

NATIONAL REPORT: AUSTRIA

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A. GENERAL

1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.

The Austrian term for parental responsibilities is *Obsorge*, i.e. caring for and supervising the child. This encompasses the entire care relationship of the parents or other person(s) entrusted with the custody of the child. It involves rights as well as duties of the holder(s) of parental responsibilities. Under Sec. 144 Austrian CC, parental responsibilities include care and education, administering the child's property, and legal representation of the child in all these matters.

2. Explain whether your national concept or concepts encompass:

(a) Care and protection

Under Sec. 144 Austrian CC, the care of minor children is part of parental responsibility. This encompasses protection of the child's physical welfare and health as well as direct supervision and upbringing, particularly the development of the child's physical, mental, psychological, and moral strengths, the fostering of its aptitudes, abilities, inclinations, and developmental capabilities, and its education in school and in an occupation (Sec. 146 (1) Austrian CC).

(b) Maintenance of personal relationships

Sec. 148 Austrian CC ensures the maintenance of the child's personal contact with his or her parent and other persons who do not live in a common household with the child, but are nevertheless very close to him or her (*Besuchsrecht*). A parent not holding parental responsibilities also has the right to be informed of important matters concerning the child and to express himself or herself about them (Sec. 178 Austrian CC).

(c) Provision of education

Under Sec. 144 Austrian CC, education of minor children is also a part of parental responsibility. It includes but is not limited to development of the child's physical, mental, psychological, and moral strengths, the fostering of its aptitudes, abilities, inclinations, and developmental capabilities, and its education in school and in an occupation (Sec. 146 (1) Austrian CC).

(d) Legal representation

Under Sec. 144 Austrian CC, legal representation of minor children is also a part of parental responsibility. This relates to matters of care, education, administration of property, and all other matters in which parents are required to act in the child's best interests with respect to third parties.

(e) Determination of residence

The parents have the right to determine the child's residence to the extent required for the care and education of the child. If contrary to this determination a child is staying elsewhere (e.g. if the child has run away or has been kidnapped), the authorities must, upon request from an authorized parent, cooperate in determining where the child is staying and bringing the child back, if necessary (Sec. 146b Austrian CC). Each parent entitled to the child's care and education is also independently entitled to this protection (e.g. if the child stays with the other parent who refuses to surrender the child at the end of his/her visit).¹ The parents' right to demand the return of a child presupposes it is still necessary and possible to care for and educate the child. This right may not be exercised in a way that is contrary to the child's interests.² Thus, from the age of 14, a youth can generally determine where he or she will vacation. On the other hand, the child's parents can forbid the youth from taking a trip to India to take drugs, for example, and can bring the child back from there.³

(f) Administration of property

Under Sec. 144 Austrian CC, administration of the child's property is part of parental responsibility. The parents must administer a child's property with the care of proper parents. They must maintain and, if possible, increase the property unless the child's interests require otherwise (Sec. 149 Austrian CC).

3. In what circumstances (e.g. child reaching majority or marrying) do parental responsibilities automatically come to an end?

Since parental responsibilities are restricted to minor children, they end automatically when the child reaches majority (Sec. 172(1) Austrian CC), i.e. at 18 years of age (Sec. 21(2) Austrian CC). The holder(s) of parental responsibilities shall release any property administered by them and all documents relating to the child to any child who has come of age (Sec. 172(2) Austrian CC).

Marriage makes a minor child equal to an adult in his or her personal relationships for the duration of the marriage (Sec. 175 Austrian CC). These personal relationships

¹ *Oberster Gerichtshof*, 28.08.1997, *Sammlung der Entscheidungen des Obersten Gerichtshofs in Zivilrechtssachen (SZ)*, Vol. 70, No. 163 = *Juristische Blätter*, 1998, p. 243.

² *Landesgericht für Zivilrechtssachen Vienna*, 07.04.1992, *EFSlg.* 68.622 (Rejection of the parents' right to bring the child home because the child's interests were endangered at home).

³ For further examples see M. SCHWIMANN in: M. SCHWIMANN, *Praxiskommentar zum ABGB*, Vol. I, 2nd Edition, Vienna: Orac, 1997, § 146b Marg. No. 2. Regarding the applicability of the Hague Convention on the Civil Aspects of International Child Abduction (25.10.1980) see *Oberster Gerichtshof*, 11.07.1990, *EFSlg.* 63.879.

include using a name and applying for personal documents, but not the legal capacity to commit and dispose of property, e.g. for purposes of support or to furnish a dowry.⁴ A child may marry after completing his or her 16th year if the future spouse is an adult and the minor appears to be mature enough for this marriage (Sec. 1(2) Austrian Marriage Act [*Ehegesetz*]).

4. What is the current source of law for parental responsibilities?

The most important source of law governing parent and child in Austria is the Austrian CC (*Allgemeines Bürgerliches Gesetzbuch*, abbreviated ABGB).⁵ It contains substantive law provisions governing the exercise of parental responsibilities (Sec. 137 to 267 Austrian CC). The religious education of children is governed by the Federal Act on the Religious Education of Children (*Bundesgesetz über die religiöse Kindererziehung*).⁶ In the area of public assistance, the 1989 Youth Welfare Act (*Jugendwohlfahrtsgesetz*)⁷ and the individual regional assistance acts are relevant.⁸ The procedural provisions relating to the exercise of parental responsibilities (*custody matters*) are contained in sections 104 et seq. of the Non-Contentious Proceedings Act (*Außerstreitgesetz*, abbreviated *AußStrG*).⁹

5. Give a brief history of the main developments of the law concerning parental responsibilities.

The development of parent and child law in Austria begins with the introduction of the Austrian Civil Code in 1811. At that time, children born in wedlock were under their father's authority. Parents could use corporal punishment on their children, but in a manner that was not excessive and harmful to their health. Parental responsibilities were divided up: The mother was responsible for the care and education of young children. The father was responsible for their care and education from the age of eight, for supporting the children, and for making all important decisions in matters relating to the children.¹⁰ Illegitimate children, of course, had a right to support from their fathers, but were excluded from the rights of kinship and family (Sec. 165 Austrian CC, original version).

In the course of the family law reforms of the 1970s, illegitimate children were given the same rights as legitimate children.¹¹ Since then, men and women have also been

⁴ M. Schwimann, *Familienrecht*, 5th Edition, Vienna: LexisNexis ARD Orac, 2004, p. 9; H. PICHLER, 'Der Unterhalt der Ehefrau unter 18 Jahren', *Österreichischer Amtsvormund*, 1985, p. 68-69.

⁵ 01.06.1811, JGS 946, <http://www.ris.bka.gv.at>.

⁶ Federal Law Gazette [*Bundesgesetzblatt, BGBl.*] 1985/155.

⁷ *BGBl.* 1989/161.

⁸ For details see E. STREINESBERGER/TH. HACKER, 'Jugendwohlfahrtsrecht', in: O. LEHNER, *Kinder- und Jugendrecht*, 2nd Edition, Vienna: Orac, 1998, p. 159-183.

⁹ *BGBl.* I 2003/111, in force since 01.01.2005, <http://www.ris.bka.gv.at>.

¹⁰ O. LEHNER, *Kinder- und Jugendrecht*, 2nd Edition, Vienna: Orac, 1998, p. 18.

¹¹ *Bundesgesetz über die Neuordnung der Rechtsstellung unehelicher Kinder* (Federal Act on the New Regulation of the Legal Status of Children Born out of Wedlock), Federal Law Gazette [*Bundesgesetzblatt, BGBl.*] 1970/312.

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entitled to equal parental rights (so-called parental authority, Sec. 137(3) Austrian CC). The welfare of the child (*Kindwohl*) in the sense of the child's best interests was established as the central theme of the Austrian law of parent and child (1977 Child's Act [*Kindgesetz*]).¹²

With the 1989 reform of the law of parent and child,¹³ there was a total prohibition against the use of corporal punishment in the parent-child relationship and the introduction of the concept of parental responsibilities instead of parental authority (Sec. 144 Austrian CC), to make it clear that the child should be the recipient of parental care and not the object of parental authority.¹⁴ The UN Convention on the Rights of the Child (20 November 1989) took effect in Austria on 5 September 1992 and is implemented in detail by the European Council's Convention on the Exercise of Children's Rights of 1 January 1996 (*Übereinkommen zur Ausübung von Kinderrechten*).¹⁵ Since 1996, the Federal Act to Protect Against Domestic Violence (*Bundesgesetz zum Schutz vor Gewalt in der Familie*) has guaranteed swift police and court measures will be taken against violent family members.¹⁶

The 2001 Act Amending the Law of Parent and Child¹⁷ (*Kindschaftsrechts-Änderungsgesetz*) further expanded the principle of parental responsibilities and enhanced the legal position of minors with respect to having a say and self-determination. The Act included important innovations related to taking the child's wishes into account (Sec. 146(3) Austrian CC), the child's right to have a say in custody proceedings (Sec. 104, 105 Non-Contentious Proceedings Act [*Außerstreitgesetz*]), and a child's independent consent to medical treatments (Sec. 146c-d Austrian CC). In addition, the age of majority was lowered from 19 to 18, the right of contact (*Besuchsrecht*) was also formulated as a right of the child (Sec. 148 Austrian CC) and - after a lengthy discussion on legal policy¹⁸ - the possibility of joint parental responsibilities was created in the case of separation (Sec. 177 *et seq* Austrian CC). Before the Act Amending the Law of Parent and Child took effect on 1 July 2001, the judge had to attribute parental responsibilities to just one parent in divorce, unless the

¹² *Bundesgesetz über die Neuordnung des Kindschaftsrechts*, (Federal Act on the New Regulation of the Law of Parent and Child), *BGBI.* 1977/403; W. POSCH, 'Zur Neuregelung der rein persönlichen Rechtsbeziehungen zwischen Eltern und Kindern nach dem BG 10.06.1977 *BGBI.* 1977/403', in: R. Ostheim, *Schwerpunkte der Familienrechtsreform 1977/78*, Vienna: Manz Verlag, 1979.

¹³ *BGBI.* 1989/62.

¹⁴ *BGBI.* 1996/759. I. HOLZHAMMER/R. HOLZHAMMER, *Ehe und Familie*, 2nd Edition, Freistadt: Plöchl Verlag, 2001, p. 97 *et seq*.

¹⁵ I. MOTTL, *Die Sorge der Eltern für ihre Kinder*, Vienna: Peter-Lang Verlag, 1992, p. 35 *et seq*. For further information see <http://www.yap.at/>; <http://www.kinderhabenrechte.at/>; <http://europa.eu.int>.

¹⁶ *BGBI.* I 759/1996. I. HOLZHAMMER/R. HOLZHAMMER, *Ehe und Familie*, 2nd Edition, Freistadt: Plöchl Verlag, 2001, p. 97 *et seq*.

¹⁷ *BGBI.* I 135/2000, <http://www.ris.bka.gv.at>. S. FERRARI/G. HOPF, *Reform des Kindschaftsrechts*, Vienna: Manz Verlag, 2001.

¹⁸ B. GRÜNDLER, 'Die gemeinsame Obsorge nach dem KindRÄG 2001', *Österreichische Juristenzeitung*, 2001, p. 701-717 with further references.

divorced parents continued to live together. Procedurally, the entire law of parent and child is part of non-contentious proceedings (*Außerstreitverfahren*) as of 1 January 2005.¹⁹

6. Are there any recent proposals for reform in this area?

No.

B. THE CONTENTS OF PARENTAL RESPONSIBILITIES

7. Describe what the contents of parental responsibilities are according to your national law, including case law.

In the broader sense, parental responsibilities mean supplying the child's material and non-material needs, including providing support (Sec. 140 Austrian CC). In a narrower sense, parental responsibilities are the supervisory and care relationship between parent and child. This encompasses care and education of the minor child, administration of the child's property, and legal representation in all these areas (Sec. 144 Austrian CC). Care, education, and administration of property constitute the internal relationship between the holder(s) of parental responsibilities and the child; legal representation constitutes the external relationship between the holder(s) of parental responsibilities and third parties.²⁰

8. What is the position taken in your national law with respect to:

(a) Care

The care of a minor child includes in particular safeguarding the child's health and physical well-being as well as direct supervision (Sec. 146(1) Austrian CC). The necessary extent of such care is based on the parents' living conditions (Sec. 146(3) Austrian CC). This means both the limits of their financial capacity and other necessities in the parental sphere, such as relocation as the result of a job change.²¹

(b) Education

Education includes the development of the child's physical, mental, psychological, and moral strengths, the fostering of its aptitudes, abilities, inclinations, and developmental capabilities, and its education in school and in an occupation (Sec. 146(2) Austrian CC). The extent of such education is based on the parents' living conditions (Sec. 146(3) Austrian CC). Therefore, it depends on their social position and financial capacity. The parents have the duty to register their children for school at the age of six.²²

¹⁹ *Außerstreitgesetz*, BGBl. I 2003/111, 112. S. Kriwanek, *Das neue Außerstreitverfahren*, Vienna: LexisNexis ARD Orac, 2004.

²⁰ M. SCHWIMANN, *Familienrecht*, 5th Edition, Vienna: LexisNexis ARD Orac, 2004, p. 70.

²¹ J. STABENTHEINER, 'KindRÄG 2001', in: P. Rummel, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 146 Marg. No. 5.

²² *Österreichisches Schulpflichtgesetz*, Federal Law Gazette [*Bundesgesetzblatt*, BGBl.] 1985/76.

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The parents' child-rearing duties also include the task of naming the child,²³ even though this is not mentioned in the statute. If, in so doing, they do not act in the best interests of the child or if they cannot agree, a court can make the necessary disposition in non-contentious proceedings under Sec. 176 Austrian CC.

(c) Religious upbringing

Parents entitled to care for and educate a child jointly determine the child's religion and can jointly change it. If they cannot agree, the court can replace the necessary consent of one of the parents. This also applies if a parent wishes to remove a child from religious instruction (Sec. 154 (2) Austrian CC), Sec. 1 and 2 Federal Act on the Religious Education of Children [*Bundesgesetz über die religiöse Kindererziehung*]).

