



Joint Custody after Divorce: Austrian Experiences

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The Austrian Situation: Divorce rates and legal framework

This policy brief illustrates main findings of the professions analysis which was part of the „Evaluation Study on the Effects of the Implementation of the Children’s Rights Amendment Act 2001, with Particular Reference to Joint Custody after Divorce” (commissioned by the Austrian Federal Ministry of Justice).

There is a trend for increased marital breakdown across Europe which is also true for Austria. As to the latest available statistics for 2005 (Statistics Austria 2006), the total divorce rate is 46.4%, with the highest rate in Vienna (63.5%) and the lowest in Tyrol (33.8%). With the rising number of divorces also the number of children, who experienced divorce was growing. The number of children in Austria (under age of 19) that are affected by parents’ divorce increased from 13.500 children in 1990 to 19.000 children in 2001. The likelihood of a parental divorce before the child gets 19 years old is 23.5% (Kytir et al. 2002). This results in a larger group of children growing up in changing family forms. As many Austrian studies showed, parental divorce often implicates that children spend less time with the parent living separated from them.

Against this background, the possibility of joint custody has been introduced in the frame of the Children’s Rights Amendment Act 2001 (hereafter called CRAA 2001). In addition, it was also made possible for both parents to be legal guardians after divorce. Put briefly, preconditions for joint custody after divorce are the consensual decision of both parents as well as their agreement about the main residence of the child. Besides the reform of child custody after divorce, the CRAA 2001 aimed at continuing the implementation of the UN Convention on the Rights of the Child in Austria. The legal position of young people has been strengthened, e.g. by the increased consideration given to their wishes in questions of upbringing and by extended rights to file petitions and the ability to independently take part in legal proceedings for minors under 14 years old. So-called visiting rights after divorce were also standardised as a right of the child and the possibility to enforce this right was improved. Furthermore, the possibility for accompanied visits has been introduced.



Evaluation of the Children's Rights Amendment Act 2001: The professions analysis¹

¹The professions analysis was carried out by Renate Kränzl-Nagl from the European Centre for Social Welfare Policy and Research and Christa Pelikan from the Institute for the Sociology of Law and Criminology (Kränzl-Nagl/ Pelikan 2006).

Five years after the introduction of the CRAA 2001, an evaluation has been carried out in order to get a deeper insight on how this newly introduced legal regulations have been put into practice.

It was the primary objective of this study to gauge the professionals' perceptions of and experience with the Children's Rights Amendment Act 2001, with particular reference to joint custody after divorce. It was, therefore, the purpose of the professions analysis to reflect the "view from outside" of the effectiveness of the tools introduced by the Children's Rights Amendment Act 2001, i.e. the view of those who enforce or deal with the CRAA 2001 in their professional lives, as opposed to the "view from inside", i.e. the reality of divorced couples and their children. A substantiated analysis of the views and experience of various professional groups contributes to making the public and often controversial debate on joint custody after divorce more matter-of-fact.

As to the methodological approach, the study results are based on:

- questionnaires, which were sent out to a total of 647 representatives of seven professional groups in Austria (family judges, lawyers, notaries, court surveyors, mediators, representatives of the youth welfare authorities and staff of family counselling centres)
- 20 oral interviews with family judges in seven of the nine Austrian provinces
- 9 statements by the children's ombudspersons of the Austrian provinces and/or the state, and
- 13 statements by representatives of women shelters.

An advisory board was established to support the completion of the study. The members advised the researchers in drawing up the analysis tools, helped send out the questionnaires and provided access to interview partners for the qualitative analyses.

How much do parents know about joint custody?

The study revealed a substantial lack of knowledge: half of the representatives of the professions believe that the majority of the parents seeking divorce are badly informed about joint custody, and a quarter of the respondents, however, believe that the majority of the parents wanting a divorce are also badly informed about sole custody.

Parents often have wrong ideas about custody regulations. They believe that

- if sharing custody they must agree on everyday and important decisions affecting their child(ren)
- if one parent is granted sole custody the other parent is deprived of some or even all of his/her rights

At the same time, the respondents gave little positive rating to the choice of counselling facilities in the run-up to the divorce: 52% of the respondents stated that there were not sufficient possibilities for children and adolescents to receive counselling. 31% of the respondents stated that there were hardly any or no sufficient counselling facilities for fathers, while 18% stated the same for the counselling facilities for mothers.

In the daily routine of the professionals, how often do they have to deal with cases of joint custody?

One third of the judges estimated that the percentage of parents sharing custody was between 20 and 40% in 2004, one third of the judges estimated the percentage between 40 and 60%, and one fifth believed that even more than 60% of their cases agreed to share custody. Lawyers were more reserved in their estimations than the mediators: 42% of the lawyers believed that up to 20% of their cases were cases of joint custody, one fifth believed that up to 40% were cases of joint custody, a quarter estimated that up to 60% were such cases, and 14% of the respondents stated that the percentage of agreed joint custody was more than 60%. Approx. 50% of the mediators estimated that up to 40% of their cases were cases with joint custody, 21% believe that 40 to 60% parents agreed on joint custody, and 28% of the mediators stated that joint custody was agreed upon in more than 60% of cases.

