

## NATIONAL REPORT: BELGIUM

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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.**

Parental responsibilities are a collection of rights necessary for the parents to properly fulfill their duties relating to person and property of their minor children.<sup>1</sup>

**2. Explain whether your national concept or concepts encompass:**

**(a) Care and protection**

Parental responsibilities include the duty of contact with the child (Art. 374(4) Belgian CC) and the authority over the child (Art. 373-375 Belgian CC), which encompasses the right to the care of the child.<sup>2</sup> (See Q 8a)

**(b) Maintenance of personal relationships**

Parental responsibilities include the right of contact with the child (Art. 374(4) Belgian CC) and the authority over the child (Art. 373-375 Belgian CC), which encompasses the right to administer the contacts and personal relationships of the child with third parties. (See Q 8a.)

**(c) Provision of education**

Parental responsibilities include the authority over the child (Art. 373-375 Belgian CC), which encompasses the right to decide on fundamental options such as the philosophical, religious and ideological upbringing of the child, its language, school, type of education. (See Q 8b.)

**(d) Legal representation**

The parents may represent their child in all civil actions, including their representation in court as either plaintiff or defendant. This competence is linked to the right to administrate the property of the child.<sup>3</sup> (See Question 8f.)

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<sup>1</sup> H. DE PAGE, *Traité élémentaire de droit civil belge*, T. II (Les Personnes), Vol. 2 (by J.-P. MASSON), Brussels: Bruylant, 1990, p. 947; J. GERLO, *Handboek voor Familierecht, 1. Personen- en familierecht*, Bruges: Die Keure, 2003, p. 298.

<sup>2</sup> H. DE PAGE, *Traité élémentaire de droit civil belge*, T. II (Les Personnes), Vol. 2 (by J.-P. MASSON), Brussels: Bruylant, 1990, p. 960.

<sup>3</sup> E. DE WILDE D'ESTMAEL, 'Que recouvre l'autorité parentale?', *Div. Act.*, 1995, p. 24-26.

**(e) Determination of residence**

A distinction must be made between 'domicile' and 'residence'. 'Domicile' is the place a person is principally established (Art. 102 Belgian CC),<sup>4</sup> while 'residence' refers to the place where a person has fixed his or her dwelling for a certain time.<sup>5</sup>

According to Art. 108 Belgian CC, the child's domicile is at the communal residence of its parents, when they live together or, if they are separated, at the residence of one of them. Following the principle of joint parental responsibilities, the parents decide together where the domicile of the child will be fixed, even in case of separation (See Q 15a). When no consent can be reached, the dispute is submitted to the Juvenile Court (See Q 37).<sup>6</sup> The determination of residence is encompassed in the exercise of the parental authority over the child (Art. 374 Belgian CC). (See Q 8a.)

**(f) Administration of property**

The concept of parental responsibilities also includes the administration of the property of the child and his legal representation (Art. 376-379 Belgian CC) and the right of use and enjoyment of its property (Art. 384-387 Belgian CC) (See Q 10 and Q 11).

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

Parental responsibilities automatically come to an end when a child reaches majority, which is at the age of 18 (Art. 388 Belgian CC). This is also the case when both parents or the only surviving parent die, when both parents (or the only surviving parent) are continuously unable to exercise their parental responsibilities or when the parent(s) are discharged of their parental responsibilities by a Juvenile Court (Art. 32-35 Belgian Law of 8 April 1965 concerning Juvenile Protection. See Q 51-54). The parental responsibilities of the parents also come to an end if the child is adopted.<sup>7</sup> The minor is judicially removed from guardianship by its marriage (Art. 476 Belgian CC).

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

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<sup>4</sup> According to Art. 36 Belgian Judicial Code, 'domicile' is the place where a person is principally registered in the registers of the population. However, this definition is limited to the application of the Belgian Judicial Code and, therefore, does not modify the Belgian CC.

<sup>5</sup> *R.P.D.B., v° Domicile* (N. GALLUS), compl. T. VIII, No. 36; *Rép. Not., 'Domicile'*, T. I, 2, VII, p. 55.

<sup>6</sup> However, the Juvenile Court is the natural judge for matters concerning children, the Justice of the Peace is competent for interim measures between spouses and the President of the Court of First Instance for interim measures when a divorce-claim has been introduced.

<sup>7</sup> M. VERRYCKEN, 'Opvallende organisatie van de voogdij', in: P. SENAËVE, J. GERLO and F. LIEVENS (eds.), *De hervorming van het voogdijrecht*, Antwerpen: Intersentia, 2002, p. 1-20.

The Belgian Civil Code contains the principles of parental responsibilities, which form the basic source of law. However, this basic source must be completed with other laws that regulate certain aspects of the parental responsibilities. The sources of law for parental responsibilities are:

- Belgian Civil Code
  - Art. 108 concerning the domicile of the child;
  - Art. 148 concerning the parental agreement with marriage;
  - Art. 203 concerning the right to maintenance;
  - Art. 221-223 concerning the disputes about parental responsibilities, questions of residence of the child or contact in the context of interim measures between spouses;
  - Art. 319 concerning the mother's agreement about the acknowledgement of her extra-marital child by a man;
  - Art. 348, 368(4) and 349(4), (5) and (6) Belgian CC concerning the adoption agreement;
  - Art. 371-388 Belgian CC concerning parental authority;
  - Art. 389 - 420 Belgian CC concerning guardianship;
  - Art. 475 *bis* - 475 *septies* Belgian CC concerning custodianship;
  - Art. 476 - 487 Belgian CC concerning judicial removal from guardianship (emancipation);
  - Art. 487 *ter* Belgian CC concerning the demand of prolonged minority;
  - Art.1397 Belgian CC concerning the right to assist with a (change of) marriage contract;
- Belgian Judicial Code:
  - Art. 734 *bis* - 734 *sexies* concerning family mediation;
  - Art. 931 concerning the child's general right to be heard;
  - Art. 1232 - 1237 concerning procedural issues about guardianship;
  - Art. 1258 concerning procedural issues about disputes arisen in the context of interim measures between spouses;
  - Art. 1280 concerning interim measures when a claim for divorce has been introduced in court;
  - Art. 1288-1304 concerning divorce by mutual consent;
  - Art. 1322 *bis* - 1322 *octies* concerning protection of cross-border rights of contact;
- Belgian Law of 8 April 1965 concerning Juvenile Protection (LJP)
  - Art. 32-35 and 60 concerning discharge of parental responsibilities;
  - Art. 51 and 56 *bis* concerning the hearing of the minor in the Juvenile Court;
- Others:
  - Art. 391 *bis* Belgian Penal Code concerning the criminal action that can be taken against the parent who disregards his maintenance-obligation;
  - Art. 432 Belgian Penal Code concerning the criminal action that can be taken against the parent who disregards someone's right of contact;

- Art. 63 Law on the Public Social Welfare Centre concerning the guardianship over particular categories of children;
- Art. 44 of the Law on the Labour Contract;
- Art. 2 of the Law of 15 May 1987 on Surnames and First Names concerning the demand of a change of name;
- Art. 3 of the Law of 28 May 2002 concerning Euthanasia;
- Art. 12 of the Law of 22 August 2002 concerning the rights of minor patients.

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

The regulations on parental responsibilities have been fundamentally reformed over the course of the last decades. Since 1804, both parents have possessed the parental power, but it was only exercised by the father until 1965. The Belgian Law of 8 April 1965 installed the joint exercise of the parental power by both parents during their marriage. In case of disagreement, the will of the father remained predominant but the mother had the ability to appeal to the Juvenile Court to contest the father's decision. The Belgian Law of 1 July 1974 treated both parents as equal holders of parental responsibilities, whereas beforehand the father was dominant. In case of disagreement, either parent had the right to appeal to the Juvenile Court. The Belgian Law of 31 March 1987 changed the terminology from parental power, being a set of rights that could also be in the interests of the holder, to parental authority, being a set of competences that are in the sole interests of the minor. It also made the regulations of parental responsibilities applicable to unmarried couples; the only criterion being a legally determined descent. The Law of 19 January 1990 lowered the age of majority from 21 to 18 years, withdrawing young adults from the scope of parental responsibilities. Notwithstanding the lowering of the age of majority, the maintenance obligation can continue till the young adult has fulfilled his education (Art. 203 Belgian CC). The Belgian Law of 13 April 1995 introduced "joint-parenthood", being the joint exercise of parental authority over the person and property of their children, whether or not the parents live together. The Belgian Laws of 27 March 2001 and 29 April 2001 made the regulations of parental responsibilities applicable to minors with only one parent, whereas before the property of the minor in these situations was submitted to the guardianship, while the person of the minor was submitted to the parental authority. Finally, the 'reparation' Belgian Law of 13 February 2003 solved a few problems that arose from the Belgian Law of 27 March 2001; among others, those concerning the territorial competence of the Justice of the Peace. In general, the exercise of parental responsibilities is placed more and more under judicial supervision.<sup>8</sup>

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

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<sup>8</sup> W. PINTENS, 'Die Entwicklung des belgischen Kindschaftsrechts', in D. SCHWAB and D. HENRICH (ed.), *Entwicklungen des europäischen Kindschaftsrechts*, Bielefeld: Verlag Ernst und Werner Gieseking, 1996, p. 19-34; W. PINTENS, 'Die Reform des belgischen Kindschaftsrechts aus vergleichender Sicht', *Fam.RZ*, 1997, p. 460-464.

Some proposals in support of homosexual couples have recently been made to introduce parental rights and responsibilities for the partner of a biological parent who cares for the latter's child without being a biological parent.<sup>9</sup> The Constitutional Court has appealed to the legislature to meet these wishes.<sup>10</sup> A proposal has also been made to introduce a new article in the Belgian CC that would ban physical and psychological violence towards children, including violence perpetrated by holders of parental responsibilities.<sup>11</sup>

The right to contact between parents and children and between grandparents and grandchildren is being guaranteed by another proposal.<sup>12</sup> Finally, a proposal has been made that would grant every minor who has reached the age of twelve and makes the request, the right to be heard in every dispute that concerns the minor.<sup>13</sup> There is even a proposal which would grant the child the right to intervene in all proceedings that concern it.<sup>14</sup> All the above mentioned proposals are still in the initial stages of the parliamentary procedure.

## B. THE CONTENTS OF PARENTAL RESPONSIBILITIES

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

Since the legislature uses neither a uniform terminology nor treats the matter as a whole, there is confusion in both the legal literature and the case law about the exact contents of the parental responsibilities. In general, parental responsibilities include the authority over the child (Art. 373-375 Belgian CC), the administration of the child's property (Art. 376-379 Belgian CC), the right to personal contact with the child (Art. 374(4) Belgian CC) and the right of use and enjoyment of the child's property (Art. 384-387 Belgian CC). *Sensu lato* the parental authority encompasses the parental competences concerning the status of the child, including the consent to marriage (Art. 148 Belgian CC) and the agreement to adoption (Art. 348, 368(4)

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<sup>9</sup> Proposition de loi complétant le Code civil par des dispositions relative à la parenté sociale, *Doc. Parl. Sénat*, B.Z. 2003, No. 3-167/1; Proposition de loi complétant le Code civil par des dispositions relative à la parenté sociale, *Doc. Parl. Chambre*, 2003-04, No. 0393/001; Proposition de loi introduisant la parenté sociale dans le Code civil, *Doc. Parl. Chambre*, 2003-04, No. 0815/001.

<sup>10</sup> Constitutional Court, 08.10.2003, *Rev. trim. dr. fam.*, 2004, p. 185-201, annotated J.-L. RENCHON; G. VERSCHULDEN, 'Arbitragehof zet de deur open voor zorgouderschap', *Juristenkrant*, 2003, Vol. 78, p. 13; also Juvenile Court of Antwerp, 03.10.2002, *R.W.*, 2002-03, p. 1188-1194, annotated T. ROBERT.

<sup>11</sup> Proposition de loi insérant un Article 371 *bis* dans le Code civil, *Doc. Parl. Sénat*, B.Z. 2003, No. 3-149/1.

<sup>12</sup> Proposition de loi garantissant le droit aux relations personnelles entre parents et enfants et entre grands-parents et petits-enfants, *Doc. Parl. Chambre*, 2003-04, No. 0976/001.

<sup>13</sup> Proposition de loi modifiant diverses dispositions relatives au droit des mineurs d'être entendus par le Juge, *Doc. Parl. Chambre*, 25.07.2002, No. 50-1991-01, pour la modification de l'article 931 du Code Judiciaire, document 51K0634.

<sup>14</sup> Proposition de loi ouvrant l'accès à la justice aux mineurs, *Doc. Parl. Chambre*, 19.07.2002, No. 50-1975/001, pour l'insertion d'un article 1237 *bis* dans le Code Judiciaire, document 51K0643.

and 349(4), (5) and (6) Belgian CC). The parental responsibilities are not subject to one general regulation, they are treated separately.<sup>15</sup>

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

### (a) Care

The care of the child is guaranteed by Art. 203 and Art. 372 to 375 Belgian CC, and it is based on descent. According to Art. 203 Belgian CC, both father and mother have the obligation to contribute to accommodation, support, surveillance, upbringing and education of their children according to their possibilities. When the descent from the father is not legally determined, Art. 336 Belgian CC provides the opportunity for the child to demand an allowance for its support, upbringing and education from the man who had intercourse with the child's mother during the legal period of conception (Art. 336 to 341 Belgian CC). The stepparent can also have obligations towards the children of his or her deceased spouse, but only within the boundaries of what the surviving spouse received out of the latter's estate and out of donations between spouses (Art. 203 (2) Belgian CC). According to Art. 391 *bis* Belgian Penal Code, criminal action can be taken against a parent who has disregarded his or her obligations for at least two months.<sup>16</sup> The specific contents of the right to care include, on one hand, the support and education of the child, encompassing the satisfaction of its material needs *e.g.* the right to nutrition, physical care, housing, heating, clothing, medical care. In addition to the right of the parents to decide on the former, they also have the right to the every day care of the child; to decide on its movements, to determine the extent of the child's contacts with third parties, its correspondance, reading material and use of audiovisual means and entertainment. On the other hand, the right to care also encompasses the satisfaction of the child's moral and intellectual needs, *e.g.* education, upbringing, assistance, protection and the right of the parents to make fundamental decisions concerning the upbringing of the child. These decisions include the choice of school, as well as the choice of profession, ideology, religion and language. (Art. 374 Belgian CC). Thus, the duty to provide necessary care includes a whole set of financial and personal actions by the parents. This obligation is the largest maintenance obligation of the Belgian legal system. The child need not prove indigence in order for maintenance to be allowed. It has the right to share the same standard of living as its parents. According to Art. 203(2) Belgian CC, this obligation ends only after one's child has finished its education; if required, after its majority.<sup>17</sup>

In the broader sense, the right to care also includes the liability of the parents for damage to third parties caused by a wrongful act of their minor child (Art. 1384(2)

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<sup>15</sup> H. DE PAGE, *Traité élémentaire de droit civil belge*, T. II (Les Personnes), Vol. 2 (by J.-P. MASSON), Brussels: Bruylant, 1990, p. 960.

<sup>16</sup> J. GERLO, *Onderhoudsgelden*, Antwerp: Kluwer, 1994, p. 160-176; J.-P. MASSON and N. MASSAGER, *Droit des personnes, Chronique de jurisprudence 1994-1998*, Brussels: Larcier, 2000, p. 200-201.

<sup>17</sup> H. DE PAGE, *Traité élémentaire de droit civil belge*, T. II (Les Personnes), Vol. 2 (par J.-P. MASSON), Brussels: Bruylant, 1990, p. 960; J. GERLO, *Onderhoudsgelden*, Antwerp: Kluwer, 1994, p. 105-176.