(d) Disciplinary measures and corporal punishment

A minor child must follow his or her parents' orders. In this, parents must pay attention to the child's age, development, and personality. Parents may not use force or inflict bodily or psychological harm (Sec. 146a Austrian CC). In enforcing their orders, parents must initially seek to influence the child's will through positive means. Only if this has failed, may they take reasonable measures to overcome the child's resistance.²⁴ The prohibition on the use of force forbids any treatment that is unreasonable and detrimental to the welfare of the child. It excludes not only the infliction of physical pain but also any treatment that violates human dignity, even if the child him or herself does not experience this as suffering in the individual case.²⁵

(e) Medical treatment

A child who is capable of understanding the situation and making its own judgments can decide on its own whether to consent to medical treatments. If the child is over 14 years of age, it will be assumed that the child understands the situation and can form judgments (Sec. 146c(1) Austrian CC). A medical treatment that is typically accompanied by severe physical or psychological impairment may be provided only if both the child who is capable of understanding the situation and making its own judgments and the person entitled to legal representation in matters of care and upbringing consent (Sec. 146c(2) Austrian CC). Such serious treatments can include taking psychotropic drugs, a cosmetic operation, or tattooing. Having one's ears pierced for earrings is not a serious treatment. Other types of piercing are in dispute.²⁶

The consent of a child who is capable of understanding the situation and making its own judgments and of the person entitled to legal representation in matters of care and

²³ *Verwaltungsgerichtshof*, 20.04.1983, *EFSI*g. 43.212.

²⁴ M. SCHWIMANN in: M. SCHWIMANN, *Praxiskommentar zum ABGB*, Vol. I, 2nd Edition, Vienna: Orac, 1997, § 146a Marg. No. 3.

²⁵ I. HOLZHAMMER/R. HOLZHAMMER, *Ehe und Familie*, 2nd Edition, Freistadt: Plöchl Verlag, 2001, p. 97 *et seq.*; O. MALECKY, 'Zur Strafbarkeit der g'sunden Watschn', *Österreichische Juristenzeitung*, 1993, p. 625.

²⁶ J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 146d Marg. No. 11.; P. Haidenthaller, 'Die Einwilligung Minderjähriger in medizinische Behandlungen', *Recht der Medizin*, 2001, p. 172 *et seq.*

upbringing are not necessary if the treatment must be provided immediately to avoid the child's death or severe impairment of its health (Sec. 146c(3) Austrian CC).

Neither a minor child nor the child's parents can consent to a procedure that would render the child permanently incapable of reproducing (Sec. 146d Austrian CC). Medically necessary interventions that may have the unavoidable effect of rendering the child permanently incapable of reproduction (*e.g.* removal of the uterus on account of a tumour)²⁷ are not subject to this prohibition on sterilization.

(f) Legal representation

Legal representation of minors relates to all matters in which the parents must act vis-à-vis third parties in the interests of the child (Sec. 144 Austrian CC).²⁸ Generally, each parent is entitled and obliged to represent the child, acting alone. The parent's legal action is valid even if the other parent does not agree (Sec. 154(1) Austrian CC). When legal actions are inconsistent with each other, the one taken first applies. If they are taken simultaneously, both are invalid. Current examples are entering into an apprenticeship contract or including children on the passport of one parent.²⁹

Important actions in which a parent represents the child (exhaustively listed in Sec. 154(2) Austrian CC) require the consent of the other parent in order to become legally effective: changing the child's name, joining or leaving a religious denomination, placement in the care of another, acquisition of citizenship or refusal to do so, premature termination of an apprenticeship or employment contract, and recognition of the paternity of a child born out of wedlock.

Acts of representation by a parent in property matters that fall outside the scope of proper business operations require not only the consent of the other parent but also the approval of the court in order to become legally effective. These include, for example, the sale and encumbrance of real estate; the acquisition, transformation, sale, or dissolution of a business; waiver of a right of inheritance, unconditional acceptance or renunciation of an inheritance; acceptance of an encumbered gift or rejection of a proffered gift; certain types of monetary investments (*e.g.* granting a loan or acquiring real estate); filing a complaint and making all procedural dispositions that relate to the matter in dispute (Sec. 154(3) Austrian CC).

9. What is the position taken in respect of the child's right to be heard with regard to the issues mentioned under Q 8 ((a)-(f)). What relevance is given to the age and maturity of the child?

²⁷ I. HOLZHAMMER/R. HOLZHAMMER, *Ehe und Familie*, 2nd Edition, Freistadt: Plöchl Verlag, 2001, p. 70.

²⁸ Notwithstanding existing legal representation and without restricting it, minors under the age of 14 have the legal capacity to undertake certain transactions independently (Sec. 865 Austrian CC); see Q 12(b).

²⁹ I. HOLZHAMMER/R. HOLZHAMMER, *Ehe und Familie*, 2nd Edition, Freistadt: Plöchl Verlag, 2001, p. 72.

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In caring for and rearing the child, the parents must also pay attention to the child's wishes, unless the welfare of the child or the parents' living conditions prevents this. The more the child can understand the reason for and importance of an action and base its wishes on this insight, the more important the wishes of the child (Sec. 146(3) Austrian CC). Expressions of a child's wishes must be taken into account, for example, in planning leisure time as long as this does not involve excessive costs, e.g. for keeping a horse, or jeopardize the child's physical or psychological health, for example, by participating in a black mass.³⁰

A child must be heard before the court in proceedings for care and education (*i.e.* in all personal law disputes excluding economic matters). If a child is under the age of 10, suitable persons or institutions (experts, representatives of juvenile court assistance or child welfare agencies) shall be brought in for this purpose, if needed. However, the questioning must stop if the child's interests would be endangered – through the questioning itself or a postponement of the judicial disposition related to it – or if it is obvious that a considered statement about the subject matter of the proceedings cannot be expected due to the child's inability to understand the questions (Sec. 105(2) Non-Contentious Proceedings Act [*Außerstreitgesetz*]). Children over 14 years of age have the capacity to plead in proceedings for care and education (Sec. 104(1) *Außerstreitgesetz*).³¹ Therefore, they can independently petition courts for the necessary orders to ensure their interests in matters of care and education if the parent's behaviour endangers the child's interests (Sec. 176(3) Austrian CC).

In addition to these general provisions, special provisions apply to the following matters: A child over the age of 14 who has expressed an opinion to his or her parents about schooling or occupational training without success can have recourse to the courts. The court shall, after carefully weighing the reasons put forth by the parents and the child, make the dispositions that are appropriate for the child's interests (Sec. 147 Austrian CC). For example, in selecting a school, the wishes of the child should not be passed over without a particular reason.³²

In questions of adherence to a religion, children over the age of 10 must be heard, children over the age of 12 can refuse to change their religious affiliation, and children over the age of 14 are free to choose their religion (Sec. 3(3) and 5 Federal Act on the Religious Education of Children [*Bundesgesetz über die religiöse Kindererziehung*]).

Apart from emergency treatment, medical treatment can be provided only with the consent of a child who is capable of understanding the situation and forming a judgment. For serious treatments the consent of the person entitled to the child's legal representation in matters of care and education is also necessary (Sec. 146c Austrian

³⁰ EBRV 296 BlgNR XXI. GP, p. 53 (explanatory notes to Government bill, 296 supplements to the stenographic minutes of the National Assembly, XXI legislative period). J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 146 (3) Marg. No. 5 with further references.

³¹ See Q 61a.

³² *Oberster Gerichtshof*, 30.01.1996, *EFSI*g. 80.929.

CC). The capacity of a child to understand the situation and form judgments must always be determined based on the specific individual case. With medical interventions, the physician's assessment is controlling.³³ In doubtful cases, it is presumed that minors over the age of 14 have the capacity to understand situations and form judgments (Sec. 146c(1) Austrian CC).

The question of whose consent to a medical treatment is necessary from the viewpoint of the child's personal rights must be distinguished from the entering into a treatment agreement. Entering into such an agreement depends on the child's capacity to contract, *i.e.* the child's capacity to acquire contractual rights and duties through his or her own actions³⁴. In contrast to the capacity to understand situations and form judgments, a minor's legal capacity is subject to certain restrictions, which are graduated based on age group.³⁵

If a child lacks the capacity to contract or the necessary capacity to understand the situation and form a judgment with respect to individual matters or a group of matters as a result of noticeably delayed development, a mental illness, or mental handicap, the court will so rule, on its own initiative or at the request of a holder of parental responsibilities. Unless revoked or limited by the court as to duration, the ruling will be effective until the child reaches majority (Sec. 154b Austrian CC). A child over the age of 14 can file a petition for revocation on their own accord (Sec. 104(1) *Außerstreitgesetz*).³⁶

10. Do(es) the holder(s) of parental responsibilities has(have) the right to administer the child's property?

The right and the duty of administering the child's property is an express part of parental responsibilities (Sec. 144, 149, and 150 Austrian CC) and the special provisions governing the exercise of parental responsibilities by other persons (Sec. 229 Austrian CC). The judicial control mechanisms are set forth in greater detail in sections 133-138 of the Non-Contentious Proceedings Act (*Außerstreitgesetz*).³⁷

³³ P. HAIDENTHALLER, 'Die Einwilligung Minderjähriger in medizinische Behandlungen', *Recht der Medizin*, 2001, p. 172 *et seq.*

³⁴ J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 146c Marg. No. 10.

³⁵ Children under the age of 7 lack legal capacity. Minors over the age of 7 can execute transactions by which they acquire rights, but not obligations. Minors over the age of 14 can independently enter into employment relationships and make commitments with respect to the income from their employment and dispose of matters that are left to their free disposition (e.g. pocket money) as long as this does not jeopardize their support (Sec. 151, 152, 865 Austrian CC).

³⁶ I. HOLZHAMMER/R. HOLZHAMMER, *Ehe und Familie*, 2nd Edition, Freistadt: Plöchl Verlag, 2001, p. 61.

³⁷ R. FUCIK, 'Die Vermögensverwaltung nach dem KindRÄG 2001: Vom Obervormund zur Missbrauchskontrolle', in: S. FERRARI/G. HOPE, *Reform des Kindschaftsrechts*, Vienna: Manz Verlag, 2001, p. 36 ; S. KRIWANEK, *Das neue Außerstreitverfahren*, Vienna: LexisNexis ARD Orac, 2004, p. 6 and 147-156.

11. If yes, explain the content of this right.

Parents must administer the property of a minor child with the care of proper parents. Unless the child's interests require otherwise, they must maintain and, if possible, increase the property (Sec. 149(1) Austrian CC). The child's special needs – due to disability or a special talent – can justify the use of property for the child's interests (Sec. 149(2) Austrian CC), e.g. using a child's property to equip the home to accommodate the child's disabilities, to finance study abroad, or to purchase a high-quality musical instrument.³⁸

In general, a child may be supported only from the earnings of the child's property (Sec. 140(3) Austrian CC). The property itself may be used for support only if the parents are not solvent and the grandparents have no duty to support (Sec. 141 Austrian CC) or the child's needs cannot be covered in some other way (Sec. 149(2) Austrian CC, at the end).³⁹ Parents must administer their children's property free of charge.⁴⁰ However, the costs of administration, including the preservation of the property and the expenditures necessary for proper business operations are to be paid from the property (Sec. 149(2) Austrian CC).

12. Are there restrictions with respect to:

(a) Certain goods and/or values (inherited property, gift...)

If a minor has a significant amount of property,⁴¹ the court must oversee its administration with the aim of preventing any endangerment of the child's interests (Sec. 133(1) Non-Contentious Proceedings Act [*Außerstreitgesetz*]). If parents, grandparents, or foster parents are entrusted with administration of property as part of their parental responsibilities, the court will generally oversee the administration of the property only if it includes immovables or if the value of the property or the annual income from it significantly exceeds €10,000 (Sec. 133(2) *Außerstreitgesetz*).⁴² In any event, the legal representative must gather records of the administration of significant amounts of property, safeguard them, and inform the court if immovables are acquired or if the value of €10,000 is exceeded (Sec. 135(3) *Außerstreitgesetz*).

If a parent or a third party gives property to a minor child and at the same time excludes a parent from administering that property, the other parent shall be

³⁸ EBRV 296 BlgNR XXI. GP, p. 53 (explanatory notes to Government bill, 296 supplements to the stenographic minutes of the National Assembly, XXI legislative period); see *Oberster Gerichtshof*, 26.02.2003, *Juristische Blätter*, 2003, p. 571.

³⁹ *Oberster Gerichtshof*, 13.02.2002, *Österreichischer Amtsvormund*, 2002, p. 83 (U 351).

⁴⁰ *Landesgericht für Zivilrechtssachen* Vienna, 30.10.1987, *EFSlg.* 53.962.

⁴¹ The term "a significant amount of property" was introduced by the 2003 *Außerstreitgesetz*, which took effect on January 1, 2005. It has no statutory definition and has not yet been interpreted by case law. See S. Kriwanek, *Das neue Außerstreitverfahren*, Vienna: LexisNexis ARD Orac, 2004, p. 49.

⁴² For court control where the best interests of the child are directly threatened, see *infra* Q 13.

responsible for administering it. If both parents or the sole parent entitled to exercise parental responsibilities is excluded, the court shall entrust other persons with administering the property (Sec. 145c Austrian CC).

The authority of a person entrusted with parental responsibilities (other than a parent or child welfare agency) to receive payments on behalf of the child is restricted by statute: Such a person can receive payments to the child that exceed €10,000 and give a receipt for them only if authorized to do so by the court. Without such authorization, the payment made to the representative releases the debtor from its debt only if the payment remains part of the child's property or is used for the child's purposes (Sec. 234 Austrian CC). Banks, in particular, must ensure that the representative has court authorization to withdraw such large amounts from the child's savings or checking account.⁴³

(b) Salary of the child

A minor over the age of 14 is entitled to keep the income he (or she) earns: He can administer it and dispose of it and make commitments based on the economic foundation for this income as long as he does not thereby endanger his support (Sec. 151(2) Austrian CC). This also applies to property and rights acquired through the use of this income, e.g. an item purchased, an insurance payment made under private insurance if the premium was paid from the child's income, lotto winnings from a ticket acquired from the child's income. In addition, the legal representative or a third party with the consent of the legal representative can also leave other matters to the child's free disposition (Sec. 151(2) Austrian CC).⁴⁴

(c) Certain transactions

Exceptional representational acts on the part of a parent in property matters require the consent of the other parent and the approval of the court to be legally valid unless the matter is part of proper business operations. This includes, for example, the sale and encumbrance of real estate; the acquisition, transformation, sale, or dissolution of an enterprise; waiver of a right of inheritance, unconditional acceptance or renunciation of an inheritance; acceptance of an encumbered gift or rejection of a proffered gift; certain types of monetary investments (e.g. granting a loan or acquiring real estate); filing a complaint and making all procedural dispositions that relate to the matter in dispute (Sec. 154(3) Austrian CC).