These estimations lead to the conclusion that currently, at least 50% of the parents want joint custody. This result, which was confirmed in the survey of parents², points to the fact that joint custody has become “normal” and has achieved equal status with sole custody. Very often, children of divorced parents live with their mothers. But sole custody for the father is less likely to be granted than the children’s residence with the father.

² See [Final Report](#) of the evaluation study, drawn up by the Arbeitsgemeinschaft für Psychoanalytische Pädagogik.

How durable is joint custody?

The professions analysis and the interviews with the judges lead to the conclusion that the durability of joint custody is a decisive factor for both parents.

Although any information on the number of divorced couples who want to change from joint custody to sole custody, or at least seek information on such a change, is based on estimations by representatives of the various professional groups (i.e. not facts), the sum total provides an adequately realistic approximation. The number of those “who come back” is small, smaller than many of the judges thought it would be: in 2004, the judges found that between 5 and 10 parents (depending on the size and department of the court involved) sought to put an end to joint custody. This figure is only slightly smaller than the number of those parents seeking to transfer the sole custody right from one parent to the other. However, it must be taken into account that the latter is a rather dramatic step and mostly the outcome of an escalating fight about visiting rights. It is mostly fights about visiting rights which put an end to the joint custody right of both parents. However, representatives of the youth welfare authorities and the respective counselling facilities, who deal with conflicts of this kind every day, reported that such fights are less likely to break out when joint custody is agreed than in the case of sole custody. A significant percentage of the respondents stated, however, that in this respect, they did not notice a difference between the two types of custody. It can be seen that the representatives of the professional groups, in particular judges, believed that joint custody stood the test rather well. But it was not always viable. It seems that parents lacking the prerequisites for a certain cooperation with and mutual acceptance of the other parent, and mostly the parents with whom the children live, slowly come to seek sole custody.

Has the professionals’ attitude towards joint custody changed?

Since the implementation of the Children’s Rights Amendment Act 2001, the attitude of the various professional groups towards joint custody has become more positive. The judges’ attitude has changed most: before the implementation of the CRAA 2001, approximately 30% of the judges often dismissed joint custody as ineffective, whereas now only 15% share this opinion; the attitude of the staff of the youth welfare authorities has changed least: before the implementation of the CRAA 2001, 37% of the staff often dismissed joint custody as ineffective, now still 33% nevertheless share this opinion.



It showed that the female respondents were more sceptical about joint custody than their male colleagues. Basically, however, the outcome of the study had neither been influenced by the provinces or regions the respondents lived in, the time the respondents had been in their offices, nor the extent to which they had dealt with cases of divorce.

Were the rights of the children reinforced?

It was an explicit aim of the reform project to strengthen the rights of the children, which was most clearly manifested by establishing the children's right to have contact with both parents after divorce. Furthermore, the CRAA 2001

- granted children of 14 years or older the right to file petitions and
- re-established the obligation to hear the child's opinion in association with divorce and tutorship/ guardianship proceedings.
- Children of 14 years or older have the right to refuse to visit the other parent.

Putting the obligation to hear the opinions of children and adolescents into practice is somewhat problematic. The questionnaire revealed that the percentage of child hearings is rather high: hearings for children younger than 10 are mostly conducted by representatives of the youth welfare authorities, hearings for older children are often held by the judges themselves. However, it has become clear in the course of the interviews with judges that this topic is extremely controversial: there are those who support such hearings, and those who feel that they are a burden with although little, yet potentially damaging effects on the children. The study also revealed that the use of the other tools to strengthen the rights of the child is relatively low, a fact which is not very surprising. However, the figures and the statements given by the children's ombudspersons showed that the children's right to file petitions is not an unused right and is still applied, even by lawyers. On the other hand, the children's right to refuse to visit the other parent bears only little relevance to the practice of the courts, counselling centres and youth welfare authorities. The children's ombudspersons stated that this right is problematic and needs to be discussed.

The Implementation of the Children’s Rights Amendment Act 2001: A successful story?

The representatives of the seven professional groups are somewhat reserved about the implementation of Children’s Rights Amendment Act 2001 and the newly introduced tools. The majority of the representatives gave good to very good ratings to only some of the objectives of the CRAA 2001:

Table I:
Evaluation by the professional groups of the CRAA’s degree of achievement

*) of the parent without the main custody right (in the case of sole custody)

	very well achieved	well achieved	partly achieved	hardly achieved	not achieved	total
Strengthening the rights of the parent without the main custody right	13,1%	46,7%	33,0%	6,7%	0,6%	100,0
Strengthening the relationship between child and parents	11,9%	34,6%	43,0%	9,7%	0,8%	100,0
Extending the right to information and the right to be heard *)	6,7%	37,6%	38,9%	15,9%	1,0%	100,0
Increased use of mediation as an extrajudicial instrument for the settlement of conflicts	3,7%	19,8%	41,9%	28,9%	5,7%	100,0
Better putting into practice of the visiting right	3,5%	25,1%	40,6%	24,8%	5,9%	100,0
Strengthening the right of the child	8,2%	30,0%	37,5%	19,9%	4,5%	100,0
Increased taking into account of the child’s interests and needs	7,2%	29,7%	40,1%	16,3%	6,7%	100,0



The children's ombudspersons and the staff of women shelters give little positive rating to the achievement of the goals of the CRAA 2001. They mentioned difficulties in the field of visiting rights and lacking attention given to the children's interests and needs.