Belgian CC). This liability is tied to the parental authority of the parents and their duty to care, educate and supervise the child.<sup>18</sup>

**(b) Education**

The right to care as mentioned above (See Q 8a) also encompasses the right of the parents to decide on the education of the child (Art. 203 Belgian CC). This right is a part of the authority over the person of the child and includes the right to decide on fundamental options such as the philosophical, religious and ideological upbringing of the child, its language, school, type of education and profession, etc. When the parents exercise the parental responsibilities together, they need to agree on the education of their children, including the choice of a school, although the presumption of agreement of Art. 373(2) Belgian CC is applicable (See Q 36). When an agreement is not possible, the disagreement must be presented to the competent authority, who will rule according to the child's interests. Even when the parental authority is exercised by only one parent, the authority may not simply deviate from a previous agreement of the parents. The court will take into account the common intent of the parents at the time they still lived together and/or exercised the parental responsibilities together. According to Art. 203 (2) Belgian CC, it is only after the child has finished its schooling that this obligation ends and, when necessary, the obligation continues after its majority. In the latter case, certain conditions will have to be met by the child in order to receive continuing support, e.g. its schooling needs to take a normal course, and the child's own revenues will be taken into account. Moreover, the respect that the child owes his parents according to Art. 371 Belgian CC will also be considered in order to decide whether it deserves further support.<sup>19</sup>

**(c) Religious upbringing**

The right to care as mentioned above (See Q 8a) encompasses the right of the parents to decide upon the religious upbringing of the child (Art. 203 Belgian CC). When the parents cannot reach an agreement on the religious education of the child, there is a tendency in the case law to prefer the less radical and stringent profession of faith, although some authors claim that the fundamental right to freedom of religion is endangered when this should lead to an evaluation of the contents of different religions by the courts. In any case, the court will have to rule according to the interests of the child in order to avoid it being torn between its parents' convictions, to avoid confusion if a different religion is imposed by one parent after the parents separate, and in order to ensure that no religion is imposed on the child that will intervene with its development and its right to its own personal convictions when it has reached the age of discernment. Generally, it is assumed that although a parent is allowed to practice his or her faith very strictly, but cannot impose this faith upon his or her minor children. If this happens, the

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<sup>18</sup> Cass., 05.04.1995, *Arr. Cass.*, 1995, p. 377; Cass. 23.02.1989, *Arr. Cass.* 1988-89, p. 721; R. DALCQ, 'Examen de jurisprudence (1987-1993). La responsabilité délictuelle et quasi délictuelle', *R.C.J.B.* 1995, p. 612-617; J. FAGNART, 'La responsabilité civile des parents', *J. dr. jeun.*, 1997, p. 362-371.

<sup>19</sup> Cass., 24.11.1983, *Rev. Not. B.*, 1984, p. 32, *Pas.* 1994, I, p. 330; Court of Appeal of Brussels, 29.05.1984, *Rev. trim. dr. fam.*, 1986, p. 444; J.-P. MASSON and N. MASSAGER, *Droit des personnes, Chronique de jurisprudence 1994-1998*, Brussels: Larcier, 2000, p. 166-174.

court may limit the parent's right to contact with the child or even take away his parental responsibilities.<sup>20</sup>

#### **(d) Disciplinary measures and corporal punishment**

Since the suppression of the Art. 375-383 Belgian CC by the Belgian Law of 15 May 1912, there have been no explicit references to disciplinary measures and corporal punishment in Belgian legislation. Although these Articles were suppressed, it would be wrong to assume the right of punishment no longer exists. The Belgian Law of 1912 only suppressed the right of the father to be the sole judge of the punishment and its execution, namely imprisonment. Two components of the right to take disciplinary measures and to corporal punishment remain. First, the right to take domestic measures was not suppressed, including the right to use extremely moderate violence when it is absolutely necessary. However, when it is not used with the required moderation, physical violence towards a child may be a reason to award exclusive parental responsibilities to the other parent.<sup>21</sup> Also, a proposal has been made to introduce a new article in the Belgian CC that bans physical and psychological violence towards children, including violence exercised by holders of parental responsibilities.<sup>22</sup> Second, according to Art. 37 Belgian LJP,<sup>23</sup> the parents have the right to ask the Juvenile Court to take measures of custody, guard and education when the child is sued for having committed a punishable offence.<sup>24</sup>

#### **(e) Medical treatment**

The right to decide on fundamental options includes those options involving the medical care of the child and is included in a parent's right to authority over the child. The parents may exercise all the rights allowed to the patient according to Art. 12(1) Belgian Law of 22 August 2002 concerning the Rights of the Patients. However, from the moment that the child has the necessary maturity and has reached a reasonable age, it is involved in the decisions. According to Art. 12(2) Belgian Law of 22 August 2002, the child can even independently dispose of all its rights as a patient, once it is able to judge its interests. Some authors talk about a "medical majority" that is submitted to the judgment of the doctor. However,

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<sup>20</sup> Court of Appeal of Gent, 13.02.2003, *R.W.*, 2003-2004, p. 1732; Court of Appeal of Liege, 18.12.2000, *Rev. trim. dr. fam.*, 2002, p. 118-123; P. DE POOTER and F. JUDO, 'De grenzen van de godsdienstvrijheid en het ouderlijk gezag verkend', note to Court of Appeal of Gent, 13.02.2003, *R.W.*, 2003-2004, p. 1732-1736; K. RIMANQUE, *De levensbeschouwelijke opvoeding van de minderjarige - publiekrechtelijke en privaatrechtelijke beginselen*, Brussels: Bruylant, 1980, p. 285 *et seq.* It must be noted that Art. 14 of the International Treaty on the Rights of the Child of 20.11.1989 provides that the Member States should honour the rights and obligations of the parents or legal guardians to lead the child in exercising its right to freedom of thought, conscience and religion in a way that is reconcilable with the child's developing abilities.

<sup>21</sup> Court of Appeal of Mons, 28.06.2000, *Rev. trim. dr. fam.*, 2002, p. 94-97.

<sup>22</sup> Proposition de loi insérant un Article 371 bis dans le Code civil, *Doc. Parl. Sénat*, B.Z. 2003, No. 3-149/1.

<sup>23</sup> Flemish and French-speaking Community: Art. 2 Belgian Law 02.02.1994, *M.B.* 17.09.1994; Cass., 04.03.1997, *J. dr. jeun.*, 1997, p. 337. For the German Community, this possibility is limited to minors who have committed acts considered to be criminal offences.

<sup>24</sup> H. DE PAGE, *Traité élémentaire de droit civil belge*, T. II (Les Personnes), Vol. 2 (by J.-P. MASSON), Brussels: Bruylant, 1990, p. 996-998; *Rép. prat. dr. belge*, compl., v° *Puissance paternelle - Autorité parentale*, No. 44.



euthanasia is an exception. According to Art. 3(1) Belgian Law of 28 May 2002 concerning Euthanasia, only a major or an emancipated minor can request euthanasia. Minor patients are excluded from the field of application of the law. The parents may not make the decision either.<sup>25</sup>

**(f) Legal representation**

Minors are only incompetent to exercise their rights. Their incompetence does not mean that they do not hold rights. Therefore, to permit minors to participate in legal transactions, the system of legal representation, according to the rules of parental authorities or guardianship, is applicable. This system has been fundamentally reformed by the Belgian Laws of 27 March 2001, 29 April 2001 and 13 February 2003. The right to legal representation must be situated as a part of the right to the administration of the property of the child (See Q 2d), which itself is part of the rights of the parents concerning the goods of their children (Art. 376-379 Belgian CC).<sup>26</sup> The parents may represent their child in all civil actions, including both the material acts of law as well as the child's representative in court as either plaintiff or defendant. A distinction must be made between three types of acts. First, there are acts over which the legal representative normally has all power. Second, there are acts where the representative needs the specific authorisation of the Justice of the Peace before being able to represent the child. This authorisation will be given if the demand is in the interests of the child. The interests of the child are the only criteria (Art. 378 and 410 Belgian CC. See Q 12a). Third, there are acts which are prohibited. Prohibited acts have such a personal character that representation is excluded (*e.g.* to write a will) or, although not mentioned in the list of Art. 410, represent a risk of impoverishment of the child and are therefore incompatible with the mission of administration of someone's patrimony (*e.g.* to provide bail).<sup>27</sup>

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

See Q 59.

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

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<sup>25</sup> J. HERVEG, M.-N. VERHAEGEN and Y. POULLET, 'Les droits du patient face au traitement informatisé de ses données dans une finalité thérapeutique: les conditions d'une alliance entre informatique, vie privée et santé', *T. Gez.*, 2002-2003, p. 82; T. VANSWEEVELT, 'Persoonlijkheidsrechten van de minderjarige en grenzen van het ouderlijk gezag: de toestemming van de minderjarige in een medische behandeling', *R.W.* 1987-88, p. 897-912.

<sup>26</sup> The rights of the parents concerning the goods of their children are divided in two categories: the rights concerning the administration of the property of the children (Art. 376-379 Belgian CC) and the right of use and enjoyment of the property (Art. 384-387 Belgian CC). See Q 11.

<sup>27</sup> H. CASMAN and J.-P. MASSON, 'La nouvelle législation sur la tutelle', *Rev. trim. dr. fam.* 2002, p. 34, No. 25; S. THIELEN, 'Administration légale et tutelle: Actes soumis à autorisation', in: Y.-H. LELEU (ed.); *Les incapacités*, Liege: CUP, 2003, p. 99.

Yes. The administration of the child's property follows the regulations of the authority over the child. When both parents exercise this authority jointly, they will also administrate the property jointly, except in case of legal exception. When only one parent exercises parental responsibilities, only this parent will administrate the property, except in case of legal exception. Then the other parent has the right to supervise the administration, to be informed and to cease the Juvenile Court (Art. 376 Belgian CC).

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

The rights of the parents concerning the property of their children are divided in two categories: the rights concerning the administration of the property of the children and their legal representation (Art. 376-379 Belgian CC) and the right of use and enjoyment of the property (Art. 384-387 Belgian CC). The administration of the child's property is distinguished by three types of acts: acts in which the legal representative generally has the power to initiate and undertake alone, acts that require the authorisation of the competent authority and acts that are forbidden.

To perform the acts of the first category, the holder(s) of parental responsibilities has complete power, as long as the holder exercises it in the interests of the child. If both parents jointly hold parental responsibilities, when one parent performs certain acts of administration alone there is a presumption of agreement by the other parent towards third parties acting in good faith. This presumption exists notwithstanding the possibility of one parent addressing the Juvenile Court when there is disagreement with the actions of the other. When the third party knew or reasonably could have known of the disagreement of the other parent, the third party is not protected by the presumption of agreement (Art. 376 Belgian CC).<sup>28</sup> Although Art. 376 Belgian CC concerning the presumption of agreement only mentions the administration of the property and not the legal representation, it is admitted that each parent can act as plaintiff in a case against a third party acting in good faith.<sup>29</sup> When the claim is introduced by a third party, both parents must be involved. When only one parent has parental responsibilities over the child, the other parent has the right to supervise the way the other parent administrates the property of the child (Art. 374(4) and 376(4) Belgian CC).<sup>30</sup> The parent without parental responsibilities may request information from the other parent and third parties, and may address the Juvenile Court when it is in the interests of the child.<sup>31</sup>

The Belgian Law of 29 April 2001, as modified by the law of 13 February 2003, requires authorisation from the Justice of the Peace of the domicile of the child (or its residence) in order to perform a limited list of acts mentioned in Art. 410 Belgian CC (See Q 12a).<sup>32</sup> The only criterion required for the authorisation is that the demand is in the interests of the child. When both parents administrate the property of the child, both parents require the authorisation. There is no presumption of agreement towards third parties of good faith when one parent acts

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<sup>28</sup> A. DUELZ, *Le droit du divorce*, Brussels: Larcier, 2002, p. 170.

<sup>29</sup> J. GERLO, *Personen- en Familierecht*, Bruges: Die Keure, 2003, p. 308.

<sup>30</sup> P. SENAËVE, *Compendium van het personen- en familierecht*, Leuven: Acco, 2004, p. 130.

<sup>31</sup> Juvenile Court of Charleroi, 16.12.1998, *J. dr. jeun.*, 2000, Vol. 198, p. 32.

<sup>32</sup> H. CASMAN, 'De nieuwe voogdijwet', *Not. Fisc. M.*, 2001, p. 240-242.

alone. When only one parent requires the authorisation, the other parent is summoned and heard, and becomes a party to the case by this convocation. Although both parents are involved in the procedure, the Justice of the Peace has the ability to authorise one of the parents to act alone when the parents do not agree on the action to be taken, or when one of the parents fails to appear (Art. 378(1)(5) Belgian CC).<sup>33</sup> When only one parent administers the property of the child, only that parent requires an authorisation, however the other parent will be summoned and heard.<sup>34</sup>

Finally there are the prohibited acts; acts that have such a personal character that representation is excluded (e.g. to write a will) or, although not mentioned in the list of Art. 410, represent a risk of impoverishment of the child and, therefore, are incompatible with the mission of administration of someone's patrimony (e.g. to provide bail).

Additionally, the parent(s) who administer(s) the child's property have (has) the legal right of use and enjoyment, which is the right to enjoy the fruits of the property of their children until they reach the age of majority or are removed from guardianship (Art. 384 Belgian CC). In return, the parents are obliged to fulfill the obligations of the usufructuary, to raise and educate their children according to their income, to ensure that the capital of the minor remains intact and to pay the costs of the last illness or the funeral of the person from whom the child inherits (Art. 386 Belgian CC). This legal right of use and enjoyment does not include the use and enjoyment of the revenues of property that was given to the child or inherited by the child under the explicit condition that its parents would not have the right of use and enjoyment (Art. 387 Belgian CC), nor the revenues of estates that are attributed personally to the child because its parents are unworthy to acquire them (Art. 730 Belgian CC), nor the salary of the child. Finally, the legal right of use and enjoyment does not include use and enjoyment of the interest of money that is placed in a bank account by or on behalf of the child.<sup>35</sup>

## 12. Are there restrictions with respect to:

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

According to Art. 378 Belgian CC, a list of certain acts can only be performed with the prior authorisation of the Justice of the Peace. Art. 378 Belgian CC refers to Art. 410 Belgian CC, which is the article concerning the authorisation required by the guardian of the child when the system of guardianship has replaced the institution of parental authorities. Holders of parental responsibilities and guardians are submitted to (almost) the same rules concerning the administration of the child's property.

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<sup>33</sup> T. MOREAU and J. SOSSON, 'La loi du 13 février 2003 modifiant certaines dispositions du Code civil et du Code Judiciaire en ce qui concerne la protection des biens du mineurs', *Rev. trim. dr. fam.* 2003, p. 699.

<sup>34</sup> A. WYLLEMAN, 'Enkele specifieke problemen inzake de nieuwe regeling van de uitoefening van het ouderlijk gezag', in: *Gandius Actueel I*, E. Story-Scientia, 1995, p. 156.

<sup>35</sup> H. CASMAN and J.-P. MASSON, 'La nouvelle législation sur la tutelle', *Rev. trim. dr. fam.* 2002, p. 34, No. 25; F. SWENNEN and K. JANSSENS, 'Het nieuwe voogdijrecht', *R.W.* 2001-2002, 17, n° 86; S. Thielen, 'Administration légale et tutelle: Actes soumis à autorisation', in: Y.-H. LELEU (ed.), *Les incapacités*, Liege: CUP, 2003, p. 99.

