

**ARTICLE****Legal relations among adults and children in view of changing family structures in Austria***dr. Elmar Buchstätter*

Modern family structures can be multi-layered and complex, particularly when children are involved. New relationships often add or substitute adults into a family structure who fulfill parental roles even though there is no biological connection to the child. Conversely, adults may remain within the family structure even though they have no emotional bond but only a purely biological connection. Inevitably, the question arises as to how the reorganization of personal structures affects the legal parent-child relationship. This article addresses the legal situation of children in Austrian stepfamilies focusing on the interdependent rights and duties of the various adult family members towards their children.

**1. Diversity and plurality of family forms***1.1 Changing family structures*

If one strictly adheres to the wording of the General Civil Code,<sup>1</sup> Austrian law understands family to mean the progenitors and all their descendants<sup>2</sup> with the main roles divided between the parents and the children<sup>3</sup> and the legal basis being a marriage contract.<sup>4</sup> This merely programmatic statement, however, does not correspond with today's much broader understanding of family. The qualification of legal entities is already limited by the law itself and adapted to the facts of the respective norm, whereas the requirement of marriage as justification is far too narrow and does not meet today's social requirements.<sup>5</sup> In fact, the concept of family is subject to constant change due to social developments as well as psychological and medical findings.<sup>6</sup> In the development of law, Austria has been strongly influenced by the case law of the European Court of Human Rights in

- 1 Judicial Law Gazette No 946/1811, in the version dated 12.10.2023, Federal Law Gazette I No 115/2023.
- 2 Non-official translation of the General Civil Code by *Eschig/Pircher-Eschig*, Das österreichische ABGB – The Austrian Civil Code, 2<sup>nd</sup> ed (2021) s 40 General Civil Code.
- 3 S 42 General Civil Code: irrespective of the degree of kinship, 'parents' refer to all relatives in the ascending line and 'children' refer to all relatives in the descending line.
- 4 S 44 General Civil Code.
- 5 *I.a., Kronthaler in Schwimann/Kodek*, ABGB: Praxiskommentar, 5<sup>th</sup> ed (2020) s 40 General Civil Code marg No 2.
- 6 *Smutny in Kletečka/Schauer*, ABGB-ON, vers 1.07 (2019) s 44 General Civil Code, marg No 2.

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recent decades.<sup>7</sup> Although, the European Convention on Human Rights does not define the terms family or family life,<sup>8</sup> an application in the sense of Article 8 of the European Convention on Human Rights must be independent of marriage.<sup>9</sup> However, the European Court of Human Rights emphasizes that the main criterion is an existing family life.<sup>10</sup>

A family in the legal sense is therefore not only the traditional family of a married couple with children, but also registered partnerships or informal partnerships, each with or without biological or at least legal children, as well as single mothers or fathers and alternative and modern family concepts such as stepfamilies.<sup>11</sup> In the latter two adults and one or more children live together and yet do not form a family in the classical sense because one of the adults is not the biological parent of at least one of the other adult's children.<sup>12</sup> In 2020, there were 83.000 stepfamilies in Austria, which is 8.6% of all couples who have shared a household with children under the age of 18.<sup>13</sup> Despite the increasing importance of stepfamilies, however, there are neither explicit definitions in the legal system nor are the rights and obligations of stepparents mapped in a separate law.<sup>14</sup> Recently, the Austrian Supreme Court has reinforced its support for the legal recognition of alternative family structures. In a noteworthy case, a stepfather pursued a claim for bereavement damages after his stepson was involved in a fatal traffic accident. The Supreme Court emphasized the evolving legislative trend, which increasingly tends to equate the relationships between stepparents and stepchildren with those between legal parents and children under specific circumstances. In this particular case, the stepfather had effectively assumed the role of the biological father and had fostered a 'warm and close relationship' with his stepson. Sharing the same household, he actively attended to the child's school-related matters and addressed any problems that arose. Consequently, the Supreme Court deemed the stepfather as a relative deserving of compensation. This ruling reflects a broader acknowledgment of the intricate dynamics within alternative family structures

7 Since 1958, the ECHR has been an integral part of Austrian Constitutional Law, Federal Law Gazette No 210/1958.

8 *Schoditsch*, Gleichheit und Diversität im Familienrecht (2020) 22.