Under the special provisions of Sec. 230-230e Austrian CC and Article XVII of the 2001 Act Amending the Law of Parent and Child (*Kindschaftsrechts-Änderungsgesetz*), monetary assets must be promptly invested in a secure investment that is as profitable as possible – to the extent they are not used for special purposes, such as support. If a person other than a parent is entrusted with parental responsibilities, the remaining movable property that is not needed for or does not appear to be suitable for the

⁴³ I. HOLZHAMMER/R. HOLZHAMMER, *Ehe und Familie*, 2nd Edition, Freistadt: Plöchl Verlag, 2001, p. 89.

⁴⁴ J. STABENTHEINER in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2000, § 151 Marg. No 5 and 6.

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satisfaction of the child's present or future needs is to be liquidated at the best possible price. Court approval is required if the market value of an individual item is expected to exceed €1,000 or the total value of the items to be liquidated is expected to exceed €10,000 (Sec. 231 Austrian CC). A person other than a parent who is entrusted with parental responsibilities may sell real estate only in an emergency. It must be sold with court approval for the clear advantage of the child (Sec. 232 Austrian CC).

13. Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?

When necessary to avert a danger directly threatening the interests of a child, the court will supervise the administration of the child's property without regard to whether a significant amount of property is involved (Sec. 133(3) Non-Contentious Proceedings Act [*Außerstreitgesetz*]). To research the property, oversee its administration, and safeguard it, the court can give orders to the legal representative, obtain information from credit institutions or other persons obligated to provide information, order an appraisal, the blocking of bank accounts, or court custody of documents or movable property, and take temporary precautionary measures (Sec. 133(4) *Außerstreitgesetz* and Sec. 229 Austrian CC). The court will also make the necessary dispositions to safeguard the interests of the child if the parents cannot reach agreement on a matter of importance to the child (Sec. 176 Austrian CC)⁴⁵. In particular, the court can substitute its consent for a parent's consent required by law if there is no legitimate ground for withholding consent, and it can take away the right of consent provided by law, the right to administer the child's property, or the parental responsibilities in their entirety (Sec. 176 and 253 Austrian CC). To avert a danger to the interests of the child, the court will give the legal representative a special order to submit a statement of accounts (section 135 (4) *Außerstreitgesetz*).

⁴⁵ E.g., blocking of a home loan and savings contract in a dispute over whether it was entered into for the benefit of the child or a parent: *Oberster Gerichtshof*, 17.01.1984, *Österreichischer Amtsvormund*, 1985, p. 51 = *EFSlg.* 45.795; judicial deposit: *Oberster Gerichtshof*, 13.02.2002, *Österreichische Juristenzeitung - EoBl*, 2002, No. 128, p. 503.

14. Do the contents of parental responsibilities differ according to the holder(s) of parental responsibilities (e.g. married, unmarried, parents not living together, stepparents, foster parents or other persons). If so, describe in some detail how it differs.

Married, unmarried, and separated parents, stepparents, and foster parents may all be holders of parental responsibilities under Sec. 144 *et seq* Austrian CC. If - by operation of law, judicial decision, or agreement - they are attributed parental responsibilities, the contents of their parental responsibilities do not differ.

In contrast, a series of special provisions apply to other persons entrusted with parental responsibilities (Sec. 187 *et seq* Austrian CC): They are subject to special court control in administering the child's property, (Sec. 229 *et seq* Austrian CC)⁴⁶ and must obtain court approval in the important matters relating to the child listed in Sec. 154(2) Austrian CC,⁴⁷ unless there is imminent danger (Sec. 216 Austrian CC). In addition, they are liable to the child for every culpable loss (Sec. 264 Austrian CC). The standard is the care exercised by a proper parent.⁴⁸ On the other hand, they are entitled to compensation and reimbursement of their expenses (Sec. 266 and 267 Austrian CC). If, however, the child welfare agency is entrusted with parental responsibilities by operation of law (Sec. 211 Austrian CC), certain allowances are made when it, as a public institution, exercises its parental responsibilities (Sec. 214 Austrian CC): There is no need for court approval in the important matters relating to the child listed in Sec. 154(2) Austrian CC ⁴⁹ or before investing the child's property, unless the agency chooses a form of investment not included in the statute. The agency can receive payments to the child without the limitation on the amount established in Sec. 234 Austrian CC and is not entitled to compensation or reimbursement of expenses for its activities under Sec. 266 and 267 Austrian CC.

C. ATTRIBUTION OF PARENTAL RESPONSIBILITIES

I. Married parents

15. Who has parental responsibilities when the parents are:

(a) Married at the time of the child's birth

By operation of law, the married parents are jointly entrusted with parental responsibilities (Sec. 144 Austrian CC).

(b) Not married at that time but marry later

By operation of law, the unmarried mother alone is entrusted with parental responsibilities (Sec. 166 Austrian CC). The child may be legitimized by subsequent

⁴⁶ For details see Q 12a and 12c.

⁴⁷ For details see Q 8f.

⁴⁸ See J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 264 Marg. No. 3.

⁴⁹ For details see Q 8f.

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marriage to the child's father (Sec. 161 Austrian CC). Therefore, the child is legitimate as of the marriage and from then on both parents are entrusted with parental responsibilities (Sec. 144 Austrian CC).

16. How, if at all, is the attribution of parental responsibilities affected by:

(a) Divorce

Sec. 177(1) Austrian CC provides that the parental responsibilities of both parents continue after divorce unless the parents agree otherwise, namely that one parent's parental responsibilities are restricted or completely revoked. However, if, in fact, the parents want to continue joint parental responsibilities, they must submit an agreement to the court naming the parent with whom the child will primarily reside (*i.e.* where the centre of the child's life will be). This will ensure that continuity of child-rearing will be maintained to the greatest extent possible.⁵⁰ The so-called domicile parent must always be entrusted with all parental responsibilities (Sec. 177(2) Austrian CC). The court will approve the parents' agreement if it is in the best interests of the child (Sec. 177(3) Austrian CC). If the parents fail to reach an (approvable) agreement on the primary residence of the child or the attribution of parental responsibilities within reasonable time, the court will entrust one parent with sole parental responsibilities based on the best interests of the child - after having unsuccessfully tried to reach an amicable solution with the parents (Sec. 177a(1) Austrian CC). The same applies if the exercise of joint parental responsibilities later fails: either parent may petition the court to end joint parental responsibilities without substantiation at any time. Then the court will entrust one parent with sole parental responsibilities based on the best interests of the child unless a reconciliation between the parents may be brought about (Sec. 177a(2) Austrian CC).

When deciding which parent shall be entrusted with sole parental responsibilities the court must *inter alia* consider whether previously the parent has observed the requirement of good behaviour (*Wohlverhaltensgebot*) according to Sec. 145b Austrian CC: In exercising parental responsibilities, each parent must refrain from doing anything that would impair the child's relationship with the other parent and other persons holding rights and duties concerning the child (*e.g.* grandparents) or make it more difficult for these persons to perform their duties with respect to the child. This prohibition encompasses a broad spectrum of behaviour: from insulting statements to physical and/or psychological violence against the other parent or persons.

(b) Legal separation

There is no legal separation under current Austria law.

⁵⁰ See *Bundesministerium für Justiz*, EBRV 296 BlgNR XXI. GP, p. 95 (explanatory notes to Government bill, 296 supplements to the stenographic minutes of the National Assembly, XXI legislative period).

(c) Annulment of the marriage

If the marriage of the parents of a minor child is annulled or declared invalid⁵¹, the same provisions apply as with divorce (Sec. 177 Austrian CC, see Q 16a).

(d) Factual separation

If married parents separate (without divorce), they are free to structure their parental responsibilities as they wish (Sec. 177b and 177 Austrian CC). Sec. 177b Austrian CC states that the provisions for divorce/annulment/nullification of a marriage apply (see Q 16a and 16c) with the exception that a court will issue a decision entrusting one parent with all parental responsibilities only upon petition.

17. To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage? If they are, are these agreements subject to scrutiny by a competent authority.

The following statements apply to both divorce and annulment (there is no legal separation in Austria): Since the 2001 Amendment to the Law of Parent and Child took effect, parents are relatively free to determine their parental responsibilities by agreement. If the parents wish to continue joint parental responsibilities after dissolution of the marriage, they must enter into an agreement deciding with which parent the child will have its primary residence (Sec. 177(2) Austrian CC).

The parents can also agree upon a new allocation of parental responsibilities (section 177(1) Austrian CC). They have the following options for structuring such an allocation: They can agree to give one parent sole parental responsibilities (Sec. 177(1) Austrian CC). It is also possible to entrust one parent with total parental responsibilities and the other parent with only partial parental responsibilities restricted to certain matters (*e.g.* schooling and occupational training, medical treatment, or the administration of particular assets).

Parents are not allowed to divide up the areas of parental responsibilities, *i.e.* to split parental responsibilities in a way that one parent is responsible, *e.g.* for care and education and the other is responsible for administration of property and legal representation. Parents are also not allowed to make a time-based allocation of parental responsibilities, *e.g.* half the year with the mother and half the year with the father. Under settled case law, the continuity of child-rearing practices is important for the welfare of the child.⁵²

All the aforementioned agreements require court approval. The court shall approve the agreement if it is in the best interests of the child (Sec. 177(3) Austrian CC). If not, the agreement is invalid and the court will entrust one parent with sole parental responsibilities based on the best interests of the child unless an approvable agreement between the parents may be reached (Sec. 177a(1) Austrian CC).

⁵¹ §§ 20-32, 35-42 *Ehegesetz* (Austrian Marriage Act).

⁵² *Oberster Gerichtshof*, 31.07.2001, *EFSI*g. 96.672.

18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents/one of the parents? To what extent, if at all, should the competent authority take account of a parent's violent behaviour towards the other parent?

Joint parental responsibilities always require an agreement between the parents, at least on the primary residence of the child (Sec. 177 Austrian CC).⁵³ Therefore, it is not possible to attribute joint parental responsibilities against the will of one or both parents. Once agreed upon, joint parental responsibilities can even not be continued against the will of one of the parents. Either parent can petition the court to end joint parental responsibilities without substantiation at any time (Sec. 177a(2) Austrian CC).

Failing an (approvable) agreement on the primary residence of the child or the attribution of parental responsibilities, the court will entrust one parent with sole parental responsibilities based on the best interests of the child. When deciding which parent to entrust with sole parental responsibilities the court must also take into account a parent's violent behaviour against the other.⁵⁴

19. Provide statistical information on the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage.

The divorce rate in Austria was 43.2% in 2003. About 16,500 minor children were affected. Since joint parental responsibilities became a possibility on 1 July 2001, about half of those seeking a divorce wished to continue joint parental responsibilities. In almost all other cases, the mother assumed sole parental responsibilities. The probability the mother will receive sole parental responsibilities in custody disputes increases the younger the child is. If the father alone has legal counsel, his chances of being awarded parental responsibilities increase. On average, three weeks' more visitation days are agreed upon with joint parental responsibilities than with sole parental responsibilities. Actually, fathers with joint parental responsibilities spend almost six weeks more time with their children than when mothers have sole parental responsibilities.⁵⁵

⁵³ See Q 16. *Oberster Gerichtshof*, 22.04.2002, *Österreichischer Amtsvormund*, 2002, p. 274 S 39; J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, §§ 177-177b Marg. No. 4.

⁵⁴ See also Q 16 and 17.

⁵⁵ Informationsdienst des Österreichischen Instituts für Familienforschung (ed.), 'Akte Scheidung', *Beziehungsweise*, 2004, No. 11 of 1 June 2004, http://www.oif.ac.at/presse/bzw/artikel.asp?Rubrik=3&ID_Art=1&BZWArtikel=743.

II. Unmarried parents

20. Who has parental responsibilities when the parents are not married?

If the parents are unmarried, the mother of the child receives sole parental responsibilities by operation of law (Sec. 166 Austrian CC). However, the parents can agree to exercise joint parental responsibilities (Sec. 167 Austrian CC).

21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, pacte civil de solidarité...)?

In Austria, there is no way of formalizing a non-marital partnership (*nichteheliche Lebensgemeinschaft*). Unmarried parents can jointly assume parental responsibilities by entering into an agreement (Sec. 167 Austrian CC).

22. Under what condition, if at all, can

(a) The unmarried mother obtain parental responsibilities

By operation of law, the unmarried mother is entitled to sole parental responsibilities for the child born out of wedlock (Sec. 166 Austrian CC). If the mother is still a minor, the public youth welfare agency assumes legal representation and administration of the child's property at birth (Sec. 145a and 211 Austrian CC).

(b) The unmarried father obtain parental responsibilities

If the parents live in the same household, they can enter into an agreement that both parents will be entrusted with parental responsibilities in the future. In such a case, the father is always entitled to full parental responsibilities (Sec. 167 (1) Austrian CC).

If the parents do not live in the same household, they can agree that the father will also be entrusted with full or partial parental responsibilities in the future, if at the same time they submit an agreement to the court indicating the parent with whom the child will primarily reside. If the child will primarily reside in the father's household, the father must be entrusted with full parental responsibilities. Despite such an agreement, however, either parent may petition the court to end joint parental responsibilities without substantiation at any time (Sec. 167(2) in conjunction with Sec. 177a(2) Austrian CC).

All the aforementioned agreements must be reviewed by the court based on the best interests of the child and approved if a positive evaluation is made (Sec. 167(1) and (2) Austrian CC).

23. How, if at all, is the attribution of parental responsibilities affected by the ending of the unmarried parents' relationship?