An authorisation by the Justice of the Peace, which will only be given in the interests of the child, is required in order (Art. 378 Belgian CC, referring to Art. 410(1), (1) to (6), (8), (9) and (11) to (14)):<sup>36</sup>

- to alienate the goods of the minor (movable and immovable goods); all alienations are concerned (sale, change,<sup>37</sup> contribution in a company ...). There are two legal exceptions: first, the fruits and undeliverable objects; and second, the goods that are administrated by a financial institution. The parents (or the sole parent) who have the right to administrate the property of the child are entitled to the fruits of the goods of their minor children as a result of their legal right of use and enjoyment. They may alienate these goods without authorisation (Art. 384 Belgian CC), given a few exceptions (See Q 11). This regulation gives the parents the opportunity to recuperate some of the costs of the housing, education, maintenance and supervision of the child (Art. 203 Belgian CC), and it avoids complicated bills at the end of the parents' administration of the child's property, since the parents must only account for the administration of the property and of the revenues over which they do not have the legal right of use and enjoyment (Art. 379 Belgian CC) (See Q 13). Art. 410(2) Belgian CC states that souvenirs and other personal goods of the child cannot be alienated unless it is absolutely necessary, and that they are to be kept at the disposal of the child until its majority. Second, Art. 410 Belgian CC, referring to Art. 407(1) Belgian CC, states that when the minor's goods (e.g. a stock account) are administrated by a financial institution, no authorisation is required for the goods' alienation. Art. 407 Belgian CC provides the conditions under which money and valuables of the minor that are placed under the administration of a financial institution by decision of the Justice of the Peace can be withdrawn by the guardian. It is disputed whether the parents (instead of only the guardian) may also ask the Justice of the Peace for an authorisation to have the goods placed under the administration of a financial institution, now that Art. 378 Belgian CC only refers to Art. 410 Belgian CC, but not to Art. 407 Belgian CC. Certain authors claim that parents may also acquire this authorisation; otherwise a proper administration of the child's property would be unnecessarily difficult. Indeed, placing the child's money and

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<sup>36</sup> H. CASMAN and J.-P. MASSON, 'La nouvelle législation sur la tutelle', *Rev. trim. dr. fam.* 2002, p. 48; S. MAERTENS and G. BENOIT (eds.), *Actualia ouderlijk gezag, voogdij en voorlopig bewind*, Bruges: Die Keure, 2004, p. 51-52, 70-88 and p. 93-148; S. MOSSELMANS, 'Art. 378 and 410 Burgerlijk Wetboek', in: X, *Personen en familierecht. Artikelsgewijze commentaar*, Antwerp: Kluwer (looseleaf.), 2003; W. PINTENS, 'De voogdijwet herbekeken - Een eerste toelichting bij de reparatiewet van 13 februari 2003', *T. Vred.*, 2003, p. 129-139; F. SWENNEN and K. JANSSENS, 'Het nieuwe voogdijrecht', *R.W.*, 2001-02, p. 16; S. THIELEN, 'Administration légale et tutelle: actes soumis à autorisation', in: Y.-H. LELEU (ed.), *Les incapacités*, Liege: Edition Formation Permanente CUP, 2003, p. 115 and 118; A. WYLLEMAN, 'De verkoop van roerende en onroerende goederen van minderjarigen', in: P. SENAEVE, J. GERLO and F. LIEVENS (eds.), *De hervorming van het voogdijrecht*, Antwerp: Intersentia, 2002, p. 311-315.

<sup>37</sup> C. DE BUSSCHERE, 'Nieuw artikel 411 B.W. - Is ruil van goederen tussen minderjarige en zijn voogd of toezienende voogd wettelijk mogelijk of daarentegen wettelijk absoluut verboden?', *T. Not.* 2002, p. 190.

valuables with a financial institution not authorised on demand of the parents would require more authorisations than a guardian must have in order to alienate goods of the minor. Others advocate that no authorisation is necessary for the parents to place the valuables with a financial institution and/or alienate them once they are placed with a financial institution.

- to acquire real estate. Although not mentioned, certain authors consider that personal property also requires authorisation. The majority of the authors, however, conclude that collecting money from the child's account does not qualify as an alienation for which an authorisation is required according to Art. 410(1)(1) Belgian CC;
- to contract a loan and to mortgage or to pledge goods of the minor;
- to enter into a lease of land, a commercial lease or a rental agreement for more than nine years, or to renew a commercial lease;
- to renounce an inheritance or a universal legacy, or accept it, but only under the benefit of inventory; to accept a donation or a specific legacy;
- to conclude a covenant of joint ownership entered into for a period of maximum five years, according to Art. 815 Belgian CC;
- to effect a compromise or to enter into an arbitration agreement;
- to pursue a trading enterprise that is acquired by hereditary succession by operation of law or succession by will;
- to alienate souvenirs and other personal objects, even when they have limited value;
- to dispose of goods which are inalienable according to a decision taken in respect of Art. 379 or 776 Belgian CC; Art. 379 provides that every court decision concerning sums of money that are attributed to the minor must decide that these sums are placed on a personalized bank account of the child; the court has no alternative. Except for the legal right of use and enjoyment of the parents, the account can not be disposed of until the age of majority of the minor; according to Article 776, the same rules apply to assets inherited by the child, although the parents may ask permission from the Justice of the Peace to use the account's assets.
- When only one parent demands the authorisation, the other will be heard or at least convoked. In case of a conflict of interest between the parents or when one parent fails to appear, one parent can be authorised to perform the action alone (Art. 378 Belgian CC).<sup>38</sup>

#### **(b) Salary of the child**

The salary earned by the child is its own property. Art. 44 Belgian Law on the Labour Contract confirms that the employer correctly pays the salary directly to the child, except when there is opposition from the mother, the father (or the guardian). Moreover, Art. 387 Belgian CC excludes the professional income of the child, including the revenues from property acquired with its professional income,

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<sup>38</sup> T. MOREAU and J. SOSSON, 'La loi du 13 février 2003 modifiant certaines dispositions du Code civil et du Code judiciaire en ce qui concerne la protection des biens des mineurs', *Rev. trim. dr. fam.*, 2003, p. 698-699; S. MOSSELMANS, 'Art. 378 Burgerlijk Wetboek', in: X, *Personen en familierecht. Artikelsgewijze commentaar*, Antwerp: Kluwer (looseleaf), 2003, p. 42; W. PINTENS, 'De voorgedijwet herbekeken - Een eerste toelichting bij de reparatiewet van 13 februari 2003', *T. Vred.*, 2003, p. 128-129.

from the legal right of use and enjoyment of the parents. This exception on the general right of use and enjoyment is justified by the wish to avoid the limitation of the diligence or the sense of initiative of the child. Although the salary is the own property of the child and is excluded from the parent's legal right of use and enjoyment, its administration is submitted to the parental authorities. The child normally can not dispose of its salary.<sup>39</sup>

**(c) Certain transactions**

Apart from the transactions already mentioned in Q 12a, Art. 378 Belgian CC refers to Art. 935(3) Belgian CC. The latter Article states that the parents and even the grandparents may accept a gift to their minor child without an authorisation from the Justice of the Peace. Thus an exception is made to the required authorisations of Art. 378 in conjunction with Art. 410 Belgian CC. When the parents both give and accept for the child, a conflict of interest arises, in which case a guardian ad hoc needs to be appointed to act on behalf of the child (Art. 378 Belgian CC).<sup>40</sup>

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

There is no general obligation of the parents or sole surviving parent to inventory the property of their minor child. Nevertheless, the parents are held responsible for their administration of the child's property. When their parental responsibilities come to an end, they must justify themselves to the adult child for both the property and revenues of the goods for which they did not have the right of use and enjoyment, but only for the property of the goods for which they did have the right of use and enjoyment, because in the latter case they were entitled to the revenues (Art. 379(1) Belgian CC).

During the parental administration of the property, the law protects the child's property. As already mentioned in Q 12, Art. 379(2) Belgian CC provides that every court decision concerning sums of money attributed to the minor must decide that these sums are placed in a personalized bank account of the child. The court has no choice except to allow the legal right of use and enjoyment of the parents, and the account can not be disposed of until the age of majority of the minor. According to Art. 776 Belgian CC, these same rules apply to assets inherited by the child, although the parents may ask permission from the Justice of the Peace to use the account's assets. All authorisations required by Art. 378 in conjunction with 410 Belgian CC are installed in order to protect the children from indebtedness or irresponsible administration of the child's property (See Q 12).<sup>41</sup>

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<sup>39</sup> P. DENIS, 'La loi du 3 juillet 1978 relative aux contrats de travail', *Ann. Dr.*, 1978, p. 384; M. TACQUET and C. WANTIEZ, 'La loi sur les contrats de travail (3 juillet 1978)', *J.T.T.* 1978, No. XXXI, p. 295.

<sup>40</sup> Justice of the Peace of Houthalen-Helchteren, 28.11.2001, *A.J.T.*, 2001, p. 720, annotated F. DEBUCQUOY; J. VERSTRAETE, 'Schenken aan minderjarigen', *Waarvan Akte*, 2002, p. 51.

<sup>41</sup> Court of Appeal of Brussels, 11.03.1986, *Rev. Not. B.*, 1987, p. 49; M. GRÉGOIRE, 'La loi du 29 avril 2001 modifiant les dispositions légales en matière d'autorité parentale et de tutelle', *Rev. not. b.*, 2002, p. 139; W. PINTENS, 'De voogdijwet herbekeken - Een eerste toelichting bij de reparatiewet van 13 februari 2003', *T. Vred.*, 2003, p. 129-132.

Whenever a conflict of interest arises between the parents' interests and the administration of the property of the child, the Justice of the Peace will appoint a guardian ad hoc to act on behalf of the child at the request of an interested party, the Public Prosecutor or *ex officio* (Art. 378 Belgian CC).<sup>42</sup>

**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.**

The contents of parental responsibilities do not differ according to whether the parents are married, whether they live together, or whether there are two parents or only one. The parental responsibilities of adoptive parents and biological parents are the same (Art. 361(1) and 370(1) Belgian CC).<sup>43</sup>

Although homosexual partners of a parent have tried to acquire parental responsibilities over their partner's child through adoption, a sole adoptive parent can currently only acquire parental responsibilities together with the legal parent by adopting the child of a heterosexual spouse or legal cohabitant (in case of ordinary adoption, Art. 345 until 367 Belgian CC), or a heterosexual spouse or factual cohabitant (in case of full adoption, Art. 368 until 370 Belgian CC).<sup>44</sup> Moreover, the Belgian Law of 13 February 2003 opening the institute of marriage to same-sex partners explicitly mentions that same-sex marriage will have no effect on affiliation or adoption.<sup>45</sup>

If both (adoptive) parents are deceased or unable to exercise their parental responsibilities, a guardianship is created (Art. 375(2) Belgian CC), and a different set of regulations is applicable instead of the regulations on parental responsibilities.<sup>46</sup>

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<sup>42</sup> C. CAPITAINE, 'Aspects procedureaux et judiciaires du droit de la tutelle et de l'autorité parentale', in: Y.-H. LELEU (ed.), *Les incapacités*, Liege: Edition Formation Permanente CUP, 2003, p.164-165; S. MOSSELMANS, 'Werking van de voogdij inzake het vermogen', in: P. Senaev, J. GERLO and F. LIEVENS (eds.), *De hervorming van het voogdijrecht*, Antwerp: Intersentia, 2002, p. 147-148.

<sup>43</sup> Court of Appeal of Antwerp, 06.03.2002, *NjW.*, 2002, p. 97; M. GRÉGOIRE, 'La loi du 29 avril 2001 modifiant les dispositions légales en matière d'autorité parentale et de tutelle', *Rev. not. b.*, 2002, p. 137-140; J.L. RENCHON, 'L'exercice de l'administration légale par le parent survivant - contrôle de la gestion du parent survivant - Responsabilité du parent survivant', in X., *Tutelle et administration légale - Questions d'application de la loi du 29 avril 2001*, Louvain-la-Neuve: U.C.L., 2002, p. 4.

<sup>44</sup> Constitutional Court, 28.11.2001, ref. 154/2001, *J.T.*, 2002, p. 82-85, annotated Y.-H. LELEU, *R.W.*, 2001-02, p. 949-951, annotated P. SCHOLLEN; Constitutional Court, 03.05.2000, ref. 49/2000, *J.T.*, 2000, p. 536, annotated Y.-H. LELEU; Constitutional Court, 03.05.2000, ref. 53/2000, *J.L.M.B.*, 2000, p. 1066-1069, annotated D. PIRE; Constitutional Court, 06.11.1997, ref. 67/97, *Rev. trim. dr. fam.*, 1997, p. 410-414; F. SWENNEN, 'Adoptie door de 'feitelijke partner' van een oorspronkelijke ouder', *R.W.*, 2000-01, p. 681-686.

<sup>45</sup> Law 13.02.2003, *Belgian Bulletin of Acts and Decrees*. 28.02.2003.

<sup>46</sup> N. GALLUS, 'Aspects civiles du nouveau droit de la tutelle', in: Y.-H. LELEU (ed.), *Les incapacités*, Liege: Edition Formation Permanente CUP, 2003, p. 205-219; S. MOSSELMANS, 'Ouderlijk goederenbeheer anno 2003', in: S. MAERTENS and G. BENOIT (eds.), *Actualia ouderlijk gezag, voogdij en voorlopig bewind*, Bruges: Die Keure, 2004, p. 49.

Although only legal and adoptive parents have full parental responsibilities, it is nevertheless possible for persons other than the (adoptive) parents to acquire certain aspects of the parental responsibilities. The grandparents, and every person who can prove having a particular affectionate relationship with a child, have the right to contact with the child. When no agreement between the parties is possible, the Juvenile Court will decide based on the interests of the child, at the request of the parties or the Public Prosecutor (Art. 375 *bis* Belgian CC). However, grandparents have no right to the parental responsibilities involving the material care of their grandchild. Indeed, the judicial right to the material care of the child includes the right to live with the child, to decide on its nutrition, clothing and housing, to administer its contacts with friends, its reading material, its entertainment, mail, etc. (See Q 8a), i.e. the daily care over the child. Material care is a parental prerogative. The grandparents have a more limited right to factually keep the child with them during the exercise of their right to personal contact, but they do not exercise any parental authority.<sup>47</sup>

Persons other than the parents may also acquire the material care (factual care) of the child when there is a disfunction in the exercise of the parental responsibilities by the parents, such as when a protective measure is issued by the Juvenile Court (Art. 37(2)(3) Belgian LJP), but this will not include the right to care as a part of the authority over the child (judicial care). The right to educate remains with the parents.<sup>48</sup>

Nevertheless, the Constitutional Court ruled that foster parents who hold the material care over the child are entitled to participate in debates concerning the child before the Juvenile Court. Also, foster parents acquire certain aspects of the parental responsibilities *e.g.* they will have the duty to raise, educate and maintain the child, (Art. 203 Belgian CC), and they also administer its property (Art. 475 *bis* until 475 *septies* Belgian CC), but the right to agree to the child's marriage or adoption (Art. 475 *quater in fine* Belgian CC) still belongs to the parents. Additionally, the Art. 34-35 Belgian LJP appoint a pro-guardian with specific responsibilities towards the child when the parent(s) have been dismissed from parental authority because of bad treatment, abuse of authority, apparent bad behaviour or grave negligence that endangers the health, safety or morality of the child.<sup>49</sup>

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<sup>47</sup> Cass., 18.02.1993, *R.W.*, 1993-94, p. 157, *J.L.M.B.*, 1993, p. 1453, annotated C. PANIER ; A. DE WOLF, 'Artikel 375 bis Burgerlijk Wetboek', in X., *Personen en familierecht. Artikelsgewijze commentaar*, Antwerp: Kluwer (looseleaf), 1997, p. 12-13 ; K. JACOBS, 'Het omgangsrecht in België en Nederland', *T.P.R.*, 1996, p. 827-902 ; J.L. RENCHON, 'La recevabilité des actions en justice introduites par les grands-parents dans le contexte du règlement de l'exercice de l'autorité parentale à l'égard de l'enfant', *Rev. trim. dr. fam.*, 1989, p. 251 *et seq.*

<sup>48</sup> Cass., 19.12.1975, *R.C.J.B.*, 1977, p. 193, annotated F. RIGAUX; S. BECQ, 'Het juridisch statuut van de pleegouders', *R.W.*, 1980-81, p. 2045-2046 and 2051; F. TULKENS and Th. MOREAU, *Droit de la jeunesse*, Brussels: Larcier, 2000, p. 652-657.