9 *Wildhaber/Breitenmoser* in *Pabel/Schmahl*, Internationaler Kommentar zur Europäischen Menschenrechtskonvention, LBW, 7.1.2022, Art 8 ECHR.

10 *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 7<sup>th</sup> ed (2021) s 22 ECHR, marg No 16; *Smutny* in *Kletečka/Schauer*, ABGB-ON, vers 1.07, s 44 General Civil Code, marg No 2.

11 Austrian Constitutional Court, e.g., Judgements of 28.6.2003, G 78/00 and 22.6.2009, U 1031/09.

12 *Théry*, Einführung: Die Zeit der Fortsetzungsfamilien, in *Meulders-Klein/Théry*, Fortsetzungsfamilien, Neue familiale Lebensformen in pluridisziplinärer Betrachtung (1993) 19.

13 Statistik Austria, 2020 Survey of Family Forms, available at [https://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/bevoelkerung/haushalte\\_familien\\_lebensformen/familien/index.html](https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/haushalte_familien_lebensformen/familien/index.html) (27.12.2023).

14 *Kronthaler* in *Schwimmann/Kodek*, ABGB: Praxiskommentar, 5<sup>th</sup> ed (2020) s 40 General Civil Code, marg No 3; for the legal consideration of the duties and rights of stepparents see 2.1.

and underscores the judiciary's commitment to adapting legal frameworks to accommodate evolving societal norms.<sup>15</sup>

Apart from the admissibility of various family concepts it needs no special mention that Austrian law treats all genders equally: same-sex spouses/partners have the same rights and obligations towards the other spouse/partner and his/her children as opposite-sex spouses/partners.<sup>16</sup> But however far the concept of family may have developed, it is still restricted in certain manifestations: polygamous family forms are prohibited – in Austria no one can marry or enter into a registered partnership if he/she is still living in such a relationship.<sup>17</sup> Austrian law also does not recognize a family-guarantee system as exists in the *kafala* often known in Arab countries. This, however, is in line with the recent case law of the European Court of Justice, according to which only biological and adopted children can be considered direct descendants of citizens of the European Union.<sup>18</sup>

### 1.2 Family functions

Although children are no longer a prerequisite for starting a legal family, family's functions naturally shift when there are children in the family – the most important task of parents is to care for and raise their children.<sup>19</sup> The nature of parental responsibilities implies that the primary holders should be the parents of a minor child according to Section 158 of the General Civil Code; they must be recognized as mother and father or other parent in order to be entitled to take care.<sup>20</sup> Married parents or parents in a registered partnership are usually both entrusted with parental responsibilities, while the single mother initially bears the responsibilities alone.<sup>21</sup> Considering the best interests of the child, however, parental responsibilities can also be assigned to grandparents, foster parents or other persons as well as to the child and youth welfare agency.<sup>22</sup> Parental responsibilities include not only certain rights, such as legal representation of the child, but also duties such as care

15 Austrian Supreme Court, Judgement of 19.9.2023, 2 Ob 126/23b; also see Der Standard (Austrian daily newspaper), Auch Stiefeltern können Anspruch auf Trauerschmerzensgeld haben (13.10.2023), available at <https://www.derstandard.at/story/3000000190775/auch-stiefeltern-koennen-anspruch-auf-trauerschmerzensgeld-haben> (27.12.2023).

16 Since 2019 same-sex as well as opposite-sex partners have been allowed to enter into either a civil marriage or a registered partnership. In addition to several other rulings by the Constitutional Court, far reaching equality of the two institutions was recently achieved. Austrian Constitutional Court, Judgement of 4.12.2017, G 258-259/2017.

17 Polygamy is punishable according to s 192 Austrian Penal Code, Federal Law Gazette No 60/1974, in the version dated 15.11.2023, Federal Law Gazette I No 135/2023; also see s 5 (1) para 2 Registered Partnership Act, Federal Law Gazette I No 135/2009, in the version dated 14.5.2021, Federal Law Gazette I No 86/2021.