If unmarried parents permanently separate, under Sec. 167(1) Austrian CC, the same provisions apply as for divorce, annulment or nullification of the marriage (Sec. 177

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and 177a Austrian CC):⁵⁶ previously agreed joint parental responsibilities continue unless the parents agree to restrict or revoke the parental responsibilities of one parent. However, in any case of joint parental responsibilities after the ending of the parents' relationship, the parents must submit an agreement to the court naming the parent with whom the child will primarily reside; this domicile parent must always be entrusted with all parental responsibilities. The court will approve the parents' agreement if it is in the best interests of the child. If the parents fail to reach an (approvable) agreement on the primary residence of the child or the attribution of parental responsibilities within a reasonable time after the ending of their relationship, the court will entrust one parent with sole parental responsibilities based on the best interests of the child - after unsuccessfully having tried to bring about an amicable solution between the parents. In practice, however, the court will usually not learn of the separation and thus not intervene unless one of the parents petitions the court.⁵⁷

If - despite an agreement after the ending of the relationship - the exercise of joint parental responsibilities later fails, either parent may petition the court to end joint parental responsibilities without substantiation at any time. The court will then entrust one parent with sole parental responsibilities based on the best interests of the child unless a reconciliation between the parents may be brought about (Sec. 167 in conjunction with Sec. 177a(2) Austrian CC).

24. May the competent authority attribute joint parental responsibilities to the parents also against the wish of both parents/one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour toward the other parent?

With unmarried parents as well, there can be no joint parental responsibilities against the will of one or both parents. If despite a previous agreement a parent later petitions the court to end joint parental responsibilities, or if after the ending of their relationship the parents are unable to reach an (approvable) agreement on the primary residence of the child or the attribution of parental responsibilities, the court must attribute sole parental responsibilities to one of them (Sec. 167 and 177a Austrian CC).⁵⁸ When deciding which parent to entrust with sole parental responsibilities the court must also take into account a parent's violent behaviour toward the other.⁵⁹

25. To what extent, if at all, are unmarried parents free to agree upon the attribution of parental responsibilities after the ending of their relationship?

In the event the parents separate, Sec. 167 Austrian CC, which governs the attribution of parental responsibilities between unmarried parents, refers to the provisions on

⁵⁶ See Q 16a and 16c.

⁵⁷ J. STABENTHEINER, 'KindRÄG 2001', in: P. Rummel, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 167 Marg. No. 8.

⁵⁸ For details see Q 22, 23 and 25.

⁵⁹ For the requirement of good behaviour (Sec. 145b Austrian CC) see Q 16 at the end.

divorce, annulment or nullification of the marriage (Sec. 177 and 177a Austrian CC).⁶⁰ That means that joint parental responsibilities can be maintained despite the dissolution of the common household if the parents submit an agreement as to the child's primary residence to the court and the court approves it. The parents can also agree to partial continuation of joint parental responsibilities whereby the parental responsibilities of one of them are restricted to certain matters. This is permissible only if it is agreed that the child's primary residence will be with the other parent who has full parental responsibilities. Finally, the parents can agree that one of them will have sole parental responsibilities. In the last two cases as well, the agreement on parental responsibilities must be approved by the court.⁶¹

26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.

In 2003, 1.4 million families, with 2.4 million children, lived in Austria: 50 % of them were married, 37% were in (heterosexual) life partnerships, and 13% were single parents. About 85% of the approximately 286,300 single parents raising children were mothers. The proportion of single fathers raising their children was related to the age of the child.⁶²

III. Other persons

27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when, he or she is:

(a) Married to that parent

Apart from stepparent adoption (Sec. 179 *et seq* Austrian CC), case law and legal writing does not regard joint parental responsibilities with equal rights and duties between a biological parent and a stepparent to be permissible.⁶³ Due to the stepparent's close actual relationship to the child, a stepparent is considered to be a foster parent under Sec. 186 Austrian CC;⁶⁴ this is a person who actually carries out the care and education of the child and with whom the child has a relationship similar to that with a biological parent. A foster parent may apply to the court for a transfer of parental responsibilities (Sec. 186a Austrian CC). However, according to predominant view such a transfer of parental responsibilities has the effect that the previous

⁶⁰ See Q 16a and 16c.

⁶¹ J. STABENTHEINER, 'KindRÄG 2001', in: P. Rummel, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 167 Marg. No. 8.

⁶² <http://www.statistik.at>; <http://www.oif.ac.at>; R. SCHIPFER, *Familien in Zahlen*, Vienna: Österreichisches Institut für Familienforschung, 2003, p. 16.

⁶³ *Oberster Gerichtshof*, 25.09.2002, *Österreichische Juristenzeitung - EvBl*, 2003, No. 16, p. 102 = *ÖJZ-LSK* 2003/2; M. SCHWIMANN, *Familienrecht*, 5th Edition, Vienna: LexisNexis ARD Orac, 2004, p. 80.

⁶⁴ See Q 31.

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holder(s) of parental responsibilities lose them to the extent they pass to the new holder of parental responsibilities.⁶⁵

(b) Living with that parent in a formalised relationship (registered partnership, civil union, *pacte civil de solidarité*...);

In Austria, there is no formalised relationship between unmarried partners.

(c) Living with that parent in a non formalised relationship

As to the question whether a partner of a parent holding parental responsibilities may obtain parental responsibilities, the same reasoning applies for marital as well as for non-marital partnerships:⁶⁶ The new partner is considered to be a foster parent under Sec. 186 Austrian CC due to his or her close actual relationship to the child. However, joint parental responsibilities between a parent and a foster parent are regarded not permissible. A judicial transfer of parental responsibilities to the foster parent (Sec. 186a Austrian CC) would have the effect that the previous holder(s) of parental responsibilities would lose their rights and duties, to the extent they passed to the foster parent as new holder of parental responsibilities⁶⁷. Thus, the only possibility for the parent's partner to obtain joint parental responsibilities is by means of an adoption (Sec. 179 *et seq* Austrian CC).⁶⁸

28. Does it make any difference if the partner of the parent holding parental responsibilities is of the same sex?

A homosexual partner cannot obtain parental responsibilities for the biological child of his or her partner, neither upon application nor via an adoption. In 2002 the Supreme Court rejected the application for joint parental responsibilities in the case of a lesbian couple.⁶⁹ Whether a homosexual partner may be regarded as a foster parent under Sec. 186 Austrian CC and thus have the right to petition the court in matters of care and education as well as in contact proceedings has been left open by the above mentioned Supreme Court decision.⁷⁰

⁶⁵ *Oberster Gerichtshof*, 25.09.2002, *Österreichische Juristenzeitung - EvBl*, 2003, No. 16, p. 102 = *ÖJZ-LSK* 2003/2; M. SCHWIMANN, *Familienrecht*, 5th Edition, Vienna: LexisNexis ARD Orac, 2004, p. 80.

⁶⁶ See also Q 27a.

⁶⁷ *Oberster Gerichtshof*, 25.09.2002, *Österreichische Juristenzeitung - EvBl*, 2003, No. 16, p. 102 = *ÖJZ-LSK* 2003/2; M. SCHWIMANN, *Familienrecht*, 5th Edition, Vienna: LexisNexis ARD Orac, 2004, p. 80. For details see Q 31.

⁶⁸ J. STABENTHEINER in: P. RUMMEL, *ABGB-Kommentar*, Vol. I, 3rd Edition, Vienna: Manz Verlag, 2000, § 182 Marg. No 4.

⁶⁹ *Oberster Gerichtshof*, 25.09.2002, *Österreichische Juristenzeitung - EvBl*, 2003, No. 16, p. 102 = *ÖJZ-LSK* 2003/2.

⁷⁰ See also M. SCHWIMANN, *Familienrecht*, 5th Edition, Vienna: LexisNexis ARD Orac, 2004, p. 80; Q 27a, 27c and Q 31.

29. How, if at all, is the attribution of parental responsibilities in the partner affected by the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

Since it is not possible for a spouse or life partner of a parent to participate in parental responsibilities, the end of the relationship has no effect on parental responsibilities. However, after the relationship ends, the child may be granted the right to maintain contact with the former spouse or life partner of the child's parent, if the break-up would endanger the interests of the child (Sec. 148(4) Austrian CC).⁷¹

30. To what extent, if at all, is the parent holding parental responsibilities and his/her partner free to agree upon the attribution of parental responsibilities after the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

Since there is no possibility for a spouse or life partner to obtain parental responsibilities during his or her relationship with the parent holding parental responsibilities, there is also no autonomy to agree upon the attribution of parental responsibilities after the ending of the relationship.

31. Under what conditions, if at all, can other persons not being a parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parent...)? Specify, where such other persons may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

Parental responsibilities can be obtained by persons other than the natural parents if parents are prevented from exercising the same, whether in whole (*e.g.* upon discharge of parental rights, Sec. 176 Austrian CC or in the event of death, Sec. 145 Austrian CC)⁷² or in part (*e.g.* because they are under age, Sec. 145a Austrian CC).⁷³ The court must then entrust one or both grandparents or foster parents with the parental responsibilities (Sec. 145 Austrian CC). Not only stepparents but also relatives, friends, and other persons who have close ties to the child and plan to care for and make the child a part of their household on a permanent basis in a close relationship similar to a parent-child one are considered for the role of foster parent(s). If no parents, grandparents, or foster parents are to be found, Sec. 187 *et seq* Austrian CC provide that another holder of parental responsibilities must be appointed. Eligible parties include private individuals who are deemed suitable for this purpose (relatives, godparents, or other trusted third parties) or, as a last resort, the youth welfare agency.⁷⁴ The final selection is made in accordance with the best interests of the child. Since all these persons may obtain parental responsibilities only if the natural parents become unable to exercise the same, they act in substitution of the parents and not in addition to them.

⁷¹ For details see Q 44c.

⁷² See Q 33.

⁷³ *Oberster Gerichtshof*, 25.09.2002, *Österreichische Juristenzeitung - EvBl*, 2003, No. 16, p. 102.

⁷⁴ See Q 32.

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If the natural parents are not prevented from exercising parental responsibilities for the above-mentioned reasons, they may place the child in the care of a foster parent or foster parents on a contractual basis. In this case, however, the foster parents' rights are generally restricted to the entitlement to file petitions in custody proceedings concerning the child (Sec. 186 Austrian CC). A judicial transfer of parental responsibilities to foster parents⁷⁵ would have the effect that the parents would lose the parental responsibilities to the extent they passed to the foster parents as new holders of parental responsibilities.⁷⁶ In such a case, the natural parents would only retain communication rights (Sec. 148 and 178 Austrian CC).⁷⁷

32. Under what conditions, if at all, can a public body obtain parental responsibilities? Specify, where it is so obtained, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

The *Jugendwohlfahrtsträger* (this is the respective federal state in its capacity as a youth welfare agency; the implementing bodies are the district youth welfare offices [*Bezirksjugendämter*] as regional authorities) is the last body to be entrusted with parental responsibilities if neither the natural parents, nor any suitable grandparent or foster parent, nor any other suitable person is able to exercise parental responsibilities (statutory third-party custody [*gesetzliche Fremdobsorge*] = public custody [*Amtsobsorge*], Sec. 213 Austrian CC). In practice, the youth welfare office frequently transfers the actual exercise of parental responsibilities by empowering third parties (e.g. a children's home director), and only assumes advisory and supervisory duties⁷⁸. Furthermore, by operation of law the youth welfare agency is responsible for the legal representation and administration of property of a child whose parents are still minors (Sec. 145a, 211 sentence 2 Austrian CC), and finally it is entitled to full parental responsibilities for parentless children found within Austria (Sec. 211 sentence 1 Austrian CC).⁷⁹ In all these cases, the youth welfare agency will act in lieu of – and not in addition to – other persons holding parental responsibilities.

In the following cases, the youth welfare agency has to support the legal representative, usually the mother, of a child born in Austria: Based on the legal representative's assent in writing the youth welfare agency will act as the child's representative for the determination and/or enforcement of the child's maintenance claims, when applicable also for the determination of paternity; for other matters only, if it is willing to do so (Sec. 212(1) - (3) Austrian CC). As the child's representative the youth welfare agency may also apply for provisional measures of protection against domestic violence (Sec. 382b, 382d Enforcement Code [*Exekutionsordnung*]) if the ordinary legal representative

⁷⁵ For details see Q 49, 50.

⁷⁶ *Oberster Gerichtshof*, 25.09.2002, *Österreichische Juristenzeitung - EvBl*, 2003, No. 16 = *ÖJZ-LSK* 2003/2; M. Schwimann, *Familienrecht*, 5th Edition, Vienna: LexisNexis ARD Orac, 2004, p. 80.

⁷⁷ See Q 44.

⁷⁸ E. STREINESBERGER/Th. HACKER, '*Jugendwohlfahrtsrecht*,' in: O. LEHNER, *Kinder- und Jugendrecht*, 2nd Edition, Vienna: Orac, 1998, p. 172.

⁷⁹ Parental responsibilities may only be transferred to resurfacing parents by a judicial decision to that effect (Sec. 250 Austrian CC).

has not filed the required petition immediately (Sec. 215(2) Austrian CC). Moreover, the youth welfare agency is generally authorized to petition the court for orders to preserve the child's interests (Sec. 176(2), 215(1) sentence 1 Austrian CC); however, in case of increased danger in any delay (e.g. when school registration is pressing or in case of violence against the child), the agency itself may take action on a temporary basis to provide for the child's care and/or education until the court has rendered a decision (Sec. 215(1) Austrian CC).

33. To whom are the parental responsibilities attributed in the case of:

(a) The death of a parent holding parental responsibilities

Upon the death of a parent who held parental responsibilities jointly with the other parent, the parental responsibilities automatically pass solely to the other, surviving parent by virtue of law.⁸⁰ This parent can demand a judicial declaration to this effect (Sec. 145(1) sentence 1 and 145(2) Austrian CC).

Upon the death of a parent who held sole parental responsibilities, the court has to decide whether the other parent or grandparent(s) or foster parents and, if applicable, which grandparent(s) or foster parent(s) are to be entrusted with parental responsibilities (Sec. 145(1) sentence 2 Austrian CC). Pursuant to the legislator's intention none of the mentioned potential holders of parental responsibilities has priority by reason of his, her or their status; they are all on an equal footing.⁸¹ Which person the court will in fact select as holder of parental responsibilities in an individual case depends solely on the child's emotional and social relationship with these persons. The decisive factor is what will serve best the child's interests. If, for instance, both the unmarried father and the stepfather as foster parent wish to obtain parental responsibilities, the court should attribute parental responsibilities primarily to the stepfather who has already had close ties to the child and not to the biological father who has previously had no or only very loose contact with the child.⁸²

If none of the aforementioned persons (parent, grandparent(s), foster parent(s), Sec. 145(1) sentence 2 Austrian CC) is able to assume parental responsibilities, the court is required to entrust another suitable person⁸³ with the parental responsibilities, taking into account the best interests of the child in selecting that person (Sec. 187 Austrian

⁸⁰ The same applies in the event that the parent's whereabouts have been unknown for at least six months or that the court has revoked his/her parental responsibilities.