<sup>49</sup> Constitutional Court, 03.12.1998, ref. 1998/122, *J. dr. jeun.*, 1999, p. 57, annotated T. MOREAU, *J.L.M.B.*, 1999, p. 312; K. DEWEERDT and J. PUT, 'Veertig jaar jeugdbeschermingsrecht. Overzicht van rechtspraak (1965-2004)', *NjW*, 2004, p. 835; J. SMETS, *Jeugdbeschermingsrecht*, Antwerp: Kluwer, 1996, p. 240-245 and 267-294; F.



In general however, grandparents, stepparents, foster parents or other persons who have no tie of affiliation with the child can not acquire parental responsibilities, although there are recent proposals for reform (See Q 6). Up until now, the only possibility for persons other than the parents to acquire full parental responsibilities is adoption.<sup>50</sup>

Finally, certain other persons may hold *obligations* towards the child. When the descent from the father is not legally determined, Article 336 Belgian Civil Code provides the child the opportunity to demand an allowance for its support, upbringing and education from the man who had intercourse with the child's mother during its legal period of conception (Art. 336 until 341 Belgian CC). Also, the step-parent can be held liable to a maintenance obligation towards the children of his or her deceased spouse, but only within the boundaries of what the step-parent received from the deceased's estate and from donations between spouses (Art. 203 (2) Belgian C).<sup>51</sup>

## 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

Since the Belgian Law of 31 March 1987, the general rule is that both parents exercise their parental responsibilities together, whether they are married (Art. 373 Belgian CC) or whether they live together, as long as the descent from the father has been legally determined.<sup>52</sup> The principle of equality of all children is confirmed by Art. 334 Belgian CC, regardless the parents' relationship of the way the descent was determined. In its judgment of 22 July 2004, the Constitutional Court confirmed this principle of equality between children born of a marriage and children born outside of marriage.<sup>53</sup>

##### (b) Not married at that time but marry later

See Q 15a.

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SWENNEN, 'Adoptie door de 'feitelijke partner' van een oorspronkelijke ouder', *R.W.*, 2000-01, p. 686.

<sup>50</sup> Constitutional Court, 08.10.2003, ref. 134/2003, *E.J.*, 2003, p. 134-139, annotated P. SENAËVE; Juvenile Court of Antwerp, 03.10.2002, *R.W.*, 2002-03, p. 1188, annotated T. ROBERT; F. SWENNEN, 'Het ouderlijk gezag en de voogdij. Recente en komende wetgeving', in: CBR (ed.), *Jongeren en Recht*, Antwerp: Intersentia, 2003, p. 55-58.

<sup>51</sup> A. HEYVAERT and R. VANCRAENENBROECK, 'Artikel 336-341 Burgerlijk Wetboek', in: X., *Personen en familierecht. Artikelsgewijze commentaar*, Antwerp: Kluwer (looseleaf), 1998, p. 32; M. PUELINCKX-COENE, 'De grote promotie van de langstlevende echtgenote. Beschouwingen bij de integratie van de wet van 14 mei 1981 in het bestaande recht', *T.P.R.*, 1981, p. 699-715; L. RAUCENT, *Les droits successoraux du conjoint survivant*, Brussels: Ed. juridiques Swinnen, 1981, p. 165-172.

<sup>52</sup> M. GRÉGOIRE, 'La loi du 29 avril 2001 modifiant les dispositions légales en matière d'autorité parentale et de tutelle', *Rev. not. b.*, 2002, p. 135.

<sup>53</sup> Constitutional Court 22.07.2004, ref. 140/2004, [www.arbitrage.be](http://www.arbitrage.be).

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

**(a) Divorce**

The parental responsibilities are in principle jointly attributed to both parents, whether they are married, live together, are divorced or are factually separated. According to Art. 373 Belgian CC, both parents hold parental responsibilities when they live together (See Q 15). Art. 374 Belgian CC confirms both parents also hold parental responsibilities when they live apart (See Q 18). The law does not make a distinction based on the parents' relationship. The legislation installs a basic model of joint parental responsibilities, and there are no specific regulations concerning the parental responsibilities of those who have divorced or for the parents of children born out of wedlock. The Constitutional Court confirmed this principle in a recent judgment, stating that since the Belgian Law of 31 March 1987, the parental authorities and responsibilities are no longer regulated on the basis of marriage, but solely on the basis of a legally determined affiliation to, or adoption of, the child.<sup>54</sup>

Although the *attribution* of parental responsibilities is principally not affected by the ending of the parent's relationship through either divorce, separation or annulment of the marriage, or the ending of the unmarried parents' relationship, the *exercise* of those responsibilities may be affected by the ending of the (un)married parents' relationship (Art. 374 Belgian CC). (See Q 37 and Q 38).

**(b) Legal separation**

See Q 16a.

**(c) Annulment of the marriage**

See Q 16a.

**(d) Factual separation**

See Q 16a.

**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.**

Parental responsibility is an institution created in the interests of the child. It is part of the status of the person; consequently, the applicable rules are those of public policy. Every agreement specifically concerning the attribution (not the exercise; parents can agree on the modalities of the exercise of parental responsibilities) of

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<sup>54</sup> Constitutional Court 12.05.2004, ref. 81/2004, [www.arbitrage.be](http://www.arbitrage.be); J. GERLO, 'De basisregeling van de wet van 13 april 1995 betreffende de gezamenlijke uitoefening van het ouderlijk gezag', in: *Gandaius Actueel I*, Antwerp: Kluwer, 135, No. 220-240; T. MOREAU, 'La loi du 13 avril 1995 relative à l'exercice conjoint de l'autorité parentale', *Div. Act.*, 1995, p. 97; W. PINTENS, 'Die Reform des belgischen Kindschaftsrechts aus vergleichender Sicht', *Fam.RZ*, 1997, p. 460-464.

parental authority is void (Art. 6 Belgian CC). This principle is unanimously accepted.<sup>55</sup>

**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?**

The joint exercise of parental responsibilities is the guiding principle, even when the parents are separated (Art. 374 Belgian CC) and even when it is against their wish.<sup>56</sup> Thus, parents exercise their parental responsibilities jointly by law and without judicial interference. However, the parents can agree on a different exercise (not attribution, see Q 17) of parental responsibilities. Also, when problems arise, such as when the parents can not reach an agreement about an important decision concerning the child (Art. 374(2) Belgian CC), or when the decision made seems to be incompatible with the interests of the child, the competent authority can vest exclusive parental responsibilities in one parent for this decision, while vesting parental responsibilities for certain important decisions concerning the education of the child in both parents.<sup>57</sup> Nevertheless, in case of minor disagreements the court can also decide that the joint exercise of parental responsibilities remains in the child's interests, and impose it, even against the wish of the parents<sup>58</sup> (See Q 42a).

Violent behaviour from one parent towards the other is only relevant when it affects the child's interests. If it appears that the behaviour of one parent towards the other has negative consequences on the child, this behaviour will be taken into account. If the violence is not proven, it will be of no relevance.<sup>59</sup> Art. 32(1)(2) Belgian LJP provides that the parent(s) can be dismissed from parental authority in case of bad treatment, abuse of authority, apparent bad behaviour or grave negligence that endanger the health, safety or morality of the child (See Q 51-54).

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

There is no recent, relevant statistical information available.

**II. Unmarried Parents**

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<sup>55</sup> Cass., 22.03.1923, *Pas.*, 1923, I, p. 423; Court of Appeal of Gent, 14.03.1894, *Pas.*, 1894, II, p. 363; Court of Appeal of Liege, 18.05.1881, *Pas.* 1881, II, p. 235; H. DE PAGE, *Traité élémentaire de droit civil belge*, T. II (Les Personnes), Vol. 2 (by J.-P. MASSON), Brussels: Bruylant, 1990, p. 951.

<sup>56</sup> Court of Appeal of Brussels, 13.06.1997, *Rev. trim. dr. fam.*, 1998, p. 617, annotated J.-L. RENCHON.

<sup>57</sup> Court of First Instance of Brussels, 12.09.1997, *Div. Act.*, 1998, p. 4, annotated LIGOT.

<sup>58</sup> W. PINTENS, 'Die Reform des belgischen Kindschaftsrechts aus vergleichender Sicht', *Fam.RZ*, 1997, p. 463.

<sup>59</sup> Court of Appeal of Brussels, 12.06.1997, *J.L.M.B.*, 1998, p. 365.

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

See Q 15a.

**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...).**

No, the nature of the relationship between parents is not relevant. Only the descent of the child is important. See Q 15a.

**22. Under what condition, if at all, can**

**(a) The unmarried mother obtain parental responsibilities**

Being the legal mother is enough to obtain parental responsibilities. See Question 15(a).

**(b) The unmarried father obtain parental responsibilities**

Being the legal father is enough to obtain parental responsibilities. See Question 15(a).

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

See Q 16a.

**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 towards the other parent?**

See Q 18.

**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?**

See Q 17.

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

No statistical information is available.

**III. Other Persons**

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

**(a) Married to that parent**

Only the parents can hold parental responsibilities, unless the child has been adopted or the parents have been discharged of their responsibilities by the Juvenile Court. Except in case of custodianship (See Q 31), the partner of a parent can never hold these responsibilities, regardless of the relationship he or she has with the parent (marriage, formalised relationship or non formalised relationship). Persons not the parent of a child can only obtain custody of the child by agreement of the parents or after intervention of the Juvenile Court, which acts on the request of the parent(s) or the Public Prosecutor.<sup>60</sup> See Q 6 regarding the introduction of parental rights and responsibilities for a partner who cares for a biological parent 's child without being the biological parent.

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

See Q 27a.

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

See Q 27a.

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

Not relevant. See Q 27

**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 Question 27 and Question 28.**

The partner of a parent can never get parental responsibilities. The kind of relationship between the parent and the parent's partner (marriage, formalised relationship, non formalised relationship) is of no relevance. The most the partner of a parent can hope for, once the relationship with the parent has ended, is contact with the child, if he or she can prove the existence of a significant affectionate relationship with the child and if it appears that this contact is in the interests of the child (Art. 375 *bis* Belgian CC). However, the law recognises 'custodianship'; the voluntary transfer of (most of the) parental responsibilities, during the life of the parent(s), on a contractual basis. (Art. 475*bis* - 475 *septies* Belgian CC). (See Q 30-31).

**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 Question 27 and Question 28.**

In principle, no agreement is possible upon the attribution of parental responsibilities (See Q 17). A parent can not transfer all parental responsibilities to

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<sup>60</sup> Cass. 26.04.1979, R.W. 1979-80, F. RIGAUX, 'La délégation de l'autorité parentale, création jurisprudentielle?', R.C.J.B. 1977, 206.

his or her partner, except through custodianship (Art. 475 *bis* - 475 *septies* Belgian CC). This institution supposes the existence of an agreement between the partner (candidate-custodian) and the child, if it has reached the age of 15 years or, if not, its parent(s) or guardian (See Q 29 and 31)

**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.**

The law recognises voluntary transfer of (most of the) parental responsibilities, during the life of the parent(s), on a contractual base: "custodianship" (Art. 475 *bis* - 475 *septies* Belgian CC). The transferee obtains parental responsibilities in substitution of the existing holder(s) of parental responsibilities. The transfer of parental responsibilities is submitted to two conditions, namely an agreement between the candidate-custodian and the child, if it has reached the age of 15 years or, if not, its parent(s) or guardian and the candidate-custodian must be at least 25 years old. All the parental responsibilities are transferred except the right of use and enjoyment of the property, the parental competences concerning the status of the person and the right to decide about the fundamental options concerning the child.

**32. 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 Public Social Welfare Centre has guardianship over two categories of children:

- children over whom nobody exercises parental responsibilities or guardianship, and over whom nobody exercises custody (Art. 396 Belgian CC and Art. 63 Belgian Law on the Public Social Welfare Centre); and
- children who are already under custody of the Public Social Welfare Centre and whose parents are partly or totally discharged of parental responsibilities.

This institution, governed by public law, acts in substitution of existing holder(s) of parental responsibilities and has a residuary competence. The guardianship over unaccompanied foreign minors is determined by the Belgian Program Law of 24 December 2002. According to this law, the guardianship over these unaccompanied foreign minors is organised by the Guardianship Service, an institution governed by public law (Art. 3(1)(1)). The Service designates, retributes and controls the guardian. The guardian exercises following tasks: physical care over the child (Art. 10(1)), contact with the minor for the purpose of creating a relationship based on mutual trust, general representation (Art. 9(1)(11)), administration of the child's

property in respect of Art. 410 Belgian CC and to present a report and the financial statement of the guardianship.<sup>61</sup>

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

**(a) The death of a parent holding parental responsibilities**

On the death of a parent, the child stays under parental responsibilities of the remaining parent.<sup>62</sup>

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

When both parents are dead, legally unknown or are unable to exercise their parental responsibilities due to permanent incapacitation, parental responsibilities are not transferred to a third person.<sup>63</sup> The system of parental responsibility is replaced by the system of guardianship (Art. 389 Belgian CC). The guardian exercises authority over the person of the minor, administrates its property and represents it (Art. 405 Belgian CC), but has no legal right of use and enjoyment. The guardian's competences are exercised under the supervision of the Justice of the Peace.<sup>64</sup>

**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?**

Both parents can appoint a guardian by a declaration before the Justice of the Peace or before a notary, as long as they act jointly. Their declaration, which takes effect on the death of both parents, may be modified at any time by making a new one (Art. 392(2)). Each parent has the right to revoke the declaration before the authority who received it,<sup>65</sup> without the intervention of the other parent (Art. 392(4)). After the death of one of the parents, the declaration remains valid so long as the surviving parent has not revoked it or so long as another guardian has not been designated by will or declaration as foreseen in Art. 392(1) Belgian CC (Art. 392 \3)). According to Art. 392(1) Belgian CC, the parent who last exercised parental authority may appoint a guardian by will, by declaration before the Justice of the Peace or by declaration before a notary. If the person designated by the parent(s) accepts the guardianship,<sup>66</sup> the Justice of the Peace will approve the

<sup>61</sup> C. CASTELEIN, 'De wet voogdij over niet-begeleide minderjarige vreemdelingen', in P. SENAËVE and F. SWENNEN, *De hervormingen in het personen- en familierecht 2002-2003*, Antwerp: Intersentia, 2003, p. 41.

<sup>62</sup> This applies, when one of the parents is dead, absent, incapable to exercise his parental responsibilities or (juridically) unknown.

<sup>63</sup> Except in case of adoption. In that situation, the parental responsibilities are attributed to the adoptive parent(s), as a consequence of the adoption, but not as a consequence of the death of the parent(s).

<sup>64</sup> W. PINTENS, 'De voogdijwet herbekeken. Een eerste toelichting bij de Reparatielwet van 13 februari 2003', *T. Vred.* 2003, 127.