18 Case C-129/18, *SM v Entry Clearance Officer, UK Visa Section*, ECLI:EU:C:2019:248.

19 *Smutny in Kletečka/Schauer*, ABGB-ON, vers 1.07 (2019) s 44 General Civil Code, marg No 42; Austrian Supreme Court, Judgement of 19.6.2013, 7 Ob 92/13 z.

20 *Gitschthaler in Schwimann/Kodek*, ABGB: Praxiskommentar, 5<sup>th</sup> ed (2020) s 158 General Civil Code, marg No 2; *Roth*, Außerstreitverfahrensrecht, 7<sup>th</sup> ed (2023) 122.

21 *Weitzenböck in Schwimann/Neumayr*, ABGB: Taschenkommentar, 5<sup>th</sup> ed (2020) s 185 General Civil Code, marg No 6.

22 S 181 (1) and s 182 General Civil Code; *Huber*, Rechte und Pflichten zwischen Eltern und Kindern, in *Deixler-Hübner*, Handbuch Familienrecht, 2<sup>nd</sup> ed (2020) 293 (297).

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and education.<sup>23</sup> In accordance with Article 2(1) of the Federal Constitutional Law on the Rights of Children,<sup>24</sup> Section 187 of the General Civil Code determines the right of the child and the parent who is not living in the same household as the child, to regular personal and direct contact, unless this is contrary to the best interests of the child. The right to personal contact is a fundamental right that forms part of the parent-child relationship and constitutes a universally recognized human right protected by Article 8 of the European Convention on Human Rights.<sup>25</sup> In this context, Section 187 of the General Civil Code refers to the ‘legal parents’, which is why the recognition of parenthood is a prerequisite for the right to access.<sup>26</sup> However, another person may obtain a subsidiary visiting right under Section 188 of the General Civil Code if there is an emotional bond between the child and the person which is significant for the psychological well-being of the child.<sup>27</sup> Consequently, protecting the best interests of their children becomes ‘the’ fundamental family function.<sup>28</sup> In the 2013 Act Amending the Act of Children and Names<sup>29</sup> the legislator prioritized the best interests of the child as a radical concept of the law.<sup>30</sup> However, the legal situation of the child should not only relate to their protection: it is fundamental that the child’s view concerning care and education matters shall always be considered.<sup>31</sup>

## 2. Recognition of multiple parental figures in stepfamilies

When a family’s underlying relationship changes, there are often more than two adults in close proximity to a child, but not all of them are biological parents nor derive their rights and responsibilities from a legally recognized parent-child relationship. The resulting constellations of ‘multiple parents’ can lead to unclear legal positions with regard to care and representation or even contact with the child. The following provides an overview of the legal status of stepparents, focusing on the question to what extent and on what legal basis the stepparent can establish a parental role, expressly excepting stepparents who do establish legally replicated parenthood by way of adoption. The scope of the stepparent’s rights and duties depends upon the nature of the relationship between stepparent and biological parent.

23 *Eschig/Pircher-Eschig*, Das österreichische ABGB – The Austrian Civil Code, 2<sup>nd</sup> ed (2021) s 158 General Civil Code; *Roth*, Außerstreitverfahrensrecht, 7<sup>th</sup> ed (2023) 113.

24 Federal Constitutional Law on the Rights of Children of 15.2.2011, Federal Law Gazette I No 4/2011.

25 *Beck*, Kindschaftsrecht, 3<sup>rd</sup> ed (2021) marg No 754a.

26 Under Austrian family law, the term ‘parent’ typically denotes individuals who have legal recognition as parents, either through legal assignment or court order. *Huber*, Rechte und Pflichten zwischen Eltern und Kindern, in *Deixler-Hübner*, Handbuch Familienrecht, 2<sup>nd</sup> ed (2020) 293 (333); Austrian Supreme Court, Judgement of 24.5.2007, 2Ob26/07y.