⁸¹ Contra some older precedents recognising a priority based on the degree of consanguinity, e.g. *Oberster Gerichtshof*, 19.06.1997, 6 Ob 170/97m, *EFSlg* 84.247; still in this tradition *Oberster Gerichtshof*, 27.02.2002, 7 Ob 31/02p, <http://www.ris.bka.gv.at/jus/>, *EFSlg* 100.189-100.191.

⁸² EBRV 296 BlgNR XXI. GP, p. 54 (explanatory notes to Government bill, 296 supplements to the stenographic minutes of the National Assembly, XXI legislative period); *Oberster Gerichtshof*, 28.05.2002, *EFSlg* 100.188; SCHWARZL, 'Obsorge, Kindeswohl und Sachwalterschaft nach dem KindRÄG 2001', in: S. FERRARI/G. HOPF, *Reform des Kindschaftsrechts*, Vienna: Manz Verlag, 2001, p. 23. See also *Oberster Gerichtshof*, 27.07.1995, *Juristische Blätter*, 1996, p. 381 = *EFSlg*. 77.968; *Oberster Gerichtshof*, 27.05.1993, *Juristische Blätter*, 1994, p. 328 = *Österreichischer Amtsvormund*, 1994, p. 27.

⁸³ Individuals who are under a legal disability or are personally unfit are inappropriate (Sec. 188 Austrian CC).

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CC). The child's relatives will be considered first and only then other persons in a position of trust. Persons who are especially suited for legal representation or the administration of property include attorneys, caretakers, and notaries. As a last resort, the youth welfare agency (*Jugendwohlfahrtsträger*) will be the holder of parental responsibilities (Sec. 213 Austrian CC).

(b) The death of both parents of whom at least one was holding parental responsibilities at the time of the death?

Also upon the death of both parents (or in the event that their whereabouts have been unknown for at least six months or that the court has revoked their parental responsibilities), the court must transfer the parental responsibilities to the grandparent(s) or one or both foster parents; the decisive factor is what will serve best the child's interests (Sec. 145 (1) sentence 2 Austrian CC). If none of these persons may assume parental responsibilities, the court has to entrust another suitable private person or, as a last resort, the youth welfare agency with parental responsibilities, taking into account the best interests of the child in selecting that person (Sec. 187 Austrian CC).⁸⁴

34. To what extent, if at all, may the holder(s) of parental responsibilities appoint a new holder(s) upon his/her/their death? If such an appointment is permitted, must it take place in a special form, e.g. will?

The transfer of parental responsibilities to other persons via a private legal transaction is not possible; instead, the court will make a decision in this regard in accordance with the best interests of the child (Sec. 145, 176, 186a, 187, 213 Austrian CC). Consequently, parents cannot prospectively make any binding disposition regarding the awarding of parental responsibilities even in the case of death.⁸⁵ Rather the court has to entrust a suitable person with parental responsibilities according to the rules laid down in Sec. 145 and 187 Austrian CC, taking into account the best interests of the child.⁸⁶

D. THE EXERCISE OF PARENTAL RESPONSIBILITIES

I. Interests of the child

35. In exercising parental responsibilities, how are the interests of the child defined in your national legal system?

Parents must see to the upbringing of their children and promote their welfare in general (Sec. 137(1) Austrian CC). In assessing the child's welfare (*Kindeswohl*), i.e. their interests, it is necessary to give due consideration to the child's personality and needs, especially his or her aptitudes and abilities, predispositions and developmental potential, as well as to the parents' living conditions (Sec. 178a Austrian CC). This

⁸⁴ For details see Q 33a, paragraph 2.

⁸⁵ *Oberster Gerichtshof*, 27.02.2002, 7 Ob 31/02p, <http://www.ris.bka.gv.at/jus/>, *EFSlg* 100.189-100.191; see also *Oberster Gerichtshof*, 19.06.1997, 6 Ob 170/97m, *EFSlg* 84.247.

⁸⁶ See Q 33(a) and (b).

notion also includes the physical, mental, and emotional welfare of the child. Therefore, parental love, care and the imparting of security are the basis for realizing the child's welfare.⁸⁷

II. Joint parental responsibilities

36. If parental responsibilities are held jointly by two or more persons, are they held equally?

The rights and duties of joint parental responsibility holders are generally equal (Sec. 137(3) Austrian CC). The only exception is if one parent is partially prevented from exercising parental responsibilities, *e.g.* if he or she has been partially discharged of his or her parental responsibilities or if he or she is a minor. In that case, the other parent independently assumes the parental responsibilities in the respective matters, *e.g.* in case of a parent's minority, the other parent takes over the administration of the child's property and legal representation (Sec. 145 and 145a Austrian CC).

37. If parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of parental responsibilities have the authority to act alone? In this respect is a distinction made between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the parental responsibilities?

The holders of joint parental responsibilities, *i.e.* parents, grandparents or foster parents (hereinafter parents), should act by mutual assent in fulfilling their rights and duties (Sec. 144 Austrian CC).⁸⁸ However, the legislature does not require unreasonable efforts⁸⁹. If an agreement cannot be reached, each parent is normally authorized to make decisions and represent the child independently, *e.g.* to enter into an apprenticeship contract or to include the child on his or her passport (Sec. 154(1) Austrian CC).⁹⁰ When the parents' legal actions are inconsistent with each other, the one taken first will be valid; if they are taken simultaneously, neither will be valid.

The case is different regarding certain important matters that are enumerated exhaustively in Sec. 154(2) Austrian CC and require the consent of the other parent in order to be legally effective. These matters comprise changing the child's name, joining or leaving a religious denomination, placement in the care of another, acquisition of citizenship or refusal to do so, premature termination of an apprenticeship or employment contract, and recognition of the paternity of a child born out of wedlock.

⁸⁷ *Oberster Gerichtshof* 22.10.1986, *Sammlung der Entscheidungen des Obersten Gerichtshofs in Zivilrechtssachen (SZ)*, Vol. 59, No. 184; LG Eisenstadt 29.11.2001, EFSIlg. 96.695.

⁸⁸ *Oberster Gerichtshof*, 04.04.1978, EFSIlg. 31.222.

⁸⁹ *Oberster Gerichtshof*, 28.8.1997, *Sammlung der Entscheidungen des Obersten Gerichtshofs in Zivilrechtssachen (SZ)*, Vol. 70, No. 163 = *Juristische Blätter*, 1998, p. 243.

⁹⁰ I. HOLZHAMMER/R. HOLZHAMMER, *Ehe und Familie*, 2nd Edition, Freistadt: Plöchl Verlag, 2001, p. 72.

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Representative acts in property-related matters that fall outside the scope of proper business operations require not only the consent of the other parent but also the approval of the court in order to become legally effective. This includes, for example, the sale and encumbrance of real estate; the acquisition, transformation, sale, or dissolution of a business; waiver of a right of inheritance, unconditional acceptance or renunciation of an inheritance; acceptance of an encumbered gift or rejection of a proffered gift; certain types of monetary investments (*e.g.* granting a loan or acquiring real estate); filing a complaint and making all procedural dispositions that relate to the matter in dispute (Sec. 154(3) Austrian CC).

If the parents cannot agree on a matter involving the child and thereby endanger the child's interests, the court will issue such orders as are necessary to safeguard the interests of the child (Sec. 176 Austrian CC).⁹¹

The above stated rules regarding the child's legal representation (Sec. 154 Austrian CC) apply regardless of which parent the child is living with most of the time. If the parents have permanently separated (after divorce, annulment of the marriage, ending of a non-marital partnership, or permanent separation of married parents) or have never lived in a common household, however, each parent may petition the court to revoke joint parental responsibilities without substantiation at any time (Sec. 167, 177a (2), 177b Austrian CC). In such a case, the court will entrust one parent with sole parental responsibilities based on the best interests of the child, unless a reconciliation between the parents may be brought about (Sec. 177a (2) Austrian CC).⁹²

38. If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g. residence or contact.

If no agreement is reached concerning an important matter involving the child (Sec. 154(2) and (3) Austrian CC) or if the child's interests are jeopardized by the inconsistent or independent action of one parent⁹³, the matter may be brought before the court for a decision (Sec. 176 Austrian CC). Either parent, the grandparents, and where applicable even the foster parents, the youth welfare agency, and a minor child over 14 years of age himself or herself will have standing to file the petition (Sec. 176(2) Austrian CC); other persons may only make proposals to the court. If one parent's consent is withheld unjustifiably, *i.e.* in the absence of convincing reasons to do so, the court may substitute that consent on a case-by-case basis. The court is also authorized to permanently revoke parental rights of assent and consent if the child's interests are at risk (Sec. 176(1) Austrian CC), *e.g.* in the event of a categorical refusal to a blood transfusion by Jehovah's Witnesses⁹⁴. The court's competence is not limited to certain issues.

⁹¹ For details see Q 38.

⁹² See Q 16, 18, 22b, 23.

⁹³ See Q 37.

⁹⁴ *Oberster Gerichtshof*, 04.06.1996, *Juristische Blätter*, 1996, p. 714 = *EFSlg.* 81.134; European Court of Human Rights, *ECHR, series A No. 255-C*, 23.06.1993, pp. 45 et seq. (*Hoffmann v. Austria*);

If the parents have permanently separated (after divorce, annulment of the marriage, ending of a non-marital partnership, or permanent separation of married parents) or have never lived in a common household, each parent may petition the court to end joint parental responsibilities without substantiation at any time (Sec. 167, 177a(2), 177b Austrian CC). Then the court will entrust one parent with sole parental responsibilities based on the best interests of the child, unless a reconciliation between the parents may be brought about (Sec. 177a(2) Austrian CC).

39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of parental responsibilities?

Pursuant to Sec. 154(1) Austrian CC, either holder of joint parental responsibilities is generally authorized to represent the child independently, *i.e.* he or she may even act alone. In the event of contradictory declarations by the parental responsibilities holders, the following principle applies: the action taken by the first parental responsibilities holder to act will be legally valid; simultaneous declarations that contradict each other will cancel each other out, whereby nothing is deemed to have been declared.⁹⁵ However, the consent of both holders of parental responsibilities is required for important matters concerning the child (Sec. 154(2) Austrian CC, *e.g.* change of religion or name or placement of the child in the care of a third party) as well as for representative acts in property-related matters that fall outside the scope of the ordinary enterprise (Sec. 154(3) Austrian CC).⁹⁶

40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so called relocation) without the consent of one of the holders of parental responsibilities?

Holders of joint parental responsibilities, *i.e.* parents, grandparents or foster parents (hereinafter parents), who are entitled to care for and educate the child also have the right to determine the child's residence. In exercising their right they should act by mutual assent (Sec. 144 and 146b Austrian CC).⁹⁷ If an agreement cannot be reached, the determination of the parent who acts first will be valid. The court may generally only interfere with this right to determine the child's residence - as with other parental rights - if the child's interests are at risk.⁹⁸ In such a case the court will render the decisions

see I. Fahrenhorst, 'Sorgerecht und Religion', *Europäische Grundrechtszeitschrift*, 1996, pp. 633 et seq.; H. Pichler, 'Zeugen Jehovas', *Österreichischer Amtsvormund*, 1994, p. 171; see O. Maleczky, 'Unvernünftige Verweigerung der Einwilligung in die Heilbehandlung', *Österreichische Juristenzeitung*, 1994, p. 681.

⁹⁵ J. STABENTHEINER, 'KindRÄG 2001', in: P. Rummel, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 154, 154a Marg. No. 3; see Q 8f.

⁹⁶ For details see Q 8f and 37.

⁹⁷ M. SCHWIMANN in: M. SCHWIMANN, *Praxiskommentar zum ABGB*, Vol. I, 2nd Edition, Vienna: Orac, 1997, § 146b Marg. No. 1.

⁹⁸ J. STABENTHEINER in: P. RUMMEL, *ABGB-Kommentar*, Vol. I, 3rd Edition Vienna: Manz 2000, § 137a Marg. No. 10.

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necessary to safeguard the interests of the child (Sec. 176(1) Austrian CC), and therefore may also permit the residence of the child to be changed without the consent of one holder of parental responsibilities. It may even issue an order on the child's residence against the determination of both parental responsibilities holders.

However, if the parents have permanently separated (after divorce, annulment of the marriage, ending of a non-marital partnership, or permanent separation of married parents) or have never lived in a common household, each parent may petition the court to end joint parental responsibilities, without substantiation, at any time. Unless a reconciliation between the parents may be brought about, the court will entrust one parent with sole parental responsibilities based on the best interests of the child (Sec. 167, 177a(2), 177b Austrian CC). Then, of course, this holder of sole parental responsibilities also has the sole right to determine the child's residence.

41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with both holders of parental responsibilities (e.g. every other month with mother/father)?

In the best interests of the child, the legislature deems it necessary that permanently separated parents who want to hold joint parental responsibilities must agree on which parent the child is to reside with most of the time, i.e. the location of the child's "home base" (Sec. 177(2) and 167 Austrian CC)⁹⁹. If the parents are unable to reach such an agreement on the primary residence of the child, the court must attribute sole parental responsibilities including the right to determine the child's residence to one of them (Sec. 167, 177a and 177b Austrian CC). A division of parental responsibilities whereby the child changes his or her residence, e.g. alternating every month from the child's father's home to the mother's home, is neither permissible by way of agreement nor by judicial decree.¹⁰⁰

III. Sole parental responsibilities

42. Does a parent with sole parental responsibilities have full authority to act alone, or does he or she have a duty to consult:

(a) The other parent

The parent with sole parental responsibilities has the sole right to make decisions, while the other parent is limited to the right to be informed and to express his or her opinion (Sec. 178 Austrian CC).¹⁰¹ In the event of sole representation by operation of law, the requirement of the other parent's consent will not apply even to important matters concerning the child (Sec. 154(2)(b) Austrian CC).¹⁰²

⁹⁹ See Q 16, 17, 22b, 23 and 25.

¹⁰⁰ See J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, §§ 177-177b, Marg. No. 6 *et seq.*

¹⁰¹ See Q 44b.