<sup>65</sup> When the declaration is initially made before a notary, another notary can be chosen for the revocation. The notary so chosen will inform the notary who received the declaration. The Law does not provide the same possibility when a declaration is made before the Justice of the Peace.

<sup>66</sup> According to Art. 396(1) Belgian CC, he has no obligation to do so.

designation, unless serious reasons concerning the child's interests prevent the Justice of the Peace from respecting the choice of the parent(s).

If there is no parental choice, the Justice of the Peace will appoint a guardian, preferably, a member of the immediate family (Art. 393 Belgian CC). According to Art. 394 Belgian CC, the Justice of the Peace will hear a minor who is at least twelve years old, its grandparents, its brothers and sisters who have reached majority, its uncles and aunts and all other persons who could give useful advice, before the approval or the appointment of the guardian.

## **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?**

The parental authorities are a purposive competence that must be exercised in the interests of the child. The notion of 'interests of the child' dominates family law and stems from public policy; it justifies the intervention of the authorities. Some authors consider the interests of the child as a general principle of law, that the judge should take into account even when the Law does not explicitly mention it, but there is no unanimity on this point of view. Although the interests of the child guide the exercise of parental responsibilities, they are not really determined; it is a subjective standard. A general definition of the interests of the child refers to an effective advantage for the child (positive component), combined with a negative component, namely the absence of any disadvantage for the child. Interests of the child are a changing notion because of the changing personal situation of the child and as an evolutive notion, according to the sociological context. Indeed, the precise implications of the principle will vary over time according to an individual child's situation. The definition may be filled in positively (in the sense that it represents a real advantage for the child) or negatively (in the sense that it causes no disadvantage to the minor), but defining the interests of the child in general rules is not only impossible, it is dangerous for the child.

The notion of 'interests of the child' has changed substantially during the last years. Where, it had been considered that the child was absolutely incapable of exercising its own rights, there is now a tendency to give the child a certain right of participation. "Protection, provision and participation" dominate the approach of the child in the legal system without, however, giving the child the sovereignty to determine its destiny. The competent authority will take certain criteria into account, such as the existing situation, the stability of the child, the maintenance of a sustained relationship between the child and its parents, the desires of the child, the age of the child, the educational capacity of the parents, the availability of the parents and the material conditions of the parents. The judgment of the competent authority will vary according to the context, the time and the place. In certain cases,



it may depend on the vision of the judge. In case of conflict between the interests of the child and the interests of its parents, the interests of the child will prevail.<sup>67</sup>

## II. Joint Parental Responsibilities

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

Yes. Both parents equally hold the parental responsibilities. This equality is realised by the system of joint exercise of parental responsibilities, according to Art. 373(1) Belgian CC. However, it is unthinkable that both parents must always act together. Therefore, Art. 373(2) Belgian CC provides a legal presumption that each parent acts with the agreement of the other, even if the other parent is not present. This presumption pertains to all acts concerning the authority over the child, including routine as well as important decisions, excepting those legally excluded (Art. 373(2) Belgian CC).<sup>68</sup> The presumption is rebuttable, but only in relation to *bona fide* third parties. Third parties are presumed to be *bona fide* as long as they have no knowledge and, according to the standard of due care, could not reasonably be expected to have any knowledge of the disagreement of the other parent.<sup>69</sup>

### 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?

When the parents live together, joint exercise of parental responsibilities is the principle. Consequently, when they do not agree on an issue, they do not have the right to act alone. They must try to reach a consensus. If they do not succeed, one of them can bring the conflict before the Juvenile Court (See Q 38). Although a parent normally has no right to act alone, in practice most of the issues brought before the Juvenile Court concern demands of a parent to undo decisions that have been taken without consent (*a posteriori*).<sup>70</sup> Art. 373 Belgian CC does not make a distinction between different types of parental decisions.

The joint exercise of parental responsibilities is also the principle for separated parents (Art. 374 Belgian CC). Separated parents are submitted to exactly the same standard as parents who live together. Consequently, when they do not agree on an issue, they do not have the right to act alone. They must bring the conflict before the Juvenile Court. However, the joint exercise of parental authorities is not easy

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<sup>67</sup> E. DE KEZEL, 'Het begrip 'het belang van het kind'', *R.W.*, 1998-99, p. 1165; M. STEENNOT, 'Het belang van het kind', *R.W.*, 1974-75, p. 1733; A.-C. VAN GYSEL, 'L'intérêt de l'enfant, principe général de droit', *T.B.B.R.*, 1988, p. 186-206.

<sup>68</sup> In fact, only one exception exists, namely the authorisation of both parents in case of removal of an organ. In this situation, the agreement of the other parent is never presumed (Art. 7 Belgian Law of 13 June 1986 concerning the Organ Transplantation).

<sup>69</sup> W. PINTENS, 'Die Reform des belgischen Kindschaftsrechts aus vergleichender Sicht', *Fam.RZ*, 1997, p. 457-464.

<sup>70</sup> Court of Appeal of Liège, 17.10.2000, *J.T.*, 2001, p. 473.

for parents who live separately. It only has a chance to succeed if the parents can reach a consensus on the most important questions concerning the education, namely the organisation of the housing and problems concerning the health, the education, the school, the recreation and the religious or ideological choices of the child. (See Q 23).

**38. 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.**

As mentioned in Q 37, the competent authority for this matter is the Juvenile Court. Its competence is not limited to certain issues. Every dispute may be brought before the Juvenile Court, whether the parents live together and whether the dispute concerns important decisions or decisions of daily nature. According to Art. 373(3) Belgian CC, only the Juvenile Court is competent for disputes concerning the authority over the child when the parents live together. Although Art. 376 Belgian CC does not explicitly mention it, it is generally admitted that the Juvenile Court is also competent for acts concerning the administration of the property.<sup>71</sup>

When parents live together a discussion may be brought before the Court when they can not reach a consensus on a certain point. Normally, the dispute must be brought to the Juvenile Court before the decision is made, because decisions made without the consensus of the parents are in conflict with the law. However, in practice most disputes concern decisions already made by one of the parents without the consent of the other. The Juvenile Court has different solving-mechanisms: it can solve the problem itself in the interests of the child and leave all remaining joint exercise of parental authority to both parents, it can give authorisation to one of the parents to act alone for one or more specific decisions, it can determine which decisions concerning the education of the child can only be made with the consent of the other parent or it can charge one of the parents with the exclusive exercise of all parental authority.<sup>72</sup>

When the parents live separately, the same rules are principally applicable and the Juvenile Court remains the competent authority (Art. 374(3) Belgian CC). However, when the question of parental responsibilities arises in a context of interim measures between spouses, the Justice of the Peace is the competent court (Art. 221-223 Belgian CC). It will take all the interim measures into account, including the problem of the children and the parental responsibilities. When an action for divorce has been introduced in court (Art. 1280 Belgian Judicial Code) or when a plaintiff can prove that the dispute is urgent (Art. 584(1) Belgian Judicial Code), the President of the Court of First Instance (judge sitting in chambers to deal provisionally with matters of special urgency) is competent. When one of the

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<sup>71</sup> G. VERSCHULDEN, 'Ouderlijk gezag en omgangsrecht', *T.P.R.* 2001, 1978.

<sup>72</sup> D. DELI, 'De uitdrukkelijke wettelijke erkenning van de gezamenlijke uitoefening van het ouderlijk gezag en van het recht op persoonlijk contact', *R.W.* 1996-1997, p. 2-3; T. MOREAU, 'La loi du 13 avril 1995 relative à l'exercice conjoint de l'autorité parentale', *Div. Act.*, 1995, p. 97; J.-L. RENCHON, 'La nouvelle réforme législative de l'autorité parentale', *Rev. trim. dr. fam.*, 1995, p. 361.

parents wants to end the system of joint exercise of parental authorities or when he or she can not reach a consensus with the other parent on a decision that must be taken, he or she can bring the dispute before the competent court. When it seems that parents disagree on one or more important aspects of the education of the child (and only then), the competent court can attribute exclusive parental responsibilities to one parent, but this is not obligatory. According to Art. 374(2) Belgian CC, important decisions consist of the organisation of the housing and problems concerning the health, the education, the school, the recreation and the religious or ideological choices of the child. (See Q 23). The competent court also has the ability to impose an arranged exercise of parental responsibilities. This may be used in a situation where parental responsibilities are primarily exercised jointly, but certain decisions may be made exclusively by one of the parents. Another possibility is a situation where exclusive exercise is excepted for certain decisions that must be made jointly (Art. 374(3) Belgian CC). Only the interests of the child are relevant. In any case, the court shall make any decision concerning the housing of the child and its inscription will be published in the Registers of Population (Art. 374 *in fine* Belgian 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?**

Concerning the relationship between the parents, normally they may only act alone if they have reached a consensus. When, there is no consensus even after discussion, the discussion must be submitted to the Juvenile Court that will make the decision (See Q 37 and Q 38). In relation to other persons, a distinction is made between acts concerning the authority over the person and the administration of the property of the child.

For acts concerning the authority over the person of the minor, Art. 373(2) Belgian CC provides a legal presumption that one parent is acting with the consent of the other parent, even if the other parent is not present. The presumption is rebuttable to all bona fide persons other than the parents. These persons are presumed to be bona fide so long as they have no knowledge, and could not reasonably be expected to have any knowledge, of the disagreement of the other parent. This presumption applies to all acts concerning the authority over the child, apart from the legally provided exceptions.<sup>73</sup> When the contracting party is bona fide, the recourse of one parent to the Juvenile Court will not lead to the nullification of the contested act; the Juvenile Court will only judge the ramifications of the act and consequently order the other parent to pay any resulting damages to the child. If the third party is not bona fide, the presumption will not be applicable and the act will be voidable.<sup>74</sup>

Art. 376(2) Belgian CC provides the same presumption for acts involving administration of the child's property. Although Art. 376(2) Belgian CC concerning the presumption of agreement only mentions the administration of the property and not the legal representation, it is agreed that each parent can act as plaintiff in a

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<sup>73</sup> See Q 42.

<sup>74</sup> G. VERSCHELDEN, 'Ouderlijk gezag en omgangsrecht', *T.P.R.* 2001, 1978.

case against a third party acting in good faith. When the claim is submitted by a third party, both parents must be involved.<sup>75</sup>

**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?**

The guideline for the determination of the residence of a child is the interests of the child. If it appears that it is in the child's interests to change its residence, the competent authority will make this decision, regardless of whether both parents consent.

**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)?**

Until the beginning of the nineties, alternating the residence of the child was exceptional, and generally only allowed if both parents agreed.<sup>76</sup> Even then some judges refused it. Since the Belgian Law of 13 April 1995, alternating the child's residence is no longer the exception; certain Juvenile Courts consider it the common rule.<sup>77</sup> The guideline used for judging the alternating system is always the interests of the child. Therefore, unless it is obviously against the interests of the child, it will be enacted if both parents agree. When the parents cannot agree, the decision will be made after examination of the interests of the child. The disagreement of the parents is no longer a determining element. The competent authority may designate an expert to investigate and give an opinion concerning the residence of the child. Generally, it is assumed that the advise of the expert will be followed by the competent authority, but the expert's advise is not binding. The competent authority cannot delegate its competence to an expert. Included in the relevant factors are the distance between the parents' houses, the age of the child, their relationship with the child, the aptitude of the parents to communicate with each other, the personal situation of both parents (e.g. their availability according to their professional situation) and the distance to the school. If the alternating system of residence is admitted, it will usually be on a weekly rather than monthly basis, but this is not a legal certainty. It is considered that a prolonged separation is not ideal, especially with younger children.<sup>78</sup>

**III. Sole Parental Responsibilities**

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

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<sup>75</sup> W. PINTENS, 'Die Reform des belgischen Kindschaftsrechts aus vergleichender Sicht', *Fam.RZ*, 1997, p. 457-464.

<sup>76</sup> Court of Appeal of Liege, 21.01.1985, *Rev. trim.dr. fam.*, 1986, p. 238.

<sup>77</sup> Juvenile Court of Brussels, 08.06.1998, *R.W.*, 1998-99, p. 822, *J.D.J.*, 1999, No. 1985, p. 42; A. DUELZ, *Le droit du divorce*, Brussels:Larcier, 2002, p. 171.

<sup>78</sup> N. DOPCHIE, 'Considérations sur l'adéquation psychologique de l'octroi d'un droit de garde alternée en cas de séparation ou de divorce', *Rev. trim. dr. fam.*, 1981, p. 367.

**(a) The other parent**

In principle, he or she has full authority to act alone and has no duty to consult the other parent. It should be noted that, excepting very grave reasons to the contrary, the other parent still retains the right to contact with the child and retains the right to supervise the way the other parent exercises parental authority and administers the property of the child (Art. 374(4) and 376(4) Belgian CC). He or she may request information from the other parent and third parties, and may address the Juvenile Court when it is in the interests of the child.<sup>79</sup> In any case, either parent or the Public Prosecutor may utilize the Juvenile Court any time a problem should arise. In the interests of the child, the court may impose or change any regulations concerning the parental responsibilities (Art. 387 *bis* Belgian CC).

However, in some cases concerning the parental authority *sensu lato*, the agreement of both parents is required, namely for parental consent in case of adoption (Art. 348(1), 349(4), (5) and (6) and 368(4) Belgian CC), custodianship (Art. 475 *bis* Belgian CC) and marriage (Art. 148(1) Belgian CC), for the request of judicial removal from guardianship (emancipation) (Art. 477 Belgian CC) and for the state of prolonged minority (Art. 487 *ter* (1) Belgian CC), to assist with a (change of) marriage contract (Art. 1397 Belgian CC)<sup>80</sup> and to appoint a testamentary guardian in case an only parent should die (Art. 392 Belgian CC).<sup>81</sup> The authorisation of both parents is also required in case of removal of an organ (Art. 7 Belgian Law of 13 June 1986 concerning the Organ Transplantation).

A discussion exists regarding the demand for a change of name (Art. 2(2) Belgian Law of 15 May 1987 on Surname and First names). Since the judgment of the Council of State of 30 July 1985,<sup>82</sup> it is admitted that the demand for change of name is not a part of the parental administration of the child's property, but instead a part of the competence of legal representation of the child which is not limited to proprietary acts. Some authors consider the demand for a change of name as a part of the parental authority *sensu lato*, which requires the intervention of both parents.<sup>83</sup> However, according to certain authors, the demand for a change of name is, by lack of a different legal regulation, part of the parental authority *sensu stricto* and, therefore, follows the general rules of Art. 373-374 Belgian CC concerning joint or sole parental responsibilities, including the presumption of agreement of the other parent towards third parties acting in good faith.<sup>84</sup>

**(b) Other persons, bodies or competent authorities**

Yes, he/she has full authority to act alone and has no duty to consult other persons, bodies or competent authorities.

<sup>79</sup> Juvenile Court of Charleroi, 16.12.1998, *J. dr. jeun.*, 2000, Vol. 198, p. 32.

<sup>80</sup> Y.-H. LELEU, 'Le contrat de mariage', in *Rép. Not.*, V-II, p. 504-504, No. 508.

<sup>81</sup> See Q 34.

<sup>82</sup> Council of State, 30.07.1985, *J.T.*, 1986, p. 47, annotated J. DE GAVRE.

<sup>83</sup> H. CASMAN, *Notarieel Familierecht*, Ghent: Mys & Breesch, 1991, n° 600.

