access and residence rights in favour of the other parent.

Secondly, there are criminal penalties in the event of failure to produce the child. The public prosecutor's office can prosecute the case of its own motion or in response to a criminal complaint submitted by the victim. The district court, sitting as a criminal court, imposes criminal penalties and, where applicable, sets the damages to be awarded to the victim. The parties do not have to be represented by a lawyer.

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?

Under *Council Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)* (the *'Brussels IIb Regulation'*), any decision on parental responsibility given by the court of another country of the European Union (except Denmark) is in principle recognised in Luxembourg by operation of law. In other words, such decisions will be recognised without any special procedure being required.

A decision on parental responsibility given by a court of another Member State of the European Union, which is enforceable there, is enforceable in Luxembourg without the need for a declaration of enforceability. In order to enforce such a decision, the party requesting enforcement shall provide the competent authority responsible for enforcement with:

a) a copy of the decision which satisfies the conditions necessary to establish its authenticity and

b) the appropriate certificate issued in accordance with Article 36 of the *'Brussels IIb'* Regulation.

The competent authority responsible for enforcement may also require a translation of the translatable content of the free text fields of the certificate and a translation of the decision.

It should be noted that decisions on rights of access and on the return of the child are recognised without any possibility of opposing them, unless the decision is irreconcilable with a subsequent decision, and are enforced without the need for a declaration of enforceability. In order to enforce such a decision, the party requesting enforcement shall provide the competent authority responsible for enforcement with:

a) a copy of the decision which satisfies the conditions necessary to establish its authenticity and

b) the appropriate certificate issued in accordance with Article 47 of the *'Brussels IIb'* Regulation.

The competent authority responsible for enforcement may also require a translation of the translatable content of the free text fields of the certificate and a translation of the decision.

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?

Under the *'Brussels IIb Regulation'*, any interested party may, by summons, submit to the district court sitting in civil matters an application for refusal of recognition or an application for refusal of enforcement relating to a decision in parental matters handed down by a court of another Member State of the European Union. The party must be represented by a barrister.

The grounds for refusal of recognition and refusal of enforcement are listed in Articles 39 and 41 of the *'Brussels IIb Regulation'*.

Either party may appeal against the decision of the district court sitting in civil matters before the Court of Appeal sitting in civil matters. The decision of the Court of Appeal sitting in civil matters can be appealed on points of law before the Court of Cassation (*Cour de Cassation*).

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 question of the law that the court will apply is distinguishable from the question of which court has jurisdiction. The courts with jurisdiction in matters of parental authority are the courts of the habitual residence of the child (Article 8 of the Brussels IIa Regulation and Article 5 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children). The applicable law is also defined by the same Hague Convention. The nationality of the child is irrelevant. Jurisdiction to take measures for the protection of the child's person and property lies with the authorities of the contracting state of habitual residence of the child, the authority in Luxembourg being the family judge. The exercise of parental responsibility is governed by the law of the state of the child's habitual residence or, if the child's habitual residence changes, by the law of the state of the new habitual residence.

Related links

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