¹⁰² M. SCHWIMANN in: M. SCHWIMANN, *Praxiskommentar zum ABGB*, Vol. I, 2nd Edition, Vienna: Orac, 1997, § 154 Marg. No. 10.

(b) Other persons, bodies or competent authorities

Transactions in property-related matters that fall outside the scope of the ordinary enterprise always require the court's approval (Sec. 154(3)(b) Austrian CC). These matters include, *inter alia*, the sale and encumbrance of real estate; the acquisition, transformation, sale, or dissolution of a business; waiver of a right of inheritance, unconditional acceptance or renunciation of an inheritance; acceptance of an encumbered gift or rejection of a proffered gift; certain types of monetary investments (e.g. granting a loan or acquiring real estate); filing a complaint and making all procedural dispositions that relate to the matter in dispute.¹⁰³

E. CONTACT

43. Having regard to the definition by the Council of Europe (see above), explain the concepts of contact used in your national legal system.

Sec. 148 Austrian CC ensures the maintenance of the child's personal contact with his or her parent and other persons who do not live in a common household with the child, but are nevertheless very close to him or her. This so-called visitation right (*Besuchsrecht*) is regarded as a fundamental right in the parent-child relationship.¹⁰⁴

Regarding the child-parent and child-grandparent(s) relationship, the concerned persons should arrange the exercise of contact by mutual assent. If an agreement cannot be reached, at the request of the child, a parent or grandparent the court will regulate the exercise of contact according to the child's best interest taking into account the needs and wishes of the child (Sec. 148(1) and (3) Austrian CC). Regarding the child-third person (other person than parent or grandparent) relationship the court will only take action to regulate the exercise of contact, if the interests of the child would be at risk without such contact (Sec. 148(4) Austrian CC).

The extent of the right of contact is not regulated in the law but rather depends on the individual case. The following standards have developed in the case law: the right of contact generally exists twice a month; the intensity and duration of the visit increases with the child's age. Beginning at three years of age, a child can already stay with the other parent for an entire day, while children over six years of age can spend an entire weekend, including an overnight stay, with the other parent.¹⁰⁵ The right to personal contact includes not only visits but also all other forms of communication, such as telephone calls, letters, faxes, e-mail, etc.¹⁰⁶

¹⁰³ See also Q 8f.

¹⁰⁴ E.g., *Oberster Gerichtshof*, 11.05.1994, *EFSlg.* 77.972; M. Roth, 'Europäische Menschenrechtskonvention und Privatrecht: Landesbericht Österreich', *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 1999, p. 735 with further references.

¹⁰⁵ *Landesgericht für Zivilrechtssachen Vienna*, 01.01.1998, *EFSlg.* 86.883 et al.; I. Mottl, 'Umfasst das Besuchsrecht auch Telefonanrufe?', *Österreichischer Amtsvormund*, 1994, pp. 173-174.

¹⁰⁶ *Landesgericht für Zivilrechtssachen Vienna*, 27.01.1995, *EFSlg.* 78.007; *Landesgericht für Zivilrechtssachen Vienna*, 30.3.2000, *EFSlg.* 92.939.

In addition to the right of contact, the parent who does not hold parental responsibilities also has the right to be informed of important matters concerning the child and to express his or her opinion on the same (Sec. 178 Austrian CC).

44. To what extent, if at all, does the child have a right of contact with:

(a) A parent holding parental responsibilities but not living with the child

Pursuant to Sec. 148 Austrian CC, a child has a right of contact with a parent who does not live in the same household with the child, irrespective of whether this parent holds parental responsibilities or not.¹⁰⁷

(b) A parent not holding parental responsibilities

The child has the same right to personal contact with a parent not holding parental responsibilities as with a parent holding parental responsibilities, but not living in the same household with the child (Sec. 148(1) Austrian CC).¹⁰⁸

In addition to this right to contact, the parent who does not hold parental responsibilities also has the right to be informed and the right to express his or her opinion (Sec. 178 (1) sentence 1 Austrian CC). These rights concern the important matters of Sec. 154 (2) and (3) Austrian CC (*e.g.* language-course vacations abroad, a change of school, graduation from school or vocational training, marriage, serious illnesses or accidents, alcohol or drug addiction, or the like)¹⁰⁹ and are closely related to the actual exercise of contact: The less regularly the parent not holding parental responsibilities has personal contact with the child (despite that parent's willingness to have such contact), the more extensive the parent's right to be informed and to express his or her opinion will be, and these rights may be extended to less important matters concerning the child (Sec. 178 (1) sentence 2 Austrian CC). Thus, for example, the father may also personally obtain information from the doctor or teachers regarding the welfare of his child if he does not learn about these matters promptly or within a reasonable time from the mother holding parental responsibilities (*e.g.* with respect to the child's specific end-of-the-year report cards, recreational activities, athletic achievements, circle of friends, *etc.*).¹¹⁰

(c) Persons other than parents (e.g. grandparents, stepparents, siblings etc...)?

The child also has a right of contact with his or her grandparents.¹¹¹ However, if the exercise of this right disturbs the family life of the parent(s) or their relationship with child, it must be restricted or prohibited (Sec. 148 (3) Austrian CC).

¹⁰⁷ For details see Q 43; G. WALLISCH, 'Der andere Elternteil und das Besuchsrecht', *Österreichische Juristenzeitung*, 2002, p. 487.

¹⁰⁸ For details see Q 43.

¹⁰⁹ See Q 37.

¹¹⁰ P. HAIDENTHALLER, 'Schwerpunkte der Kindschaftsrechts-Reform 2001', *Juristische Blätter*, 2001, pp. 628-630; U. Aichhorn, *Das Recht der Lebenspartnerschaften*, Vienna/New York: Springer Verlag, 2003, p. 83.

¹¹¹ See also Q 43.

The child may also be granted personal contact with third parties to whom he or she has close emotional ties if interrupting the contact would be disadvantageous to the child (Sec. 148(4) Austrian CC). In this manner the child's contact with a stepparent(s), foster parent(s), and also with a former partner of the parent holding parental responsibilities, as well as with siblings, aunts, uncles, godparents, etc. can be established or maintained, even against the will of the parental responsibilities holder. The right of contact with third parties does not depend on a kinship relationship. Entitled to petition the court are the child's parents, the youth welfare agency, and the child him or herself, but not the third party; also the third party is not entitled to standing as a party in the contact proceedings. However, the court may take action *ex officio*.

45. Is the right to have contact referred to in Q 43 also a right and/or a duty of the parent or the other persons concerned?

The right to personal contact is also worded as a right of the respective parent and the grandparent(s) (Sec. 148(1) and (2) Austrian CC), and it is also understood as a duty of these persons to take their responsibility towards the child seriously.¹¹² Persons other than the respective parent and the grandparent(s) to whom the child has close emotional ties are not entitled to petition the court for regulating the exercise of contact or to standing as a party in the respective proceedings; thus they do not have an independent "right of contact".¹¹³

Neither a child over the age of 14 years nor the respective parent can be forced to exercise contact (Sec. 108 Non-Contentious Proceedings Act [*Außerstreitgesetz*]), since maintaining the contact is only beneficial to the child's welfare if it is done so on a voluntary basis. However, upon rejecting the right of contact, one also loses the right to be informed and the right to express one's opinion (Sec. 178(3) last sentence Austrian CC). Moreover, there are consequences under the law of succession, as well: Sec. 773a Austrian CC generally enables the testator to reduce a child's entitlement to a compulsory portion to one-half if a close family relationship never existed between them. However, this option does not apply if the testator unjustifiably refused to have contact with the child.

46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?

The parents and the child may and even should arrange the exercise of contact by mutual assent (Sec. 148(1) Austrian CC). For a contact arrangement to be implemented

¹¹² E.g., *Oberster Gerichtshof*, 10.04.1997, *Österreichischer Amtsvormund*, 1997, p. 168 (Udo Jürgens Case); M. ROTH, 'Europäische Menschenrechtskonvention und Privatrecht: Landesbericht Österreich', *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 1999, p. 735 *et seq.* with further references.

¹¹³ For details see Q 44c paragraph 2.

by force, it must be approved by the court (Sec. 109 and 110 Non-Contentious Proceedings Act [*Außerstreitgesetz*]). Thus, according to predominant opinion a contact arrangement is not legally binding until it has been approved in this manner.¹¹⁴ The overriding criterion for the court's scrutiny are the child's best interests (Sec. 148(1) Austrian CC).¹¹⁵

47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?

The court may restrict or even revoke the exercise of contact if the child's interests are at risk, i.e. if a specific physical or emotional threat to the child's welfare exists (Sec. 148(2) and 176 Austrian CC). This applies, e.g. in the case of alcohol dependency,¹¹⁶ relevant criminal conviction,¹¹⁷ abuse of the relationship of authority,¹¹⁸ but also in the case of sporadic exercise of the contact if the child is regularly disappointed by it.¹¹⁹ The same is true if the parent entitled to contact interferes with the child's relationship with the other parent or other important contact persons; this concerns especially gross violations of the requirement of good behaviour set forth in Sec. 145b Austrian CC,¹²⁰ such as incitement of the child, insulting statements and physical or psychological violence against the other parent or contact persons.

Furthermore, the grandparents' exercise of contact may be restricted if this becomes necessary in order to prevent interference with the parents' family life or their relationship with the child (Sec. 148(3) Austrian CC). This is the case, for instance, if conflicts arise between the parents and the grandparents concerning the child's upbringing.¹²¹

If problems arise, any party to the proceedings, i.e. a parent or a child over 14 years of age, can petition the court for a visit escort (*Besuchsbegleitung*, section 111 Non-Contentious Proceedings Act [*Außerstreitgesetz*]): a suitable person, e.g., a relative, teacher, social worker, or employee of the youth welfare office, attends the meeting between the parent holding contact rights and the child, usually on neutral ground (a so-called "visit cafe" [*Besuchscafé*]).

¹¹⁴ J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 148 Marg. No. 1c with further references.

¹¹⁵ See *Oberster Gerichtshof*, 13.07.2000, *EFSlg.* 92.901; M. Friedrich, 'Was ist das Optimum des Kindeswohls', in: Schriftenreihe des Bundesministeriums für Justiz (Hg), *Gemeinsame Obsorge - Chance oder Scheinlösung?*, Vienna: 1996, p. 63.

¹¹⁶ *Landesgericht für Zivilrechtssachen* Vienna, 01.10.1996, *EFSlg.* 81.018.

¹¹⁷ *Landesgericht für Zivilrechtssachen* Vienna, 29.08.1985, *EFSlg.* 48.347, and 07.05.1987, *EFSlg.* 53.912.

¹¹⁸ *Landesgericht für Zivilrechtssachen* Vienna, 26.05.1994, *EFSlg.* 75.045.

¹¹⁹ *Oberster Gerichtshof*, 15.09.1981, *EFSlg.* 38.286.

¹²⁰ See also Q 16 at the end.

¹²¹ *Landesgericht für Zivilrechtssachen* Vienna, 16.01.1996, *EFSlg.* 81.051; *Landesgericht Linz*, 22.12.2000, *EFSlg.* 93.001 et al.

48. What if any, are the consequences on parental responsibilities, if a holder of parental responsibilities with whom the child is living, disregards the child's right to contact with:

(a) A parent

The parent with whom the child is living is obliged to enable and support the other parent's exercise of his or her right of contact. A violation of this duty to afford the other parent regular contact with the child will by operation of law expand the other parent's right to be informed and to express his or her opinion about important matters involving the child (Sec. 178(1) sentence 2 Austrian CC)¹²². To enforce the right of contact, the court must primarily order compulsory measures, which may range from reprimands and fines all the way to detention (Sec. 110 (2) in conjunction with Sec. 79(2) Non-Contentious Proceedings Act [*Außerstreitgesetz*])¹²³. If these measures fail, the parental responsibilities may even be totally or partially revoked as a last resort (Sec. 176(1) Austrian CC)¹²⁴.

(b) Other persons

In this case as well, to enforce the right of contact in relation to other persons the court will adopt compulsory measures (Sec. 110(2) in conjunction with Sec. 79(2) Non-Contentious Proceedings Act [*Außerstreitgesetz*]) and, as a final resort, may even - at least partially - revoke the parental responsibilities (Sec. 176(1) Austrian CC).¹²⁵

F. DELEGATION OF PARENTAL RESPONSIBILITIES

49. To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?

Parental responsibilities as such may only be transferred to another person by operation of law or by court order in accordance with the child's best interests (Sec. 145, 176, 186a, 187, and 213 Austrian CC).¹²⁶ However, one possibility to freely relinquish the actual exercise of parental responsibilities for the child with respect to his or her

¹²² See Q 44b.

¹²³ See Q 58.

¹²⁴ M. SCHWIMANN in: M. SCHWIMANN, *Praxiskommentar zum ABGB*, Vol. I, 2nd Edition, Vienna: Orac, 1997, § 148 Marg. No. 20. The recalcitrant parent may also lose his/her spousal maintenance (Sec. 74 Austrian CC); *Oberster Gerichtshof*, 21.21.1995, *EFSlg.* 78.714 = *Juristische Blätter*, 1996, p. 402 = *Österreichischer Amtsvormund*, 1996, p. 170; M. ROTH, 'Europäische Menschenrechtskonvention und Privatrecht: Landesbericht Österreich', *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 1999, p. 735.

¹²⁵ STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 148 Marg. No. 10.

¹²⁶ See Q 33 and 51. Erklären die Eltern oder ein Elternteil einen ausdrücklichen Verzicht auf ihre Elternrechte, so wird dies von der Rechtssprechung als Kindeswohlgefährdend beurteilt, *Landesgericht für Zivilrechtssachen* Vienna, 22.08.1985, *EFSlg.* 48.405.