<sup>84</sup> W. PINTENS, *Naam*, in *A.P.R.*, Gent: Story-scientia, 1981, No. 129; J. SOSSON, 'Une procédure peu connue: le changement de nom par la voie administrative. Conditions, modalités et effets', *Ann. Dr. Louvain*, 1994, p. 107, confirmed by Council of State 27.05.1994, *R.A.C.E.* 1994, 12-15; D. VAN GRUNDERBEECK, *Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer personen- en familierecht (Naamwet)*, Antwerp, Maklu, 1997, p. Art. 2-8 - 2-14.

## 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.

The concept of contact refers to the right for certain adults to have contact with a child on a regular basis. This contact can consist of hosting the child, letting it reside during limited periods, paying it a visit, writing it, calling it or sending it by mail or e-mail.

### 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

Basically, the child has the right of contact with both of its parents, regardless of whether both parents exercise the parental responsibilities. Both parents may work out every thinkable system of contact between a child and themselves. If no agreement can be reached by the parents, the competent authority will design a contact-scheme at the request of one of the parents or at the request of the Public Prosecutor.<sup>85</sup> It can also work out every thinkable scheme. The decisive factor will be the interests of the child.

#### (b) A parent not holding parental responsibilities

Unless there are exceptional reasons to the contrary, a child has the right of contact with a parent, even when the parent does not hold any parental responsibilities. These exceptional reasons are interpreted very strictly. A parent that has been discharged, will only have a right of contact when it can be proven that it is in the interests of the child to see the parent and the child has a significant, affectionate relationship with the parent. This right of contact is based on Art. 375 *bis* Belgian CC. (See Q 53).

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

According to Art. 375 *bis* Belgian CC, a child has the right of contact with its grandparents when it is proved that it is in the child's interests. For all other persons (including brothers and sisters of the child), it must also be proved that the child has a significant, affectionate relationship with the persons seeking the right.<sup>86</sup>

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

The right of contact referred to in Q 43 is a right of the parents. However, according to Art. 375 *bis* Belgian CC, two other categories of persons have the right to have contact with a child, namely its grandparents and every other person, with the additional condition that the person seeking the contact can prove the existence of a significant, affectionate relationship with the child. The use of a uniform

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<sup>85</sup> See Q 61a for the competence of the Public Prosecutor.

<sup>86</sup> A. DE WOLF, *Artikelsgewijze commentaar met oeverzicht van rechtspraak en rechtsleer personen- en familierecht* (Art. 375 *bis* Belgian CC), Antwerp: Maklu, 1997, p. 1-21.

terminology, namely 'right of contact', allows the judge to define precisely the modalities of the right of contact whether it concerns a parent, a grandparent or every other person. This contact can consist of hosting the child, letting it reside during limited periods, paying it a visit, writing to it, calling it or sending it by mail or e-mail.<sup>87</sup> Although the possible modalities of the right of contact are the same, the grandparents or other persons never exercise parental authority. They have a right with its own aim, namely to maintain an affectionate relationship with the child.<sup>88</sup>

**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?**

There is a distinction between contact arrangements between the parents, and contact arrangements between the parents and every other person. Concerning contact arrangements between the parents, since the joint exercise of parental responsibilities is considered to be the principle, regardless of whether the parents live together, parents who do not (or no longer) live together are not obliged to make an explicit contact arrangement,<sup>89</sup> but they may.<sup>90</sup> The Law does not provide for parental contact agreements, but does not exclude them either. Therefore, referring to the general principles, such agreements are possible and binding; they can be oral or written. However, the contractual freedom and binding effect of the agreement will be limited by the interests of the child. An agreement will only apply so long as the interests of the child do not require its modification. Unless otherwise legally required (*cf. infra*), parents are not obliged to go to court; the interference of the judge must be the exception. When arrangements are submitted to the Juvenile Court, it is not bound by them; however, it can include these arrangements in a judgement, after advice of the Public Prosecutor<sup>91</sup> and so long as these arrangements respect the interests of the child and the rules of parental authority (See Q 17). After ratification of the agreement, Art. 1043 Belgian CC concerning the judgments of agreement will be applicable.

Can an agreement modify an agreement? As long as an agreement has not been submitted to the scrutiny of the Juvenile Court, it can be modified by another agreement. Once a judgment has been pronounced, the judgment will apply so long as it has not been replaced by another judgment<sup>92</sup> or by an agreement in case of divorce by mutual consent. A notarial deed or a judgment can also be modified by a judgment when it can be proven the agreement or judgement denies the interests of the child.<sup>93</sup>

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<sup>87</sup> J. SOSSON, 'Note - Quand l'enfant vit au loin ... L'avènement du droit aux relations cyber-personnelles?', *Rev. trim. dr. fam.*, 1998, p. 86.

<sup>88</sup> A. DE WOLF, *Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer personen- en familierecht* (Art. 375 bis Belgian CC), Antwerp: Maklu, 1997, No. 27-31.

<sup>89</sup> Excepted in case of divorce by mutual consent.

<sup>90</sup> Court of Appeal of Brussels, 07.05.1999, *Rev. trim. dr. fam.*, 2000, p. 637-643, annotated J.L. RENCHON; Court of Appeal of Ghent, 03.05.1999, *E.J.*, 2000, p. 56, annotated K. BROECKX.

<sup>91</sup> Art. 765 Belgian Judicial Code and see Q 61a.

<sup>92</sup> Cass. 05.09.1979, *R.W.* 1979-80, 1863, annotated L. DUPONT.

<sup>93</sup> Court of Appeal of Brussels, 07.05.1999, *Rev. trim. dr. fam.*, 2000, p. 637-643, annotated J.L. RENCHON; Court of Appeal of Ghent, 03.05.1999, *E.J.*, 2000, p. 56, annotated K. BROECKX; J. GERLO, 'Overeenkomsten over kinderen', annotated cass. 16.01.1997, *R.W.* 1997-98, p.

Certain legal dispositions explicitly regulate contact arrangements between parents. The parents may conclude a partial or complete agreement concerning the person, the maintenance and the property of their children during a divorce based on fault (Art. 229-231 Belgian CC) or separation (Art. 232 Belgian CC). The Court of First Instance will ratify the agreement when it deems ratification proper (Art. 1258(2) Belgian Judicial Code).<sup>94</sup> Art. 1043 Belgian CC concerning the judgments of agreement is applicable for decisions that ratify an arrangement (Art. 1258(2)(3) Belgian Judicial Code). If there is no ratification of an agreement, the Court of First Instance sends the case to the President of the Court of First Instance (Art. 1258(2)(4) Belgian Judicial Code). In case of a divorce by mutual consent, the parents are obliged to work out an agreement concerning the authority over the person and the administration of the property of their child (Art. 1288(2) Belgian Judicial Code), as well as the contribution of each parent in the maintenance of the child (Art. 1288 (3) Belgian Judicial Code). The agreement must include an arrangement for during the divorce and for after the divorce is finalised. The Court of First Instance will review the agreement after the Public Prosecutor offers a written advice (Art. 1289 *ter* Belgian Judicial Code). The Court may suggest a change to the agreement when certain aspects of it seem contrary to the interests of the minor children, and it may decide to hear the children (See Q 59). The Court may alter or ban parts of the agreement that are manifestly contrary to the interests of the children (Article 1290 Belgian Judicial Code). Finally, the Court will ratify the agreement (Art. 1298 Belgian Judicial Code).<sup>95</sup>

According to Art. 387 *bis* Belgian CC, these arrangements can always be modified. When a dispute arises, the competent authority is not bound by the existing arrangement, but will judge according to the interests of the child. The judge will then determine where the child will reside and where it will be registered in the Registers of Population (Art. 374 Belgian CC).<sup>96</sup>

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118-120; B. MAINGAIN, 'Le pacte de séparation de fait : un mode de règlement licite du conflit familial', *Rev. Trim. Dr. Fam.* 1983, 248-249; J-L. RENCHON, 'Les conventions entre parents relatives à leurs droits et obligations à l'égard de leurs enfants', *Rev. trim. dr. fam.*, 1988, p. 297.

<sup>94</sup> It must be noted that according to Art. 232 Belgian CC, the pronouncement of the divorce based on a two year factual separation is submitted on the condition that the divorce will not tenderly affect the material condition of the minor children. By a judgment of 12.05.2004, the Constitutional Court has judged that this condition was against the principle of equality foreseen in the Art. 10 and 11 Belgian Constitution, because this condition was not provided in a case of divorce based on fault according to Art. 229 and 231 Belgian CC (Constitutional Court 12.05.2004, *Rev. not.* 2004, p. 354).

<sup>95</sup> Some authors consider that discrimination exists between spouses who want to divorce by mutual consent and the others because only in case of divorce by mutual consent, must the parents have a written convention which is submitted to judicial scrutiny while other parents are free to make an agreement which will not directly be submitted to the scrutiny of the court (J. GERLO, E. DE GROOTE and A. WYLLEMAN, 'De uitoefening van het ouderlijk gezag en omgangsrecht', in *Gandaius Actueel I*, Antwerp: Story scientia, 1995, No. 240; differently F. BUYSSSENS, 'Echtscheiding door onderlinge toestemming', in P. SENAËVE and W. PINTENS, *De hervorming van de echtscheidingsprocedure en het hoorrecht van de minderjarige*, Antwerp: Maklu, 1997, p. 287, footnote 209).

<sup>96</sup> In case of divorce by mutual consent, Art. 1288 *in fine* and 1293 Belgian Judicial Code explicitly provide for this possibility, when the situation of the parents or the children



Concerning contact arrangements between parents and other persons, Art. 375 *bis* Belgian CC provides that the Juvenile Court decides on the right of contact 'in the absence of agreement between the parties'. This implies that contact arrangements can be made, moreover, that the Juvenile Court will only be competent when no agreement can be reached between the parents and the other person. Therefore, in case of Art. 375 *bis* Belgian CC, it is impossible to present an agreement to the Juvenile Court (*e.g.* to preserve the future) when no discussion exists between the parents and the other person at the moment of the introduction of the dispute before the judge.<sup>97</sup> When an agreement is reached pending the dispute before the Juvenile Court, the judge can confirm it in its judgment.<sup>98</sup>

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

Yes, it can. It can even work out a solution that has not been asked for/proposed by the parents. The only decisive criteria are the interests of the child.<sup>99</sup>

**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**

If a parent disregards the child's right of contact with its parent, it will not have any direct consequence on parental responsibilities. However, this attitude can be considered as being against the interests of the child so that, if claimed by the Public Prosecutor or the other parent, the competent court has the possibility to decide that the child should live with the other parent. Besides, the right to contact can be enforced in different ways. However, only judgments are enforceable; without a court decision,<sup>100</sup> the disregard of the child's right to contact cannot be enforced. First, the court decision can be submitted to forced execution, by a bailiff, if necessary '*manu militari*'. Although it is possible, it is not considered to be opportune, certainly not for older children. In practice, it does not happen anymore. Second, the court can submit the right of contact to the payment of a fine. If the right of contact is not respected, a certain financial compensation will be due every time the right of contact is disregarded according to Art. 1385 *bis* Belgian Judicial Code.<sup>101</sup> A third enforcement-system is the system of damage. Indeed,

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changes due to new circumstances irrespective of the will of the parties, the competent authority may review the agreement, both during the divorce procedure as afterwards.

<sup>97</sup> This confirms the principles of Art. 17 and 18 Belgian Judicial Code.

<sup>98</sup> A. DE WOLF, *Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer personen- en familierecht* (Art. 375 *bis* Belgian CC), Antwerp: Maklu, 1997, p. 14-16.

<sup>99</sup> Q. FISCHER, 'Les pouvoirs du juge qui fixe les modalités d'hébergement d'un enfant chez chacun de ses parents. Quelques réflexions sur les principes directeurs de l'instance', *Div. Act.*, 2002, p. 71.

<sup>100</sup> This is for example when the parents or their lawyers have made a provisional agreement pending the decision of the judge.

<sup>101</sup> P. SENAEVE, in *Comm. Pers.*, 'de dwangsom' (Art. 1385 *bis*-1385 *nonies* Belgian Judicial Code) (1998); J. VAN COMPERNOLLE, 'L'astreinte', *Rép. not.*, Brussels: Larcier, 1992, T.XIII, L. IV-6; K. WAGNER, 'Dwangsom en omgangsregeling', *A.J.T.*, 2001-2002, p. 337.

compensation can afterwards be claimed if it has appeared that the right conferred by court decision has been disregarded.<sup>102</sup> A fourth option is a criminal action that can be taken against the parent who disregards someone's right of contact, according to Art. 432 Belgian Penal Code.<sup>103</sup> This parent may be sentenced to imprisonment for a term of eight days to one year and be fined to €26 to €1000. Finally, Art. 1322 *bis* - 1322 *octies* Belgian Judicial Code organise the procedural issues concerning the enforcement and protection of international rights of contact in the context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the European Convention of 25 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, namely by providing simplified proceedings commenced by an application before the President of the Court of First Instance of the place of residence of the child at that moment. The President will settle the case as in interim injunction proceedings (Art. 1322 *sexies* Belgian Judicial Code); the defendant will have no right to submit a counterclaim (Art. 1322 *octies* Belgian Judicial Code).

#### **(b) Other persons**

There are no consequences for parental responsibilities if the parent with whom the child is living disregards the right of contact of that child with other persons. The possibilities to enforce performance of the right of contact are the same as described under Q 48a.

## **F. DELEGATION OF PARENTAL RESPONSIBILITIES**

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

Parental responsibility is an institution created in the interests of the child. It is part of the status of the person; consequently, the applicable rules are of public policy. Every agreement which transfers or modifies the exercise of parental authority is void (Art. 6 Belgian CC). This principle is unanimously accepted.<sup>104</sup> The parental competences concerning the status of the person, including the permission to marriage (Art. 148 Belgian CC), the permission for adoption (Art. 348, 368(4) and 349(4-6) Belgian CC), and the demand of judicial removal of the minor from custodianship (emancipation) (Art. 477 Belgian CC), cannot be transferred.

<sup>102</sup> H. DE PAGE, *Traité élémentaire de droit civil belge*, T. II (Les Personnes), Vol. 2 (by J.-P. MASSON), Brussels: Bruylant, 1990, p. 991.

<sup>103</sup> Art. 432 Belgian Penal Code, formerly Art. 369 *bis* Belgian Penal Code; Cass. 02.12.1997, *Div. Act.*, 1998, p. 102; Cass. 28.10.1987, *J.T.*, 1988, p. 144; M.-A. BEERNAERT, 'Droit pénal de la famille - Chronique de jurisprudence 1992-1997', *Div. Act.*, 1998, p. 98; J. DE GAVRE, 'A propos de l'arrêt de la Cour de Cassation du 22 octobre 1980 et de l'article 369 *bis*, al. 4 du Code Pénal', in *Mélanges offerts à Robert Legros*, Brussels: Ed. ULB, 1985, p. 151-164; J. MESSINE and M. HIRSCH, 'Propos sur le délit de non-présentation d'enfant', in: *Mélanges offerts à R. Vander Elst*, Brussels: Nemesis, 1986, p. 643; L. STEVENS, 'Over strafrecht, uit de echt gescheiden ouders en hun kinderen. Een decennium rechtspraak m.b.t. art. 369 *bis* Sw. (1989-1999)', *E.J.*, 1999, p. 130-142'.

<sup>104</sup> Court of Appeal of Ghent, 14.03.1894, *Pas.*, 1894, II, p. 363; Court of Appeal of Liege, 18.05.1881, *Pas.* 1881, II, p. 235; H. DE PAGE, *Traité élémentaire de droit civil belge*, T. II (Les Personnes), Vol. 2 (by J.-P. MASSON), Brussels: Bruylant, 1990, p. 951.

