

## 3 Custody & best interests of the child

### 3.1 Definitions

#### 3.1.1 Parental custody

This includes care and parenting, property management and legal representation of underage children. If possible, parents should exercise parental custody by mutual agreement. Parents must have the best interest of their underage children at heart, i.e. provide them with care, security and a careful upbringing. Violence towards children is inadmissible.

#### 3.1.2 The best interests of the child under the law is understood to be

- "adequate provision of food, medical and sanitary care and housing";
- "care, security and protection of the child's physical and mental integrity"
- avoidance of violence;
- careful upbringing and support in accordance with the child's "aptitudes, abilities, inclinations and development potential";
- "appreciation and acceptance of the parents";
- consideration of his or her opinion "according to his or her understanding and ability to form opinions";
- ensuring "reliable contact and secure ties with both parents and important attachment figures" and avoiding conflicts of loyalty;
- safeguarding of property and other claims and interests of the child. (§ 137 b ABGB).

Apart from the parents, other persons who have a family relationship with the parent (e.g. adult siblings, new spouses or partners) must do everything reasonable to protect the child's welfare, e.g. to take the child to the doctor or hospital in case of illness. This right and duty to represent the parent with custody "in matters of daily life" is of course also available to the non-custodial parent if the child (lawfully) stays with him or her, e.g. if the child falls ill during a contact weekend.

#### 3.1.1 Who may represent the child?

Even in cases of joint custody, the principle of **individual representation** applies, i.e. each parent alone is entitled and obliged to represent the child vis-à-vis third parties. This act of representation (e.g. conclusion of a mobile phone contract) is legally effective, even if the other parent does not agree to it. This also means that a third party must accept the act of representation of each parent with custody: e.g. the signature of a parent with custody who concludes a mobile phone contract for his or her child, registers the child for kindergarten, a holiday camp or the like, is sufficient.

Only such measures as

- name changes
- changes of nationality
- joining or leaving the church
- transfer to foster parents
- contracts of apprenticeship, training or services
- acknowledgement of paternity
- transfer of residence abroad

require the full consent of the other parent with custody in order to become legally effective.

## 3.2 Joint or sole custody

### 3.2.1 Standard case: joint custody

In Liechtenstein, joint custody has been the rule since 1 January 2015. Irrespective of this, it can be stated, that the child's remaining contact with both parents is considered an essential advantage. Good communication and willingness to cooperate on behalf of the parents, is a prerequisite for the success of joint custody. Joint custody has a relieving effect on the parents.

### 3.2.2 Exceptional case: sole custody

Sole custody is predominantly a practice, if the child's mother is unmarried or is in conflictual relationships and serious experiences of violence between the parents. In the case of sole custody, a rather conflict-exacerbating effect on the post-marital parenting situation can be observed. This is generally the case, if fathers are not sufficiently informed or are given hardly any opportunities to participate in the decision-making process for their children.

## 3.3 Custody arrangements depending on marital status

### 3.3.1 Custody of unmarried parents

In the case of unmarried parents, the mother of the child is entrusted by law with sole custody. The parents have the possibility to agree on joint custody together in writing and have to have it confirmed by the court or have to obtain it unilaterally by filing an application with the court.

### 3.3.2 Custody during marriage

If the parents are married to each other, both are entrusted with custody (legal rule).

### 3.3.3 Custody after separation

Parents living separately, have to determine, with which parent the child should mainly reside or by whom the child should mainly be cared for. If the parents cannot agree on a custody arrangement, the court decides on the disputed points or orders a court mediation.

## 3.4 New regulation of guardianship

### 3.4.1 From sole to joint custody (participation)

By agreement:

If only one parent is entitled to sole custody - either by law (in the case of unmarried couples) or, based on a court decision - the parents can agree on joint custody. The agreement requires a court approval in all cases. In doing so, the court has to examine whether the parents are willing and able to perform the tasks associated with custody by mutual agreement and whether the agreement is in the best interests of the child.

On application:

If the child's mother is the sole custodian under the law, the child's father may apply to the court for joint custody. The court must grant the application, if the best interests of the child do not conflict with joint

custody.

It is more difficult if the parents have previously had sole custody based on an agreement or a court order. In these cases, the court will only grant an application if the changed living conditions bring an added value for the best interests of the child, compared to the previous sole custody.

### 3.4.2 From joint to sole custody (withdrawal - restriction)

By agreement:

If the parents agree, that in future - for whatever reason - only one parent is to exercise custody, they can make an agreement to this effect with the court. They can also restrict custody to certain matters or agree on the division of care.

On application:

If one parent seeks sole custody, he or she can apply to the court for the termination of joint custody. Custody can be restricted or withdrawn, if parents (or one parent) endanger the best interests of the child, i.e. grossly neglect the child; expose the child to dangerous situations; deprive the child of necessary medical treatment or appropriate education; or if a joint custody arrangements don't work in practice, due to a conflictual relationship between the parents.

11

## 3.5 Rights & Duties in Custody

### 3.5.1 Right to determine the child's place of residence

The parent with custody rights is entitled to determine the child's residence. If it has not (yet) been determined, in whose household a child is to be mainly cared for, the child's residence may only be moved abroad with the consent of both parents or with court approval. This always applies even if both parents are entrusted with joint custody.