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care and education is the contractual placement of the child in the care of foster parents (Sec. 186 *et seq* Austrian CC).¹²⁷

Transferring the child into the care of a third party requires the consent of both parents (Sec. 154(2) Austrian CC); in the event of unjustified refusal by one parent, such consent may be substituted by the court's decision (Sec. 176(1) Austrian CC). Moreover, for children over 16 years of age an administrative approval by the public youth welfare agency that verifies the suitability of the foster parents must be obtained (Sec. 14 and 16(1) Youth Welfare Act [*Jugendwohlfahrtsgesetz*]).¹²⁸ While the child may be transferred into foster care without the required approval, this will result in an administrative penalty (Sec. 35(3) No. 2 *Jugendwohlfahrtsgesetz*). In spite of the child's placement in the care of foster parents the parental responsibilities holders retain full parental responsibilities by operation of law; they fulfil their duties by engaging the foster parents who carry out the actual care and education of the child. Foster parents are entitled to petition the court in matters of care and education as well as in contact proceedings. However, only under certain circumstances do foster parents have the right to obtain parental responsibilities (Sec. 186a Austrian CC).¹²⁹

50. To what extent, if at all, may a person not holding parental responsibilities apply to a competent authority for a delegation of parental responsibilities?

Foster parents have a right to the transfer of parental responsibilities and thus may petition the court to this effect, if they are to assume the child's care for the long term, the transfer is consistent with the child's best interests, and the parent(s) or grandparent(s) holding parental responsibilities consent to the transfer (Sec. 186a(1) Austrian CC). The transfer may only be ordered against the will of the parent(s) or grandparent(s) if the interests of the child are at risk (Sec. 186a(2) Austrian CC).¹³⁰ However, according to predominant views such a transfer of parental responsibilities has the effect that the previous holder(s) of parental responsibilities lose them to the extent they pass to the new holder of parental responsibilities.¹³¹

Besides, a transfer or delegation of parental responsibilities may only be ordered if the child's interests are at risk. In this case the court must intervene *ex officio* and discharge the holder(s) of his, her or their parental responsibilities, in part or in whole, and transfer them to another suitable person or persons (Sec. 176(1) Austrian CC), regardless of who brought the matter before it.¹³²

¹²⁷ See R. HOLZHAMMER/M. ROTH, *Bürgerliches Recht*, 6th Edition, Vienna: LexisNexis ARD Orac, 2004, p. 372 *et seq*.

¹²⁸ O. LEHNER, *Kinder- und Jugendrecht*, 2nd Edition, Vienna: Orac, 1998, p. 177 *et seq*.

¹²⁹ For details see Q 50.

¹³⁰ On the other hand, the transfer of parental responsibilities has to be revoked, if this is consistent with the best interests of the child (Sec. 186a (3) Austrian CC).

¹³¹ *Oberster Gerichtshof*, 25.09.2002, *Österreichische Juristenzeitung - EvBl*, 2003, No. 16 = *ÖJZ-LSK* 2003/2; M. SCHWIMANN, *Familienrecht*, 5th Edition, Vienna: LexisNexis ARD Orac, 2004, p. 80. See also Q 27.

¹³² For details see Q 51 and 52.

G. DISCHARGE OF PARENTAL RESPONSIBILITIES

51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his/her/their parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of parental responsibilities, etc.? To what extent, if at all, should the competent authority take into account a parent's violent behaviour towards the other parent?

If the holder(s) of parental responsibilities threaten the child's interests, the court must intervene and issue the orders necessary to safeguard these interests; in particular the court may totally or partially discharge the holder(s) of his, her or their parental responsibilities, if necessary (Sec. 176 Austrian CC). According to precedent, the child's interests are threatened if the parents neglect their duty to bring up the child or if they abuse their child-rearing authority,¹³³ violate the prohibition against corporal punishment (Sec. 146b Austrian CC),¹³⁴ or in the event of sexual abuse,¹³⁵ psychological torture, the failure to obtain necessary medical treatment for the child¹³⁶ or the violation of the duty to support the child,¹³⁷ also the mother's alcohol addiction or mental illness can lead to the revocation of her parental responsibilities.¹³⁸

The revocation of parental responsibilities can only be ordered as the most extreme emergency measure if no other alternative exists to protect against a specific and genuine threat to the child's interests.¹³⁹ Thus, for example, the existence of a risk to the child's interests solely because the parent holding parental responsibilities was a member of the Jehovah's Witnesses or the Church of Scientology was rejected:¹⁴⁰ therefore, the withholding of consent to a blood transfusion (that was not actually medically necessary) for the child for reasons of faith does not warrant a precautionary revocation of parental responsibilities because a revocation of this sort would violate Art. 8 European Convention on Human Rights.¹⁴¹ The revocation of parental

¹³³ *Landesgericht für Zivilrechtssachen Vienna*, 11.05.1982, *EFSlg.* 40.878 (child left alone at night); *Oberster Gerichtshof*, 04.06.1996, *Juristische Blätter*, 1996, p. 714; *Oberster Gerichtshof*, 27.11.2001, *Österreichische Juristenzeitung - EvBl*, 2002, No. 82, p. 335 = *Juristische Blätter*, 2002, p. 374.

¹³⁴ *Landesgericht für Zivilrechtssachen Vienna*, 29.08.2001, *EFSlg.* 96.644.

¹³⁵ *Oberster Gerichtshof*, 13.01.1994, *Österreichische Juristenzeitung - EvBl*, 1994, No. 123, p. 594 = *EFSlg.* 15.149.

¹³⁶ *Oberster Gerichtshof*, 16.12.1992, *EFSlg.* 68.799.

¹³⁷ E. GITSCHTHALER, *Unterhaltsrecht*, Vienna: Manz Verlag, 2001, Marg. No. 31-35. M. SCHWIMANN & W. KOLMASCH, *Unterhaltsrecht*, 3rd Edition, Vienna: LexisNexis ARD Orac, 2004, p. 95.

¹³⁸ *Landesgericht für Zivilrechtssachen Vienna*, 13.05.1987; *EFSlg.* 54.019; contra *Landesgericht für Zivilrechtssachen Vienna*, 20.03.1985, *EFSlg.* 48.411.

¹³⁹ *Oberster Gerichtshof*, 04.06.1996, *EFSlg.* 96.626.

¹⁴⁰ J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 176 Marg. No. 2 with further references.

¹⁴¹ *Oberster Gerichtshof*, 04.06.1996, *Juristische Blätter*, 1996, p. 714 = *EFSlg.* 81.134; Case Hoffmann v. Österreich, ECHR, series A No. 255-C, 23.06.1993, pp. 45 et seq.; see I. FAHRENHORST, 'Sorgerecht und Religion', *Europäische Grundrechtezeitschrift*, 1996, p. 633 et seq; MALECKY,

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responsibilities because of a one-time suicide threat by the parent holding parental responsibilities or because of relationship problems was also denied.¹⁴²

Prior to the revocation of parental responsibilities, a less severe option is the furnishing of assistance with child rearing, e.g. advice on child rearing, therapeutic measures, placement with a child-minder, nursery, children's clinic, or with foster parents (*Erziehungshilfe*, Sec. 27 and 28 Youth Welfare Act [*Jugendwohlfahrtsgesetz*]).

Pursuant to Sec. 145b Austrian CC, a parent must refrain from any act that impedes the child's relationship to other persons holding rights and duties concerning the child or their performance of their duties with respect to the child (requirement of good behaviour [*Wohlverhaltensgebot*]). This prohibition encompasses a broad spectrum of behaviour: from insulting statements to physical and/or psychological violence against the other parties. Any violation against this prohibition may be penalized, if necessary, by restricting or revoking parental rights, i.e. parental responsibilities (Sec. 176, 253 Austrian CC) and/or the right of contact (Sec. 148 Austrian CC).

If a parent behaves in an uncooperative manner in exercising his or her parental responsibilities, this violates the principle of mutual assent specified in Sec. 144 Austrian CC; in this case too, the parental responsibilities can be revoked as a last resort in terms of the specific areas in which no agreement can be reached, e.g., administration of property, education, or medical treatment.¹⁴³ In practice, however, such cases are rare.

52. Who, in the circumstances referred to in Q 51, has the right or the duty to request the discharge of parental responsibilities?

If holders of parental responsibilities threaten the child's interests, then the court must intervene *ex officio* and issue the necessary orders (including the revocation of parental responsibilities), regardless of who brought the matter before it, e.g. a neighbour or relative, *etc* (Sec. 176 (1) Austrian CC). Agents of the school authority (i.e. teachers and educators), security forces, and hospitals are required to report to the youth welfare agency if they suspect that the child's interests are at risk (Sec. 37(1) and (2) Youth Welfare Act [*Jugendwohlfahrtsgesetz*]).¹⁴⁴ The parents, grandparents and foster parents, a minor child over 14 years of age, and the youth welfare agency each have an individual

'Unvernünftige Verweigerung der Einwilligung in eine Heilbehandlung', *Österreichische Juristenzeitung*, 1994, p. 681; H. PICHLER, 'Die Kinder der Zeugen Jehovas - Probleme der Obsorgezuteilung und der Bluttransfusion', *Österreichischer Amtsvormund*, 1994, p. 171.

¹⁴² M. SCHWIMANN in: M. SCHWIMANN, *Praxiskommentar zum ABGB*, Vol. I, 2nd Edition, Vienna: Orac, 1997, § 176 Marg. No. 7; J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz Verlag, 2003, § 186a Marg. No. 3; E. STREINESBERGER/Th. HACKER, 'Jugendwohlfahrtsrecht', in: O. Lehner, *Kinder- und Jugendrecht*, 2nd Edition, Vienna: Orac, 1998, p. 169.

¹⁴³ J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz, 2003, § 176 Marg. No. 4, 10. See also Q 38.

¹⁴⁴ O. LEHNER, *Kinder- und Jugendrecht*, 2nd Edition, Vienna: Orac, 1998, p. 164.

right to petition the court (Sec. 176(2) Austrian CC). Persons who bring matters before the court but do not pertain to the group of persons authorized to file petitions do not thereby gain standing as parties or to file appeals.

53. To what extent, if at all, are rights of contact permitted between the child and the previous holder of parental responsibilities after the latter has been discharged of his/her parental responsibilities?

Following the revocation of parental responsibilities, a parent or grandparent retains the right to personal contact with the child by operation of law (Sec. 148(1) Austrian CC); in addition the parent holds the right to be informed and to express his or her opinion concerning important matters involving the child (Sec. 178 Austrian CC). However, these rights must be restricted or prohibited if the threat to the child's interests that resulted in the revocation of parental responsibilities continues to exist by maintaining contact with the child (Sec. 148(2), 178(3) Austrian CC).¹⁴⁵ The reactions of the child (who by this point often demonstrates abnormal behaviour and developmental disturbances) and the child's utterances are of special importance in this case.¹⁴⁶ The maintenance of personal contact with other previous holders of parental responsibilities (than parents or grandparents), however, is only permitted if the child's interests are at risk otherwise, *i.e.* without the contact (Sec. 148(4) Austrian CC).

54. To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his/her parental responsibilities, regain them?

Parental responsibilities may be restored to a previous holder of the same if the reasons that led to their revocation no longer exist, *i.e.* if the child's interests are no longer threatened.¹⁴⁷ Before coming to a decision whether parental responsibilities should be restored to their previous holder or not, the advantages and disadvantages of both options have to be weighed.¹⁴⁸

H. PROCEDURAL ISSUES

55. Who is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact? Who is the

¹⁴⁵ J. STABENTHEINER, 'KindRÄG 2001', in: P. Rummel, *ABGB-Kommentar*, suppl. vol. 1, 3rd Edition, Vienna: Manz, 2003, § 178 Marg. No. 4.

¹⁴⁶ O. LEHNER, *Kinder- und Jugendrecht*, 2nd Edition, Vienna: Orac, 1998, p. 173.

¹⁴⁷ O. LEHNER, *Kinder- und Jugendrecht*, 2nd Edition, Vienna: Orac, 1998, p. 176; *Oberster Gerichtshof*, 4.6.1996, *Juristische Blätter*, 1996, 714; *Oberster Gerichtshof*, 27.11.2001, *Österreichische Juristenzeitung - EvBl*, 2002, No. 82, p. 335.

¹⁴⁸ M. SCHWIMANN in: M. SCHWIMANN, *Praxiskommentar zum ABGB*, Vol. I, 2nd Edition, Vienna: Orac, 1997, § 176 Marg. No. 5; 06.09.1984, *EFSlg.* 45.858; *Oberster Gerichtshof*, 28.08.1985, *EFSlg.* 48.419; *Oberster Gerichtshof*, 09.04.1991, *Österreichischer Amtsvormund*, 1991, p. 140; B. VERSCHRAEAGEN, 'Das Kind "Helene"', in: Franz Matscher/Ignaz Seidl-Hohenveldern (eds.), *Europa im Aufbruch - Festschrift für Fritz Schwind zum 80. Geburtstag*, Vienna: Manz, 1993, p. 227-238.

competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?

Custodial matters comprise disputes concerning parental responsibilities (Sec. 144 *et seq* Austrian CC), questions regarding the child's primary residence (Sec. 167 and 177 Austrian CC) and the right of contact (Sec. 148 Austrian CC), including additional rights of communication of the parent not holding parental responsibilities pursuant to Sec. 178 Austrian CC. These matters must be resolved through non-contentious court proceedings (Sec. 104 *et seq* Non-Contentious Proceedings Act [*Außerstreitgesetz*]). The authority that is competent to make these decisions is the district court having jurisdiction over the domicile in which the minor normally resides (Sec. 104a and 109 Jurisdictional Norm [*Jurisdiktionsnorm*] 1895). In custodial matters, specially trained court employees, so-called judicial officers [*Rechtspfleger*], have broad authority including the power to approve the agreements concerning the exercise of a parent's or grandparent's right to have contact with the child as well as the parents' agreements concerning the primary residence of the child and the exercise of parental responsibilities (Sec. 19(1), 19(2) No. 2 Judicial Officers Act [*Rechtspflegergesetz*] 1985). However, all other procedures for regulating the personal rights and duties emanating from family relations, and in particular the procedures for the (partial) revocation of parental responsibilities as well as for the substitution of assents and consents by the court (Sec. 176 Austrian CC) are reserved for the judge (Sec. 19(2) No. 2 *Rechtspflegergesetz*).

The youth welfare agency (to be precise the district youth welfare office of the minor's domicile) should be heard before the court issues orders in proceedings concerning care and education of the child and the arrangement of his or her personal contacts, or before it approves an arrangement on these matters unless the child's interests would be threatened by a delay associated with this (Sec. 106 *Außerstreitgesetz*). Also, the offices of the juvenile court assistance can be utilized as a source of information (Sec. 48 Juvenile Court Act [*Jugendgerichtsgesetz*] 1988).¹⁴⁹

56. Under what conditions, if any, may a legally effective decision or agreement on parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, e.g., required that the circumstances have changed after the decision or agreement was made and/or that a certain period of time has passed since the decision or agreement?