27 Austrian Supreme Court, Judgement of 21.2.2018, 3 Ob 130/17i.

28 See the ‘good conduct requirement’ pursuant to s 159 General Civil Code.

29 Federal Law Gazette I No 2013/15.

30 S 137 *et seq* General Civil Code.

31 S 160(3) General Civil Code.

## 2.1 Spouses and registered partners

In 2006, a first attempt was made to establish a provision obliging one spouse to provide reasonable assistance to the other in the exercise of parental responsibilities for his/her biological children.<sup>32</sup> However, it was only in the course of the 2009 Family Law Amending Act<sup>33</sup> that the legislator succeeded in introducing a special consideration of modern family forms and relationships.<sup>34</sup> Although established case law has already subsumed the spouse's participation in the upbringing of the other spouse's children under the general duty to assist of Section 90(1) of the General Civil Code,<sup>35</sup> the newly added Section 90(3) of the General Civil Code is noteworthy: it provides for an explicit extension of the spouse's duty to cooperate in non-essential matters of parental responsibilities.<sup>36</sup>

The duty to assist exists irrespectively of whether the new spouse lives in a joint household with their stepchild.<sup>37</sup> If a parent to whom parental responsibilities of their child were transferred from a previous relationship enters into a civil marriage, the new spouse must assist in the exercising of parental responsibilities.<sup>38</sup> It is irrelevant whether the biological parent has full or joint parental responsibilities. This power of representation is by law an essential element of marriage and does not require the consent of the spouse who holds parental responsibilities.<sup>39</sup> The provision, however, covers only those areas of parental responsibilities that concern 'matters of daily life', namely those that occur regularly and affect the child's development only in a way that is correctable,<sup>40</sup> such as picking up the stepchild from kindergarten or writing an excuse for school.<sup>41</sup> The stepparent's power of representation results from the legal relationship of the spouses and therefore only exists *vis-à-vis* the other spouse, but not towards a stepchild. The stepparent has no parental responsibilities of their own<sup>42</sup> and their representation is only necessary if the biological parent is prevented from fulfilling the responsibilities by illness or absence.<sup>43</sup> If the biological parents share parental responsibilities, the stepparent's right to legally represent is only relevant if both biological parents are unable to exercise their responsibilities.<sup>44</sup> The spouse

32 *Smutny in Kletečka/Schauer*, ABGB-ON, vers 1.07 (2019) s 44 General Civil Code, marg No 43.

33 Federal Law Gazette I No 75/2009.

34 Explanatory notes to the Individual Request 673/A, XXIV. legislation period 16.

35 *Ferrari in Schwimann/Neumayr*, ABGB: Taschenkommentar, 5<sup>th</sup> ed (2020) s 90 General Civil Code, marg No 9; Austrian Supreme Court, Judgement of 29.3.1972, 2 Ob 293/71.

36 *Hopf/Kathrein*, Eherecht, 3<sup>rd</sup> ed (2014) s 49 Austrian Marriage Act, marg No 10.

37 *Fischer-Czermak*, Beistandspflichten und Vertretung in Obsorgeangelegenheiten nach dem FamRÄG 2009, EF-Z 2010/2 (4).

38 S 90(3) sentence 2 General Civil Code.

39 *Volgger*, Die Hinderung eines Elternteils an der Ausübung der Obsorge, EF-Z 2011/57 (95).

40 *Ferrari in Schwimann/Neumayr*, ABGB: Taschenkommentar, 5<sup>th</sup> ed (2020) s 90 General Civil Code, marg No 13; *Smutny in Kletečka/Schauer*, ABGB-ON, vers 1.07 (2019) s 90 General Civil Code, marg No 29.

41 *Hopf/Kathrein*, Eherecht, 3<sup>rd</sup> ed (2014) s 90 General Civil Code, marg No 16/1.

42 Explanatory notes to the individual request 673/A, XXIV. legislation period 26; *Volgger*, Die Hinderung eines Elternteils an der Ausübung der Obsorge, EF-Z 2011/57 (95).

43 *Smutny in Kletečka/Schauer*, ABGB-ON, vers 1.07 (2019) s 90 General Civil Code, marg No 29.