However, custodianship (Art. 475 *bis* – 475 *septies* Belgian CC) is a strictly regulated institution that offers the possibility to transfer a part of the parental responsibilities, under judicial control, to a person who takes over the parental duties and certain parental prerogatives. It is similar, but not equal, to adoption. The custodian has the right to administer the property (Articles 376-379 Belgian CC), but has no right of its use and enjoyment (Art. 384-387 Belgian CC). It includes the right of housing as long as the child has its usual domicile with the custodian (if not, that right still belongs to the parent(s)).

**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?**

It is generally agreed that parental authority belongs only to the parents, and not to other persons.<sup>105</sup> Therefore, other persons can not initiate an action for the transfer of (a part of) parental authorities. It is inadmissible, except in the specific context of custodianship, where the candidate-custodian must ask the Juvenile Court to uphold the agreement between him/her and the child, if it has reached the age of 15 years or, if not, its parent(s) or guardian (Art. 475 *bis* Belgian CC).<sup>106</sup> Also, see Q 32 concerning the intervention of the Public Social Welfare Centre and Q 51-54 concerning the discharge of parental responsibilities.

## **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?**

Art. 32 Belgian LJP provides that the holder(s) of parental responsibilities can be discharged of all or a part of the responsibilities if:

- the father or the mother has been condemned to a criminal penalty for an act perpetrated against the child, or with the help of a child or its descendents;
- the father or the mother who, by maltreatment, abuse of authority, obvious bad behaviour or serious negligence, has endangered the health, security or morality of the child;
- the father or the mother marries a person who has been discharged of their parental responsibilities.

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<sup>105</sup> H. DE PAGE, *Traité élémentaire de droit civil belge*, I, Brussels: Bruylant, 1962, p. 717.

<sup>106</sup> K. HERBOTS, *Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer personen- en familierecht* (Art. 387 *bis* Belgian CC), Antwerp: Maklu, 1997, n° 18; J.-L. RENCHON, 'La recevabilité des actions en justice introduites par les grand-parents dans le contexte du règlement de l'exercice de l'autorité parentale à l'égard de l'enfant', *Rev. Trim. Dr. Fam.* 1989, p. 255, No. 8. See Q 31 concerning custodianship.

So long as the violent behaviour of a parent is only towards the other parent, this behaviour is not an assessment criterion.<sup>107</sup>

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

According to Art. 32(3) Belgian LJP, the discharge of parental responsibilities must be demanded by the Public Prosecutor.<sup>108</sup>

**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?**

The right of contact is tied to parental responsibility.<sup>109</sup> Consequently, when a parent is discharged of parental responsibilities, the parent cannot claim a right of contact as part of parental responsibility. However, according to Art. 375 *bis* Belgian CC, any person that can prove a significant, affectionate relationship with a child, can ask a right of contact. This right of contact will be attributed to the person if it is proven that it is in the interests of the child. Using this judicial fiction, a parent that has been completely discharged of his or her parental responsibilities can obtain a right of contact with the child if it is in the child's interests.<sup>110</sup> Even before the introduction of Art. 375*bis* Belgian CC, the Belgian Supreme Court had already judged that it was not contradictory to pronounce the discharge of parental responsibility and still maintain a right of contact with the discharged parent.<sup>111</sup>

**54. 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 can be regained at any time, if *ex-officio* pronounced by the Juvenile Court or if proposed by the Public Prosecutor at the Juvenile Court (Art. 60(1) Belgian LJP). A previous holder can also ask to regain parental responsibilities after one year has passed since the judicial decision of discharge has become definitive (Art. 60(2) Belgian LJP). Parental responsibilities can only be regained if it is proved that this is in the interests of the child. The fact that the discharged parent has improved himself or herself is not enough. The discharged parent must also prove that he or she has rebonded a harmonious relationship with the child.<sup>112</sup>

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<sup>107</sup> H. DE PAGE, *Traité élémentaire de droit civil belge*, T. II (Les Personnes), Vol. 2 (by J.-P. MASSON), Brussels: Bruylant, 1990, p. 1030-1044; F. TULKENS and T. MOREAU, *Droit de la jeunesse*, Brussels: Larcier, 2000, p. 607-615.

<sup>108</sup> Court of Appeal of Brussels, 29.06.1927, *Pas.*, 1928, II, p. 156; Court of First Instance of Brussels, 27.11.1948, *J.T.*, 1949, p. 327.

<sup>109</sup> A. DE WOLF, 'De nieuwe regeling van het omgangsrecht', in: P. SENAËVE (ed.), *Coouderschap en omgangsrecht*, Antwerp: Maklu, 1995, No. 354-355.

<sup>110</sup> Court of First Instance of Liege, 08.12.1999, *Rev. trim. dr. fam.*, 2000, p. 701.

<sup>111</sup> Cass. 19.04.1989 *Arr. Cass.* 1988-89, 957; K. DEWEERDT and J. PUT, 'Veertig jaar jeugdbeschermingsrecht - Overzicht van rechtspraak: 1965-2004', *NjW* 2003-2004, p. 835.

<sup>112</sup> Court or Appeal of Brussels, 16.02.1998, *J.D.J.* 1998, No. 174, annotated R. LOOP.

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

The competent authority is the Juvenile Court. According to Art. 387 *bis* Belgian CC, this Court has a general competence for all disputes concerning minors, including disputes concerning parental responsibilities, questions of residence of the child or contact.<sup>113</sup> However, when a dispute arises in certain situations, other authorities are competent. There is a distinction between married parents, parents who cohabit legally and unmarried parents.

When a question of parental responsibilities arises between married parents (*e.g.* in case of factual separation, but not necessarily), the Justice of the Peace is the competent court for determining interim measures between spouses (Art. 221-223 Belgian CC). It will take all elements of the factual separation into account, including problems of the children. When a divorce procedure has been introduced in court (Art. 1280 Belgian Judicial Code) the President of the Court of First Instance is competent to pronounce interim measures. Measures between legally cohabitating parents, including measures concerning the children, are pronounced by the Justice of the Peace (Art. 1479 Belgian CC).

Unmarried parents who did not formalise their relationship cannot invoke the competence of the Justice of the Peace; only the Juvenile Court is competent, unless urgency can be proven. When the plaintiff can prove the dispute is extremely urgent, the President of the Court of First Instance is competent according to Art. 584(1) Belgian Judicial Code concerning interim injunction proceedings to take measures concerning the children. This competence applies notwithstanding the relationship between the parents.<sup>114</sup>

### **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, for example, 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?**

As provided by Art. 387 *bis* Belgian CC, every legally effective decision or agreement concerning the child may be reviewed from the moment there is a change in the circumstances from which the previous decision was taken. The invoked circumstances must have changed after the legally effective decision or

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<sup>113</sup> Other articles of the Belgian Civil Code confirm it for specific matters, *cf.* Art. 373(3), 374(2), 375*bis* (2) and 376 (4) Belgian CC.

<sup>114</sup> K. HERBOTS, *Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer personen- en familierecht* (Art. 387 *bis* Belgian CC) Antwerp: Maklu, 1997, No. 11-14.

agreement. Circumstances known or even existing (and unknown) at the moment of the previous decision or agreement are not enough to obtain a modification.<sup>115</sup>

**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?**

According to the Belgian Law of 19 February 2001 concerning family mediation (Art. 734 *bis* - 734 *sexies* Belgian Judicial Code), the Judge has the ability to designate a mediator in the following cases (Art. 734 *bis* Belgian Judicial Code): disputes concerning the consequences of marriage,<sup>116</sup> divorce,<sup>117</sup> parental authority,<sup>118</sup> legal cohabitation<sup>119</sup> (Art. 734 *bis* (1) and (2) Belgian Judicial Code) and factual cohabitation (Art. 734 *bis* (3) Belgian Judicial Code). This takes place at the request of the concerned parties. The judge can also designate a mediator on his or her own initiative; in this case, the agreement of the concerned parties (on the principle as well as on the name of the mediator) is required. The judicial procedure is suspended during the mediation.<sup>120</sup>

At the stage of enforcement of a decision/agreement, no alternative disputes solving mechanisms are legally organised, however, in practice the competent authority can choose this solution in case of international parental kidnapping.

**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?**

If disregarded, a child's right to contact may only be enforced if this right is contained in a judgment. Agreements made by the parents or their lawyers, *e.g.*

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<sup>115</sup> Cass., 14.12.1989, *Pas.*, 1990, I, p. 477; Court of Appeal of Mons, 03.04.1990, *Pas.*, 1990, II, p. 198; P. HOFSTRÖSSLER, 'De wet van 13 april 1995 betreffende de gezamenlijke uitoefening van het ouderlijk gezag', *A.J.T.* 1995-96, p. 34; J.-L. RENCHON, 'La nouvelle réforme législative de l'autorité parentale', *Rev. Trim. Dr. Fam.* 1995, 405.

<sup>116</sup> Art. 203-223 Belgian CC.

<sup>117</sup> Art. 295-307*bis* Belgian CC and Art. 1254-1310 Belgian Judicial Code.

<sup>118</sup> Art. 371-387*bis* Belgian CC.

<sup>119</sup> Art. 1475-1479 Belgian CC.

<sup>120</sup> B. COMPAGNION, 'La médiation légale dans le cadre d'une procédure judiciaire', *Div. Act.*, 2001, p. 98; I. HACHEZ, 'La médiation familiale à l'heure de sa consécration légale', *Rev. trim. dr. fam.*, 2001, p. 207; A. THILLY, 'De la pratique à la loi du 19 février 2001 à la médiation en matière familiale dans le cadre d'une procédure judiciaire', *J.T.*, 2001, p. 665. Also see the proposal of law according to which the mechanism of mediation is extended to all disputes that can be solved by settlement (Proposition de loi complétant le Code Judiciaire par une septième partie relative à la procédure de médiation extrajudiciaire, *Doc. Parl. Chambre* 08.01.2004; see [www.lachambre.be](http://www.lachambre.be), document 51S0442).

pending the decision of the judge, are not enforceable unless they are confirmed by judgment.<sup>121</sup>

The judgment can be enforced in different ways. Namely, the decision can be submitted to forced execution by a bailiff, the court can submit the violation of the right of contact to the payment of a penalty, damages can be claimed afterwards and criminal action can be taken against the parent who disregards another's right of contact (See Q 48a).

**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?**

Different systems for hearing children must be distinguished.

The Belgian Law of 30 June 1994 has provided a common right, or more precisely, a possibility, of hearing the child, by introducing Article 931 (3-7) in the Belgian Judicial Code.<sup>122</sup> According to Art. 931(3), every minor<sup>123</sup> who has enough discernment can be heard in every dispute in which it is concerned.<sup>124</sup> Art. 931(3)-(7) Belgian Judicial Code is applicable to all courts<sup>125</sup> and to all the proceedings in which children are concerned, whether it concerns their person, their property, their status or their maintenance. The hearing of the child does not require the child to be a party to the dispute.<sup>126</sup> It can take place *ex officio* or on the demand of the child, by the competent authority or by the person it designates. Confusion exists on the interpretation of "discernment";<sup>127</sup> the judicial authority decides in a sovereign manner and has the right to refuse to hear the child, but if the hearing

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<sup>121</sup> D. DELI, 'De uitdrukkelijke wettelijke erkenning van de gezamenlijke uitoefening van het ouderlijk gezag en van het recht op persoonlijk contact', *R.W.* 1996-1997, p. 3.

<sup>122</sup> J. DE GAVRE, 'La loi du 30 juin 1994 modifiant l'article 931 du Code Judiciaire et les dispositions relatives aux procédures du divorce', *J.T.*, 1994, p. 593; P. DONNY, 'L'audition de l'enfant, pratiques et dérives', *Rev. dr. ULB*, 1996, p. 169; B. POELMANS, 'Het hoorrecht van minderjarigen', in: P. SENAEVE and W. PINTENS, *De hervorming van de echtscheidingsprocedure en het hoorrecht van de minderjarige*, Antwerp: Maklu, 1997, p. 64-122.

<sup>123</sup> Children who have reached the age of 18 years have no right to be heard, even if they may be concerned as to disputes between their parents e.g. the interim measure concerning the separated residences.

<sup>124</sup> Also see Q 61 about the proposal made in Parliament in this matter.

<sup>125</sup> Justice of the Peace, Court of First Instance, President of the Court of First Instance and exceptionally Juvenile Court, when Art. 56 *bis* Belgian LJP is not applicable.

<sup>126</sup> Art. 931(7) Belgian Judicial Code; Court of Appeal of Liege, 09.01.1996, *J.L.M.B.*, 1996, p. 663, annotated V. D'HUART.

<sup>127</sup> For the hearing of a child of 9-10 years: Court of Appeal of Brussels, 09.02.1999, *J.D.J.*, 2000, No. 194, p. 43; Court of Appeal of Ghent, 19.06.1995, *R.W.*, 1995-96, p. 1356; Court of Appeal of Antwerp, 15.06.1995, *R.W.*, 1995-96, p. 1356; Court of First Instance of Brussels, 29.12.1995, *Rev. trim. dr. fam.*, 1996, p. 442. Against the hearing of a child of 6-7 years : Court of First Instance of Brussels, 12.06.1996, *Rev. trim. dr. fam.*, 1996, p. 464; Court of First Instance of Brussels, 14.05.1996, *Rev. trim. dr. fam.*, 1996, p. 464; Court of First Instance of Mons, 22.03.1995, *Rev. trim. dr. fam.*, 1995, p. 690.

has been asked by the child the judge must justify his refusal by referring to the criterion of discernment of the child. No appeal is possible from this decision.<sup>128</sup>

Aside from this common right of Art. 931 (3-7) Belgian Judicial Code, Art. 56 *bis* LJP,<sup>129</sup> provides a specific right of hearing before the Juvenile Court. The Juvenile Court has the obligation to call up the child, if it has reached the age of twelve when this court decides upon parental responsibilities, the child's residence or contact, or the administration of its property.<sup>130</sup> If the child has not reached the age of twelve, the Juvenile Court can decide to hear the child, or refuse it by a decision justified according to the general right of hearing in proceedings mentioned in Art. 56 *bis* Belgian LJP<sup>131</sup> (Art. 51(1) Belgian LJP that refers to Art. 931 Belgian Judicial Code).

The Belgian Law on Guardianship of 29 April 2001 has installed a specific right to be heard in procedures before the Justice of the Peace concerning guardianship and parental responsibilities (Art. 1233(1) Belgian Judicial Code). The Justice of the Peace must call upon the minor in order to hear it, if the child is at least twelve years old, in procedures that concern its person, and when it is at least fifteen years old in procedures that concern its property (Art. 1233(1)(2) Belgian Judicial Code). The child is also heard in procedures involving the designation of its guardian, after it has reached the age of twelve, and about all decisions personally concerning the child. The specific procedure of Art. 1233 Belgian Judicial Code is not applicable when parents ask for an authorisation according to Art. 410 Belgian Civil Code, however Art. 378 Belgian CC refers to Art. 410 Belgian CC. There is no obligation to hear the child. Only Art. 931 Belgian Judicial Code is applicable.<sup>132</sup>

A child of the age of fourteen can also attend proceedings when the court decides upon parental responsibilities, unless the court decides that according to the circumstances it is better to forbid the presence of the child.<sup>133</sup> (Also see Q 61 concerning the voluntary intervention of the child).

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<sup>128</sup> Court of Appeal of Liege, 17.12.2002, *J.L.M.B.*, 2003, afl. 36, p. 1577; G. BAETEMAN, J. GERLO, E. GULDIX, A. WYLLEMAN, G. VERSCHELDEN and S. BROUWERS, 'Overzicht van rechtspraak (1995-2000): Personen- en familierecht', *T.P.R.* 2001, p. 1996-2000 and 2005.

