

Domov>Družinske zadeve in dedovanje>Starševska odgovornost – pravica do varstva in vzgoje otroka ter stikov

Parental responsibility - child custody and contact rights

Nemčija

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:

- the child is born to married parents,
- the parents marry after the birth of the child,
- the parents declare that they wish to care jointly for the child (custody declarations),
- 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 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.

German law assumes that it is generally in the child’s best interest to have contact with both parents and therefore guarantees the child’s right to contact with his/her parents. 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.

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.).

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

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If the child is not cared for by his/her parents because, for example, 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, the Family Court will appoint a carer for the child for those aspects (Section 1909 of the Civil Code [*Bürgerliches Gesetzbuch*, BGB]).

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

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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 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?

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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, a legally binding change to the custody arrangements is not possible only by agreement, but 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. If the parents agree that one parent should be granted sole custody, they can ask the Family Court to transfer parental custody.

The parents can also agree how to manage access rights, since there are no requirements. If an arrangement is recorded in a settlement before a court and approved by the court, this settlement is equivalent to a binding court ruling 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 a voluntary youth welfare support service (*Freie Jugendhilfe*) organisation. 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. If the parents disagree on a custody-related matter that is important for the child, the Court may also give one parent power to make decisions on their own in this respect (*Alleinentscheidungsbefugnis*).

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.

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?

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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. However, 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?

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If parents have joint custody of their child and they live together, they must reach mutually acceptable solutions on all issues relating to parental care. If, on the other hand, the parents live apart, they only have to do so in relation to matters of considerable importance for the child. On everyday matters, the parent with whom the child lives 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?

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In most cases, 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 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.

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, diplomatic missions abroad.

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

The principle of 'ex officio investigation' (*Amtsermittlungssatz*) 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.

In emergency cases, the court can issue a temporary injunction, as long as this is justified and urgently needed. If the child's wellbeing is at risk, the court must verify whether a temporary injunction should be issued, even without a request from one of the parties. If it is not possible to reach a mutually acceptable settlement within the time limit in access proceedings, the court must discuss the issue of a temporary injunction with the parents and the Youth Welfare Office.

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 for proceedings, including those 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 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). The following comments refer to **parental care (custody)** and **access**.

It is possible to appeal against 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. Temporary injunctions on parental custody may only be appealed against if they were issued on the basis of oral exchange. Such appeals must be lodged within two weeks. Injunctions issued without oral exchange are final. Irrespective of the question of oral exchange, temporary injunctions on the right of access are also not open to appeal. In these cases, however, it is possible to bring proceedings on the merits. It is worth noting that temporary injunctions become invalid when other rulings concerning the same matter take effect.

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?

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If an 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. Under certain conditions, imprisonment can also be ordered directly. The decision ordering the surrender of the person or the regulation of access will outline the consequences of breaching the enforcement order. The maximum fine for one person is EUR 25 000 and the maximum term of imprisonment six months. Another potential means of enforcement is the order of force to be used on the obligated party. 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.

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?

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Decisions on parental custody and access issued in other Member States of the EU (except Denmark) are 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. The application must be made to the local Family Court where the 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 issue the enforcement order on the basis of this 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 on access rights and the return of children who have been wrongfully removed or retained can be recognised and enforced in Germany 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.

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?

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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 must be made to the Family Court at the seat of the Higher Regional Court in whose jurisdiction the respondent or the child affected by the decision habitually resides. Failing that, it is the Family Court in whose jurisdiction the interest in non-recognition or the need for care exists that is competent; otherwise it is the Pankow/Weißensee Family Court. 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 court will be able to decide on all matters relating to the child. However, 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.

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

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?

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A distinction must be made between questions of applicable law and questions of jurisdiction. The judicial and administrative authorities of the habitual residence of the child usually have jurisdiction in matters of parental custody and access (Article 8 of Regulation (EC) No 2201/2003 and Article 5 of the Hague Convention on Protection of Children). However, nationality is irrelevant. The applicable law is also based on the Hague Convention on Protection of Children. Also 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. If the German judicial and administrative authorities which have jurisdiction by virtue of the child's place of residence issue provisions on parental custody and access, these will be governed by German law.

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