44 *Fischer-Czermak*, Beistandspflichten und Vertretung in Obsorgeangelegenheiten nach dem FamRÄG 2009, EF-Z 2010/2 (4).

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entrusted with parental responsibilities may even – expressly or impliedly – grant power of representation for other than daily life matters and thereby exceed the wording of the provision. On the other hand, spouse may also limit or prohibit the stepparent’s authority under Section 90(3) of the General Civil Code. In case a stepparent acts contrary to the declared intent of the spouse holding parental responsibilities, the act is nevertheless legally effective, if the third party was not aware of the restriction. However, such an act may constitute marital misconduct or lead to a claim for damages by the involved child.<sup>45</sup> The special duty of assistance of the stepparent towards their spouse includes every element of parental responsibilities: the care and upbringing of the child as well as the administration of property and representation of the child.<sup>46</sup> However, Section 90(3) of the General Civil Code does not oblige the stepparent to provide maintenance for their stepchild.<sup>47</sup> The extension of the duty to assist under Section 90(3) of the General Civil Code is only relevant if the biological parent entrusted with parental responsibilities and the stepparent are married.

While a direct application or even analogy to registered partnerships cannot be derived, there is a parallel provision to Section 90(1) of the General Civil Code in Section 8(2) of the Registered Partnership Act. Although this duty to assist the other registered partner does not contain an explicit reference to representation in matters of parental responsibilities, the content of the provision must be understood in the same way as the provision for married couples – if only because of the case law of the Constitutional Court on the equality of marriage and registered partnership.<sup>48</sup>

Children in stepfamilies also find noteworthy consideration in Austrian social insurance law: if the biological parent and the stepparent are married or have entered into a registered partnership, stepchildren are treated the same as biological relatives under the General Social Insurance Act<sup>49</sup> with regard to their stepparents.<sup>50</sup> This classification entitles stepchildren to claim under the health insurance of their stepparents.<sup>51</sup> Even if the spouses divorce or the registered partnership is dissolved, the stepchild remains a relative of the stepparent in this connection.<sup>52</sup>

## 2.2 Informal partners

Informal partners have had a weak position in Austrian law so far: only in a few respects, does the law place their relationship on an equal footing with marital and

45 *Smutny in Kletečka/Schauer*, ABGB-ON, vers 1.07 (2019) s 90 General Civil Code, marg No 29.

46 *Fischer-Czermak*, Beistandspflichten und Vertretung in Obsorgeangelegenheiten nach dem FamRÄG 2009, EF-Z 2010/2 (5); *Jetzinger*, Gesetzliches Erbrecht für Stiefkinder, JEV 2019/3 (112); *Nademleinsky*, Das FamRÄG 2009 – Die wichtigsten Änderungen, Zak 2009/17 (326).

47 Explanatory notes to the individual request 673/A, XXIV. legislation period 26.

48 *Jetzinger*, Gesetzliches Erbrecht für Stiefkinder, JEV 2019/3 (112).

49 Federal Law Gazette No 189/1955, in the version dated 22.12.2023, Federal Law Gazette I No 152/2023.

50 S 123(3) General Social Insurance Law.

51 *Windisch-Greatz in Mosler/Müller/Pfeil*, Der SV-Komm (2016) s 123 General Social Insurance Law, marg No 22.

52 S 123(3) General Social Insurance Law.

formal partnership relationships or at least attach legal consequences to the existence of the informal partnership.<sup>53</sup>