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Read more about:

[Evaluation of the Children's Rights](#)

[Amendment Act 2001, in particular of](#)

[Joint Custody after Divorce](#)

Demands for a better implementation of the CRAA 2001

The following are the main demands and proposals for the better implementation of the CRAA 2001 and improvement of the situation of the affected persons. These demands and proposals result from the study and enjoy a great amount of acceptance among the respective professional groups and institutions:

- more consciousness-building methods: parents must be conscious of the responsibility they bear after separation and/or divorce and of the special needs of their child(ren)
- more matter-of-fact information for parents on the legal regulations in case of a divorce, in particular of joint custody
- development of counselling and support facilities for affected persons, in particular for children and adolescents and in the run-up to a divorce
- reduction of financial restrictions when taking mediation and/or reduction of costs for parents seeking to take mediation
- establishment of support for the affected children during the proceedings and/or advocates for children and adolescents in tutorship/guardianship proceedings
- more training for all professionals dealing with divorce, in particular those who hear children and adolescents, and
- support for the exchange of opinions among and between the professions dealing with divorce.



References:

Kränzl-Nagl Renate/ Pelikan Christa (2006):

Evaluationsstudie über die Auswirkungen der Neuregelungen des Kindschaffsrechtsänderungs-Gesetzes 2001, insbesondere der Obsorge beider Eltern. Ergebnisse der Berufsgruppenerhebung. Forschungsbericht erstellt im Auftrag des Bundesministeriums für Justiz. Europäisches Zentrum für Wohlfahrtspolitik und Sozialforschung & Institut für Rechts- und Kriminalsoziologie:Wien

Kytir Josef, Helga de Wild and Peter Zuser (2002):

„Demographische Strukturen und Trends 2001“, Statistische Nachrichten 10: 736-754.

Statistics Austria (2006):

Scheidungsrate erreicht 2005 neuen Rekordwert von 46,4%. In Wien enden 63% der Ehen vor dem Scheidungsrichter. Pressemitteilung vom 29.6.2006. Bundesanstalt Statistik Österreich:Wien



When Parents Separate

How children, women and men
experience divorce

This publication is available in German
only, please refer to the below abstract.

Ulrike Zartler, Liselotte Wilk, Renate Kränzl-Nagl (Hg.) (2004):

Wenn Eltern sich trennen

Wie Kinder, Frauen und Männer Scheidung erleben

Wohlfahrtspolitik und Sozialforschung • Band 13
Campus Verlag

Welche Bedeutung hat eine Scheidung für die davon Betroffenen, und wie gehen Kinder, Frauen und Männer mit einer Scheidung bzw. Trennung um? Diese Fragen haben angesichts der nicht nur in Österreich, sondern europaweit konstant hohen Scheidungsraten nach wie vor hohe Aktualität. Der vorliegende Band greift diese Fragen auf. Zu ihrer Beantwortung werden die ökonomischen und rechtlichen Rahmenbedingungen, welche die Folie des Trennungsprozesses bilden, veranschaulicht und die Perspektiven und Erlebensweisen der einzelnen Mitglieder von Nachscheidungsfamilien (Kinder, Frauen, Männer) dargestellt und analysiert. Dabei wird sowohl auf die Entwicklung zur Scheidung/Trennung als auch auf den Bewältigungsprozess Bezug genommen.

Anhand statistischer Daten wird die mit Scheidung verbundene ökonomische Beeinträchtigung vor allem von Frauen veranschaulicht. Eine Analyse der gesetzlichen Verankerung von Scheidung und Trennung verweist auf die Bedeutung rechtlicher Festlegungen für die Gestaltung des Scheidungsprozesses und die Lebensgestaltung der Familienmitglieder nach einer Scheidung. Ausgehend von entscheidungs- bzw. stresstheoretischen Zugängen werden im Hauptteil des Buches die Ergebnisse einer empirischen Studie, basierend auf Interviews mit Mitgliedern von Scheidungsfamilien und ExpertInnen, dargestellt. Dabei wird gezeigt, dass es „die“ Scheidung nicht gibt und sich die Situation von Kindern, Frauen und Männern stark unterscheidet. Das betrifft das Erleben des Trennungsprozesses ebenso wie den Umgang mit Veränderungen und Herausforderungen. Besondere Berücksichtigung finden die nach wie vor unterschiedlichen Chancen zur Bewältigung von Scheidungsfolgen in Stadt und Land.

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