### 3.5.2 Right to information and expression

A parent who does not have custody rights, also has the right to be informed of important matters, but also of all other essential measures affecting the child (such as change of residence in Austria or abroad, choice of education), and to be informed in due time, so that he or she has the opportunity to express his or her opinion within a reasonable time-period. If the parent with custody does not respond to the other parent's statement, the other parent can file an application with the court. For example, if it is a question of whether a certain educational path is in the best interests of the child or whether another proposal, e.g. one suggested by the father, is better suited to the wishes and inclinations of the child.

### 3.5.3 Right of contact

The relationship with both parents is an essential right of the child.

It is newly regulated, that regular personal contacts corresponding to the needs and age of the child, are both a right and a duty of the parent not entrusted with custody. The contacts are to be arranged in such a way, that a close relationship can be secured or established. The needs and wishes of the child should be considered in accordance with its age. Adolescents from the age of 14 can participate in a consensual contact arrangement themselves or file an application for contact arrangements with the court.

When it comes to contact between the child and the separated parent (usually the father), there are constant points of contact between the parents. Old hurts and grievances or strongly divergent ideas on parenting issues often have a negative effect on the parents' cooperation. If the fronts between the

parents are not too hardened, it is advisable to seek professional help from neutral mediators, especially in regard to contact (see point 12).

In particularly serious cases, contact can be restricted or prohibited altogether, e.g. violence towards the child, the main caring parent is persistently badmouthed or belittled and the like. If one parent pays too little or maintenance too late, this has no influence on the contacts. Contact that has been agreed or ordered in court, can also be enforced, as long as the best interests of the child are not endangered.

As the relationship between the parents is often emotionally charged during separation phases, contact between parents and child can also suffer. If contact does not work out, contact accompaniment can be considered by court order. Accompanied contact is particularly appropriate to protect the child (from violence, abduction, etc.), to re-establish contact after a prolonged separation or to facilitate the handover of the child. Accompanied contact is usually ordered by the court and implemented by the Child and Youth Service (ASD) or on its behalf by the Assisted Living Association (VBW).

For the parents, a good **code of conduct** is required, i.e. both parents must refrain from anything that could hinder or impair the child's relationship with the other parent. If contact with the child is impeded or even prevented, the court can make "appropriate orders", such as orders to enable contact up to the point of withdrawal of custody, as the ultimate measure (ultima ratio).

### 3.6 Childcare models

In this section, the ideal-typical models of childcare will be discussed and evaluated. It should be noted that sometimes, there is a fluid transition between the classic standard model, the "residence model" and the "double residence or alternating model". The courts must take into account the different forms of care, since child maintenance does not only depend on the ability of the debtor to pay maintenance, but primarily on the care model practiced by the parents.

#### 3.6.1 Residence model - center of life with A, visiting contact with B

The classic/traditional model. The children remain with the parent who has mainly taken care of them in recent years, i.e. mostly with the mother. The father is granted contact rights (formerly: visitation rights). General practice, is a more or less broadly fixed contact on every second weekend (e.g. Friday evening - Sunday evening). It makes sense to split up the holidays, public holidays and bridge days, to arrange contacts during the week, specific school or sporting events, etc. The father has the right of contact with the child. The visitation agreement should also include, when it is possible for young children to stay overnight, during visits.

- + If custody is practiced fairly by both parents together, the residence model is a reliable solution.
- + Fixed routines and stability, with sufficient contact by the other parent, especially in baby and toddlerhood.
- The decreasing relationship to the other parent (usually the father). One of the two parents has far less of the child, he or she does not take part in "normal" everyday life during the week, or only to some extent.

#### 3.6.2 Dual residence or alternating model - children live alternately with F and M

The care times of both parents are approximately the same in the alternating model. A main residence must be determined for the child, the child benefit goes to one parent. Whether the change takes place

every three days, every week or always after two weeks depends on the individual needs and experiences. It is also common for parents to step-in flexibly.

Prerequisites for the model to work:

- 1) a positive, stable relationship between the children and both parents;
  - 2) a good basis for discussion and a willingness to cooperate on behalf of both parents;
  - 3) different educational attitudes of the parents should not be an obstacle;
  - 4) the parents' homes should be close to each other, so that the children can reach kindergarten or school from both locations. We owe this to our children, don't we?
- + It is ultimately the consistent implementation of the children's right to family life with both parents, equal rights for men and women, the compatibility of family and work; and joint parental responsibility at eye level.
  - + The risk of parent-child alienation is minimized, the multiple burden and tendency towards poverty of single parents (usually mothers) is counteracted.
  - A feeling of brokenness, if any, arises in the child.
  - In addition, the child's need for flexibility in individual cases is often subordinated to strict adherence to the care times, that are necessary for the implementation of the alternating model.

13

3.6.3 Nest model - children stay in one home, parents take turns caring for them.

This model can be a good transitional solution, especially directly after a separation. At present, it is rarely practiced as a permanent solution. It requires a two- or three-flat solution. The children live in their home as before, in their traditional environment, the parents take turns using this "nest" and look after the children there, and the rest of the time (when the other is responsible for looking after them) they spend in their own separate or shared second home. The additional flat gives each parent their own space and retreat.

- + It is advantageous for the children to keep their familiar environment. They can keep their friends, continue to have the same school route and do not have to commute constantly.
- + The additional flat gives each parent their own space and retreat.
- Additional financial burden, if the parents have to finance two or three flats.