<sup>129</sup> Cass., 04.09.2002, *Rev. trim. dr. fam.*, 2003, p. 555-558; Court of Appeal of Antwerp, 15.06.1995, *J.dr.jeun.*, 1996, p. 383, annotated J. JACQMAIN; Court of Appeal of Gent, 19.06.1995, *R.W.*, 1995-96, p. 1356; M. GROGNARD, 'L'audition de l'enfant depuis l'application des articles 931 nouveau du Code Judiciaire et art. 56bis de la loi du 8 avril 1965 relative à la protection de la jeunesse', *Div. Act.*, 2002, p. 149-159.

<sup>130</sup> Contrary to Art. 931 Belgian Judicial Code that provides that the Judge has the possibility to refuse to hear the child, if the Judge refers to 'discernement' as a criterion and also provides that the child can be heard in all the proceedings by which it is concerned.

<sup>131</sup> Article 931 Belgian Judicial Code can not be applied to other proceedings before the Juvenile Court, e.g. adoption, because other specific rules concerning the hearing of the child are applicable.

<sup>132</sup> F. APS, 'De procedures inzake voogdij en het hoorrecht van minderjarigen', in: P. SENAËVE, J. GERLO and F. LIEVENS (eds.), *De hervorming van het voogdijrecht*, Antwerpen: Intersentia, 2002, p. 269-291; H. CASMAN, 'De nieuwe voogdijwet', *Not. Fisc. M.* 2001, p. 245.

<sup>133</sup> Art. 75 Belgian LJP as modified by Belgian Law of 10.03.1999; K. HERBOTS, 'De minderjarige als toeschouwer in de rechtszaal. Beschouwingen aangaande de Wet van 10 maart 1999', *E.J.*, 1999, p. 82.



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

Variances exist between the child's different rights to be heard. Art. 931 Belgian Judicial Code represents the 'general law' of the hearing of the child and is generally applicable. The hearing of the child according to Art. 51(1) Belgian LJP takes place according to this principle. Art. 1233 Belgian Judicial Code explicitly refers to Art. 931(6)-(7) Belgian Judicial Code. The other modalities according to Art. 931(3)-(5) Belgian Judicial Code are not automatically applicable, except when the child is heard between the ages of 12 or 15 years.<sup>134</sup> When Art. 56 *bis* Belgian LJP does not provide specific rules concerning the modalities of hearing, the Juvenile Court can apply the common modalities of Art. 931 Belgian Judicial Code, as long as these are compatible with the specific rules of the Belgian LJP.<sup>135</sup>

Art. 931(3) Belgian Judicial Code explicitly states that the child can be heard directly by the competent authority or by the person this authority designates. The competent authority is free to designate the person he judges qualified (doctor, psychologist, social worker, ...), excepting the Public Prosecutor. Neither Art. 56 *bis* Belgian LJP nor Art. 1233 Belgian Judicial Code provides this possibility. Therefore it is agreed that the child must be heard by the competent authority; no other person can be designated.<sup>136</sup> The hearing will happen in a suitable place.<sup>137</sup>

Neither the parties, nor their lawyers, nor the Public Prosecutor can be present during the hearing, whether the child is heard by the competent authority or by another designated person (Art. 931(3) Belgian Judicial Code). This refusal to admit the parties or their lawyers during the hearing of the child is criticised because it would be against the principles of a fair trial (Art. 6(1) ECHR).<sup>138</sup> Although the child is principally heard alone, Art. 931(6) Belgian Judicial Code provides that the child can be assisted by a doctor, a social worker, a psychologist, a lawyer if it appears to be opportune. When the competent authority hears the child itself, a registrar must be present to make a record.

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<sup>134</sup> F. APS, 'De procedures inzake voogdij en het hoorrecht van minderjarigen', in: P. SENAËVE, J. GERLO and F. LIEVENS (eds.), *De hervorming van het voogdijrecht*, Antwerp: Intersentia, 2002, p. 270, No. 613 and p. 284, No. 642.

<sup>135</sup> B. POELMANS, 'Het hoorrecht van minderjarigen in P. Senaëve, W. Pintens, *De hervorming van de echtscheidingsprocedure en het hoorrecht van de minderjarige*, Antwerp: Maklu, 1997, p. 78.

<sup>136</sup> Court of First Instance of Liege, 27.01.1995, *J.D.J.*, 1997, No. 164, p. 170; Juvenile Court Ghent, 14.12.1994, *E.J.* 1995, 92, annotated A. WYLLEMAN; F. APS, 'De procedures inzake voogdij en het hoorrecht van minderjarigen', in: P. SENAËVE, J. GERLO and F. LIEVENS (eds.), *De hervorming van het voogdijrecht*, Antwerp: Intersentia, 2002, p. 285, No. 646; B. POELMANS, 'Het hoorrecht van minderjarigen', in: P. SENAËVE and W. PINTENS, *De hervorming van de echtscheidingsprocedure en het hoorrecht van de minderjarige*, Antwerp: Maklu, 1997, p. 97 No. 143.

<sup>137</sup> Art. 931(7) and 1233 Belgian Judicial Code, but also Art. 56 *bis* Belgian LJP by lack of other legal regulation.

<sup>138</sup> S. DEMARS, 'Questions controversées relatives à l'application de la loi du 30 juin 1994 modifiant les procédures de divorce', *J.T.* 1995, p. 825; J. VAN COMPERNOLLE, 'La justice familiale et les principes fondamentaux du droit judiciaire', in: *Familles et Justice, Justice civile et évolution du contentieux familial en droit comparé*, Brussels: Bruylant, 1997, p. 396.

The competent authority must make a written record of the hearing of the child (Art. 931(7) and 1233 Belgian Judicial Code). This is necessary to respect the rights of defense of the parties, who must have the ability to respond to the hearing, and for the Judge on appeal, who must take notice of this hearing. The parties, as well as their lawyers, may take notice of the record of hearing, but no copy may be delivered. Art. 931 Belgian Judicial Code does not explicitly provide that the hearing must be recorded in its entirety. Therefore, some authors consider that, not only is there no obligation to do so, the child has the ability to ask that certain declarations not be recorded.<sup>139</sup> This tendency is criticised by the majority of the authors, who consider that this is against the rights of defense and the principles of a fair trial.<sup>140</sup> In practice, it appears that the judges are reluctant to record the whole hearing and mostly limit the record to a summarizing of the hearing.<sup>141</sup> If the child is heard by another person, this person also has the obligation to make a written report of the hearing. The problem of the rights of defense when the hearing is not completely recorded does not rise in this case, because the competent authority does not possess more information than the parties.

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

### **(a) Parental responsibilities**

Normally, a child is not personally and legally represented in disputes concerning parental responsibilities. It has the right to be heard in the circumstances described in Q 60, but is not a party to the case. Neither does it become a party to the case because of its hearing (Art. 931(7) Belgian Judicial Code).<sup>142</sup>

The interests of the child are represented by the Public Prosecutor, who is always present in hearings at the Juvenile Court and in hearings including children in front of the President of the Court of First Instance.<sup>143</sup> The Public Prosecutor has three determined tasks. First, he is the principal party every time public policy (the interests of the child) is threatened.<sup>144</sup> According to Art. 387*bis* Belgian CC, he has a general right of action before the Juvenile Court, notwithstanding the relationship of the parents. Beside that, Art. 138(2) Belgian Judicial Code provides that the Public Prosecutor intervenes in civil proceedings by legal action every time the law provides it and every time public policy requires it. Second, he is a joined party

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<sup>139</sup> C. MAES, C. STAPPERS, L. BOUTELIGIER, D. DEGRANDE and J. VAN GILS, *Mogen wij nu iets zeggen ? Over kinderen, echtscheiding en hun recht om gehoord te worden*, Bruges: Die Keure, 1996, 28.

<sup>140</sup> B. POELMANS, 'Het hoorrecht van minderjarigen', in: P. SENAËVE and W. PINTENS, *De hervorming van de echtscheidingsprocedure en het hoorrecht van de minderjarige*, Antwerp: Maklu, 1997, p. 108-109, No. 169-171; J. VAN COMPERNOLLE, 'La justice familiale et les principes fondamentaux du droit judiciaire', in: *Familles et Justice, Justice civile et évolution du contentieux familial en droit comparé*, Brussels: Bruylant, 1997, p. 396.

<sup>141</sup> E.g. Juvenile Court of Brussels; see B. POELMANS, 'Het hoorrecht van minderjarigen', in P. SENAËVE and W. PINTENS, *De hervorming van de echtscheidingsprocedure en het hoorrecht van de minderjarige*, Antwerp: Maklu, 1997, p. 109-110, No. 171.

<sup>142</sup> Court of Appeal of Brussels 09.02.1999, *J.T.* 2000, 150.

<sup>143</sup> No Public Prosecutor is present at the court of the Justice of the Peace when interim measures between spouses are discussed.

<sup>144</sup> According to Art. 1388 Belgian CC, the parental authority is from public policy.

when he gives advice in the interests of the child.<sup>145</sup> That task is confirmed by Art. 138 (2) Belgian Judicial Code, which provides that the Public Prosecutor can intervene not only by legal action, but also by advice. Third, he is the instructor of the civil procedure when, according to Article 872 Belgian Judicial Code, he collects the information demanded by the competent court.<sup>146</sup>

The possibility for a child to intervene voluntary in a dispute directly concerning it arose before the introduction of the right of hearing of the child by the Belgian Law of 30 June 1994. It had been suggested to tolerate the voluntary intervention of the child in order to give it the opportunity to be heard, according to Art. 12 of the International Convention on the Rights of the Child.<sup>147</sup> This point of view had been accepted by certain courts.<sup>148</sup> However, since the introduction of the Belgian Law of 30 June 1994, this possibility must be excluded. Indeed, according to Art. 931(3)-(7) Belgian Judicial Code, the child has the possibility to ask to be heard when it is concerned by a dispute; that is the way it must express its point of view.<sup>149</sup> Moreover, once it has been heard the child has no right to intervene in the dispute opposing its parents.

The question of whether the child has the right to take the initiative of a legal action has been discussed. According to the classic theory, the incapacity of the minor does not exclude its action, but it must be protected. The action of a minor, therefore, does not cause the inadmissibility of its action, but must be regularized by its legal representative. The child acts correctly when it is represented by its legal representatives, but not when it acts itself.<sup>150</sup> When there is a conflict of interest between the child and its parents, Art. 378 Belgian CC provides that an *ad hoc* guardian must be designated by the competent authority. Certain courts even accept the voluntary intervention of the child,<sup>151</sup> referring to Art. 12 of the International Convention on the Rights of the Child, whose immediate applicability is recognised, but this is very exceptional, because a child is not qualified to act in justice. Finally, a proposal has been made according to which the child should have the right to intervene in proceedings that concern it (See Q 6).<sup>152</sup>

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<sup>145</sup> When no advice is given by the Public Prosecutor, the judgment is null, according to Art. 765 Belgian CC.

<sup>146</sup> Cass., 13.12.1990, *Pas.*, 1991, I, p. 367; Cass., 13.06.1997, *Pas.* 1997, I, p. 671, annotated A.-Ch. VAN GYSEL; A.-Ch. VAN GYSEL and J.-C. BROUWERS, 'Le rôle du ministère public dans les procédures civiles concernant l'enfant', *Rev. dr. ULB*, 1996, p. 35.

<sup>147</sup> C. PANIER, 'Faire entendre sa parole en justice : un droit pour l'enfant?', *J.L.M.B.* 1992, 149-150; B. POELMANS, 'Het hoorrecht van minderjarigen', in: P. SENAËVE and W. PINTENS, *De hervorming van de echtscheidingsprocedure en het hoorrecht van de minderjarige*, Antwerp: Maklu, 1997, p. 116.

<sup>148</sup> Court of Appeal of Liege 24.06.1992, *J.L.M.B.* 1992, 1087; Court of Appeal of Mons 10.10.1993, *R.R.D.* 1993, 401; Court of Appeal of Antwerp 14.04.1994, *J.D.J.* 1995, No. 147, 322; also see C. PANIER, 'Faire entendre sa parole en justice: un droit pour l'enfant?', *J.L.M.B.* 1994, p. 522-523.

<sup>149</sup> For an application, see Court of Appeal of Liege, 09.01.1996, *J.L.M.B.* 1996, 664.

<sup>150</sup> Th. MOREAU, 'L'autonomie du mineur en justice', in: *L'autonomie du mineur*, Brussels: Publications des Facultés Universitaires Saint-Louis, 1998, p. 170.

<sup>151</sup> Liege 23.04.2000, *J.L.M.B.* 2000, p. 1085.

<sup>152</sup> Projet de loi ouvrant l'accès à la justice aux mineurs, *Doc. Parl. Chambre* 19.07.2002, No. 50-1975/001, pour l'insertion d'un article 1237 *bis* dans le Code Judiciaire; see [www.lachambre.be](http://www.lachambre.be), document 51K0643.

**(b) The child's residence**

See Q 61a.

**(c) Contact**

See Q 61a.

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

The age and maturity are relevant for hearing the child in disputes concerning it. Indeed, the Belgian Law of 30 June 1994 has provided a general right, or more precisely, a possibility, of hearing the child. According to Art. 931(3)-(7) Belgian Judicial Code, every minor who has adequate discernment can be heard in every dispute by which it is concerned. Art. 56 *bis* Belgian LJP provides a specific obligation of hearing before the Juvenile Court, if the child has reached the age of twelve, when the court decides upon parental responsibilities, the child's residence, or contact, or the administration of its property. When the child has not reached the age of twelve, the Juvenile Court can decide to hear the child or refuse it by motivated decision, according to the common right of hearing in proceedings mentioned in Art. 56*bis* Belgian LJP (Art. 51(1) Belgian LJP). The Law on guardianship of 29 April 2001 has installed a specific right to be heard in actions before the Justice of the Peace concerning guardianship and parental responsibilities (Art. 1233(1) Belgian Judicial Code). The Justice of the Peace must call upon the minor, when the child is twelve years old in actions that concern its person, and when it is fifteen years old in procedures that concern its property (Art. 1233(1)(2) Belgian Judicial Code).<sup>153</sup>

A child of the age of fourteen also has the right to attend hearings when the court decides upon parental responsibilities, unless the court decides that according to the circumstances it is better to forbid the presence of the child.<sup>154</sup> Finally, a proposal has been made in Parliament according to which every minor who has reached the age of twelve, and asks, must be heard in every dispute that concerns it.<sup>155</sup> This proposal would have the advantage of uniformising the hearing of the child making it imperative (and no longer a right in certain cases, as now) and by introducing one criterion of age (now, the age of discernment, fourteen years and fifteen years are other criteria).

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<sup>153</sup> F. APS, 'De procedures inzake voogdij en het hoorrecht van minderjarigen', in: P. SENAEVE, J. GERLO and F. LIEVENS (eds.), *De hervorming van het voogdijrecht*, Antwerpen: Intersentia, 2002, p. 269-291; P. SENAEVE and W. PINTENS, *De hervorming van de echtscheidingsprocedure en het hoorrecht van de minderjarige*, Antwerp: Maklu, 1997, p. 78-79.

<sup>154</sup> Art. 75 Belgian LJP as modified by Belgian Law of 10.03.1999; K. HERBOTS, 'De minderjarige als toeschouwer in de rechtszaal. Beschouwingen aangaande de Wet van 10 maart 1999', *E.J.*, 1999, p. 82.

<sup>155</sup> Projet de loi modifiant diverses dispositions relatives au droit des mineurs d'être entendus par le Juge, *Doc. Parl.* Chambre 25.07.2002, No. 50-1991-01, pour la modification de l'article 931 du Code Judiciaire, [www.lachambre.be](http://www.lachambre.be), document 51K0634.