In matters of parental responsibilities, the child's residence and contact there is no revision of a legally effective decision in the sense of a reopening of the proceedings (Sec. 107(1) No. 3 *Außerstreitgesetz*); however, a subsequent change of circumstances may be asserted by means of a new petition.¹⁵⁰ Thus, for instance, an arrangement on the exercise of contact may be reviewed via a new petition, if the child's age-related

¹⁴⁹ <http://www.soziales.at>.

¹⁵⁰ S. KRIWANNEK, *Das neue Außerstreitverfahren*, Vienna: LexisNexis ARD Orac, 2004, p. 128.

needs have changed.¹⁵¹ Generally, the court may only interfere with parental rights and thus modify a legally effective decision or agreement on the above stated matters if there is a specific threat to the child's interests (Sec. 176 and 148(2) Austrian CC).¹⁵² The revocation or restriction of parental rights must be a necessary measure to secure the child's best interests; the court has to apply a high standard.¹⁵³ The argument that other methods of childrearing are "better" or "more progressive" will not suffice for that purpose nor the fact that the child's upbringing by a third party would be better than a proper upbringing by the child's parents,¹⁵⁴ since the continuity of the child's upbringing is considered to be extremely important.¹⁵⁵ On the other hand, an expected substantial amelioration of the child's developmental potential¹⁵⁶ or the genuine desire of a minor over 14 years of age to be assigned to the other parent may be considered as sufficient reason for a review of the attribution of parental responsibilities.¹⁵⁷

However, the legal situation is different in the event of (full or restricted) joint parental responsibilities if the parents have permanently separated (after divorce, annulment of the marriage, ending of a non-marital partnership or permanent separation of married parents) or have never lived in a common household.¹⁵⁸ In these cases, each parent may petition the court to end joint parental responsibilities without substantiation at any time. Then, the court must entrust one parent with sole parental responsibilities based on the best interests of the child unless a reconciliation between the parents may be brought about (Sec. 167, 177a(2) and 177b Austrian CC).

57. What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?

Throughout the proceedings on parental responsibilities, the child's residence or the exercise of contact, the court must take steps to ensure the parties reach an amicable agreement (Sec. 13(3) Non-Contentious Proceedings Act [*Außerstreitgesetz*], Sec. 177a(1)

¹⁵¹ U. AICHHORN, *Das Recht der Lebenspartnerschaften*, Vienna/New York: Springer Verlag, 2003, p. 73 et seq.

¹⁵² See also Q 40, 47 and 51.

¹⁵³ J. STABENTHEINER, 'KindRÄG 2001', in: P. RUMMEL, *ABGB-Kommentar*, suppl. vol. I, 3rd Edition, Vienna: Manz, 2003, § 176 Marg. No. 3, § 177 Marg. No. 16.

¹⁵⁴ *Landesgericht für Zivilrechtssachen Vienna*, 21.12.1995, *EFSlg.* 78.215; J. STABENTHEINER in: P. RUMMEL, *ABGB-Kommentar*, Vol. I, 3rd Edition, Vienna: Manz Verlag, 2000, §§ 137, 137a Marg. No 10.

¹⁵⁵ *Oberster Gerichtshof*, 05.12.1989, *EFSlg.* 59.774; *Oberster Gerichtshof*, 30.01.2001, *Österreichischer Amtsvormund*, 2002, p. 268 S 37; *Oberster Gerichtshof*, 31.07.2001, *EFSlg.* 96.672.

¹⁵⁶ *Oberster Gerichtshof*, 27.11.2001, *Österreichische Juristenzeitung - EvBl*, 2002, No. 82, p. 335, and 26.06.1991, *Österreichische Juristenzeitung - EvBl*, 1991, No. 168, p. 737.

¹⁵⁷ *Oberster Gerichtshof*, 08.05.1996, *Juristische Blätter*, 1996, p. 714; *Oberster Gerichtshof*, 27.11.2001, *Österreichische Juristenzeitung - EvBl.*, 2002, No. 82, p. 335.

¹⁵⁸ Such joint parental responsibilities are based either directly on a legal provision (§ 177 (1) sentence 1 Austrian CC) or on the parents' agreement (§§ 167, 177 (1) Satz 2 and 3, 177b Austrian CC); they cannot be attributed by judicial decree, see Q 18 and 24.

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and (2) Austrian CC for proceedings on the attribution of parental responsibilities, Sec. 108 AußStrG for contact proceedings). If an amicable agreement might be expected via the support of an out-of-court institution, in particular via counselling or mediation,¹⁵⁹ the proceedings should be suspended for a relevant length of time not exceeding six months, unless a delay in the decision would impair public or private interests protected by the proceedings (Sec. 29 *Außerstreitgesetz*). Therefore a stay is excluded, e.g. in a proceeding concerning the discharge of parental responsibilities because the child's interests are threatened or if one parent obviously intends to delay the proceedings.¹⁶⁰

Besides counselling and mediation, parents may be granted varied assistance with child rearing (*Erziehungshilfe*), e.g. therapeutic measures, placement with a child-minder, nursery, children's clinic, or with foster parents (Sec. 27 and 28 Youth Welfare Act [*Jugendwohlfahrtsgesetz*]). To support the exercise of contact in problem cases, any party to the proceedings (parent, grandparent, minor over 14 years of age) can petition the court for a *Besuchsbegleitung* (Sec. 111 *Außerstreitgesetz*): A suitable person (e.g. a relative, teacher, social worker, or employee of the youth welfare office) then attends the meeting between the parent entitled to contact and the child, usually on neutral ground such as a child-protection facility (so-called "visit cafe" [*Besuchscafé*]).

The mentioned mechanisms and measures are generally also available at the stage of enforcement of a decision or agreement concerning parental responsibilities, the child's residence or contact (Sec. 13(3) *Außerstreitgesetz*: "at any stage of the proceedings"). However, the court may only refrain from continuing enforcement if and as long as the child's interests are at risk (Sec. 110(3) *Außerstreitgesetz*).

58. To what extent, if at all, is an order or an agreement on parental responsibilities, the child's residence or contact enforceable and in practice enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?

To enforce arrangements on parental responsibilities, the child's residence or contact, the court will employ coercive measures, including reprimands, fines, coercive detention, compulsory appearance before the court or taking possession of important documents, e.g. a passport (Sec. 110(2) in conjunction with Sec. 79(2) Non-Contentious Proceedings Act [*Außerstreitgesetz*]). The court may refrain from continuing a coercive measure *ex officio* if and as long as the child's interests are threatened (Sec. 110(3) *Außerstreitgesetz*).

Direct coercive measures may only be employed to enforce an arrangement on parental responsibilities and the child's residence, but not a contact arrangement (Sec. 110(2)

¹⁵⁹ See Act on Mediation in Civil Matters [*Zivilrechtsmediationsgesetz*] 2004, Federal Law Gazette [*Bundesgesetzblatt, BGBl.*] I 2003/29, <http://www.ris.bka.gv.at>; M. ROTH/K. MARKOWETZ, 'Bundesgesetz über Mediation in Zivilrechtssachen - Ein Überblick über die neuen Bestimmungen', *Juristische Blätter*, 2004, p. 296-302.

¹⁶⁰ A. DEIXLER-HÜBNER, 'Die neuen familienrechtlichen Verfahrensbestimmungen', in: S. FERRARI/G. HOPF, *Reform des Kindschaftsrechts*, Vienna: Manz Verlag, 2001, p. 124.

Non-Contentious Proceedings Act [*Außerstreitgesetz*]). Hence, taking delivery of the child in order to enforce the right of contact is not permissible; this is regarded as a disproportionate measure that would be detrimental to the child's interests.¹⁶¹ Also, the court has to refrain from other coercive measures to enforce the right of contact if a minor over 14 years of age or the parent entitled to have contact refuses to exercise the contact and an instruction on their rights and duties and the importance of the contact for the child's welfare as well as an attempt at reconciliation remains unsuccessful (Sec. 108 *Außerstreitgesetz*).¹⁶²

When enforcing an order or an agreement on parental responsibilities or the child's residence, for the sake of preserving the child's interests a public welfare institution (youth welfare agency or juvenile court assistance office) may be called in to render support, in particular to care for the child on a temporary basis. Direct coercive measures to enforce the order, e.g. the delivery of the child in the event the parent not holding parental responsibilities refuses to surrender the child, may only be carried out by court officials (bailiffs) and public-safety officers (policemen) who have been called in (Sec. 110(4) *Außerstreitgesetz*, 146b Austrian CC). However, any physical impact on the child should be a last resort.

59. To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child's residence or contact, e.g., upon a dispute, when scrutinizing an agreement, when appointing or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?

Children are heard in person in proceedings concerning their care and education including the arrangement of the child's residence, as well as in proceedings on the right to personal contact unless the child lacks the necessary capacity to understand, as in the case of a small child. The only exception is if questioning the child or any delay associated with doing so would threaten the child's interests (Sec. 105 Non-Contentious Proceedings Act [*Außerstreitgesetz*]).

60. How will the child be heard (e.g. directly by the competent authority, a specially appointed expert or social worker)?

Generally, the child will be heard directly by the judge. However, the child may also be heard by the youth welfare agency, by representatives of the juvenile court assistance office or by other appropriate means, such as by experts (e.g. persons trained in education and psychology or social workers), if the child has not yet reached the age of 10 years, if his or her development or health condition so requires, or if it is not expected that the child will otherwise express his or her sincere and uninfluenced opinion (Sec. 105 (1) Non-Contentious Proceedings Act [*Außerstreitgesetz*]).

¹⁶¹ S. KRIWANNEK, *Das neue Außerstreitverfahren*, Vienna: LexisNexis ARD Orac, 2004, p. 130.

¹⁶² *Oberster Gerichtshof*, 29.06.1994, *EFSI*g. 75.001.

61. How, if at all, is the child legally represented in disputes concerning:

(a) Parental responsibilities

In proceedings concerning parental responsibilities, each parent holding parental responsibilities is independently entitled to represent the child. If the parents fail to reach an agreement or the court fails to appoint one parent or a third party as representative pursuant to Sec. 176 Austrian CC, the parent who takes the first procedural step will be the child's representative (Sec. 154a Austrian CC). The right of sole representation based on taking the first action lasts until the decision that concludes the proceedings takes legal effect¹⁶³. For minors represented in court by a legal representative, a special guardian (*Kollisionskurator*, Sec. 271 Austrian CC) must be appointed if a conflict of interests arises. However, this cannot be the youth welfare agency.¹⁶⁴

In addition to the authority of the minor's legal representative to conduct legal proceedings in the name of the minor, minors over 14 years of age may also take legal actions on their own in proceedings concerning their care and education, including the arrangement of their residence as well as in proceedings on the right of contact, but not in proceedings on matters concerning the administration of property (Sec. 104(1) Non-Contentious Proceedings Act [*Außerstreitgesetz*]). The court must instruct and advise the minor appropriately as required by his or her capacity to understand; also, the child must be informed of any opportunities for advice that exist (Sec. 104(1) *Außerstreitgesetz*). In the event of contradictions between the substantive motions of the minor and those of the child's legal representative, the court is required to make the decision that best serves the interests of the child (Sec. 104(2) *Außerstreitgesetz*). A minor over 14 years of age who is capable of representing him- or herself in court proceedings independently may also independently select a representative, e.g. an attorney, for such proceedings. In practice, however, the youth welfare agency is most often used as a representative since no legal professional duty exists for custody proceedings and complicated legal problems seldom arise (Sec. 212(3) - (5) Austrian CC).¹⁶⁵

(b) The child's residence

Since the arrangement of the child's residence constitutes part of the parental responsibilities, the comments made to Q 61a likewise apply to legal representation in disputes of this nature.

(c) Contact

The comments made to Q 61a likewise apply to legal representation in disputes regarding contact.

¹⁶³ I. Holzhammer/R. Holzhammer, *Ehe und Familie*, 2nd Edition, Freistadt: Plöchl Verlag, 2001, p. 73.

¹⁶⁴ *Oberster Gerichtshof*, 25.02.2004, *Österreichische Juristenzeitung - EvBl*, 2004, No. 115, p. 557.

¹⁶⁵ A. Deixler-Hübner, 'Die neuen familienrechtlichen Verfahrensbestimmungen', in: S. Ferrari/G. Hopf, *Reform des Kindschaftsrechts*, Vienna: Manz Verlag, 2001, p. 120.

62. What relevance is given in your national legal system to the age and maturity of the child in respect of Q 59-61?

Minors must be heard in person in proceedings concerning their care and education including the arrangement of their residence, as well as in proceedings on the right to contact unless a well-considered statement on the subject matter of the proceedings obviously cannot be expected given the minor's limited capacity to understand. If the minor has not attained 10 years of age, or if his or her development or health condition otherwise so requires, then in addition to being questioned by the court, the child can also be heard by the youth welfare agency, by representatives of the juvenile court assistance office or through other suitable means, such as by experts (Sec. 105 Non-Contentious Proceedings Act [*Außerstreitgesetz*]).

Minors who have attained 14 years of age are capable of representing themselves in proceedings regarding their care and education including the arrangement of their residence, as well as in proceedings on the right to contact (Sec. 104(1) *Außerstreitgesetz*). Nevertheless, in a given case, the court may declare that a child lacks the necessary maturity to do so (Sec. 154b Austrian CC).¹⁶⁶ In this instance, the parents are normally responsible for representing the minor (Sec. 154a Austrian CC).¹⁶⁷ Majority (Sec. 21 Austrian CC) and full legal capacity to conduct legal proceedings in one's own name (Sec. 2 Austrian Code of Civil Procedure [*Zivilprozessordnung*]) begins at age 18.

¹⁶⁶ See Q 9.

¹⁶⁷ C. FISCHER-CZERMAK, 'Zur Handlungsfähigkeit Minderjähriger nach dem Kindschaftsrechtsänderungsgesetz 2001', *Österreichische Juristenzeitung*, 2002, p. 297; J. WEITZENBÖCK, 'Die Handlungsfähigkeit Minderfähiger nach dem KindRÄG 2001', in: S. FERRARI/G. HOPF, *Reform des Kindschaftsrechts*, Vienna: Manz Verlag, 2001, p. 7.