For stepparents living in an informal partnership, the situation appears to be as follows: neither Section 90(3) of the General Civil Code nor Section 8(2) of the Registered Partnership Act can be applied by analogy to informal partnerships, as such relationships do not give rise to mutual duties of assistance under Austrian law.<sup>54</sup> Therefore, the 2013 Act Amending the Act on Children and Names separately considers stepparents living in an informal relationship: Section 139(2) of the General Civil Code for the first time provides a legal basis to represent the biological parent in parental responsibility matters of daily life. The provision enables informal partners to participate in family issues in the same way as is provided for spouses<sup>55</sup> and registered partners.<sup>56</sup> According to its wording, Section 139(2) of the General Civil Code also obliges partners to safeguard the best interests of the child.<sup>57</sup> However, these rights and obligations only apply if the partner lives in the same household as the parent and the parent's minor child<sup>58</sup> and if there is also a family relationship with the parent.<sup>59</sup> The provision therefore refers to stepparents, irrespective of whether they are married/partnered<sup>60</sup> or live in an informal partnership,<sup>61</sup> and goes beyond the scope of application of Section 90(3) of the General Civil Code and Section 8(2) of the Registered Partnership Act; Section 139(2) of the General Civil Code is not primarily about the support of a partner, but about the protection of the child within a partnership. The legislature wants to ensure that every person who is in the immediate vicinity of the child does everything in their power to protect the best interests of the child. Although the right to represent the partner in daily matters of parental responsibilities also arises from Section 139(2) of the General Civil Code it can be restricted by the biological parent – just as is provided for in Section 90(3) of the General Civil Code.

53 *E.g.*, in the recently updated inheritance law, see s 677(3), s 745(2) and s 748 General Civil Code.

54 *Fischer-Czermak*, Beistandspflichten und Vertretung in Obsorgeangelegenheiten nach dem FamRAG 2009, EF-Z 2010/2 (4); *Jetzinger*, Gesetzliches Erbrecht für Stiefkinder, JEV 2019/3 (112); *Stefula*, Die Neuerungen zur Patchworkfamilie – Anwendungsbereich und Reichweite von § 90 Abs 3 und § 137 Abs 4 ABGB, iFamZ 2009/5 (266).

55 S 90(3) General Civil Code.

56 S 8(2) Registered Partnership Act.

57 In addition to the constitutional anchoring in Austrian law, the best interests of the child are described based on a not exhaustive list of criteria under s 138 General Civil Code.

58 This additional requirement has been established by the 2013 Act Amending the Act on Children and Names to extend the duty of assistance to informal partners: see Explanatory notes to the Governmental Proposals, 2004 of the addenda to the stenographic protocol of the national council, XXIV. legislation period 18.

59 *Barth/Jelinek*, Das neue Obsorgerecht, in *Barth/Deixler-Hübner/Jelinek*, Handbuch des neuen Kindschafts- und Namensrechts (2013) 109 (140).

60 According to s 2 Registered Partnership Act.

61 *Deixler-Hübner*, Obsorge, in *Deixler-Hübner*, Scheidung, Ehe und Lebensgemeinschaft, 13<sup>th</sup> ed (2019) 196 (201); *Fischer-Czermak* in *Kletečka/Schauer*, ABGB-ON, vers 1.05 (2017) s 139 General Civil Code, marg No 6.

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These restrictions would render the respective act of representation ineffective if a third party were to become aware of it.<sup>62</sup>

### 3. Conflict of rights between the stepparent and the other biological parent?

As outlined above, a stepparent who is married to or partnered with the biological parent and/or lives in a joint household with the stepchild can obtain rights and obligations from Section 90(3) and/or 139(2) of the General Civil Code and/or Section 8(2) of the Registered Partnership Act. However, for the rights and duties of the other biological parent *vis-à-vis* the rights and duties of the stepparent, the decisive question is whether both biological parents have joint parental responsibilities or the biological parent with whom the child resides is entrusted with sole full parental responsibilities.

#### 3.1 Cases involving joint parental responsibilities

If the biological parents exercise parental responsibilities jointly, the parent who does not live with the child in a shared household has the same rights as the parent who permanently lives with the child. In the case of joint parental responsibilities, the biological parent who does not live with the child nevertheless has more rights and duties<sup>63</sup> than the stepparent who shares the household with their stepchild. Consequently, there can be no conflict between the rights and duties of the biological parent and the stepparent's duty of representation. It is assumed that in the case of joint parental responsibilities, the stepparent's power of representation can only be exercised if both biological parents are unable to exercise their parental responsibilities – possible conflicts between the biological parent and the stepparent are thus prevented.<sup>64</sup>

#### 3.2 Cases involving sole parental responsibilities

If one biological parent is entrusted with full parental responsibilities, the other biological parent has certain rights and duties with regard to personal contact<sup>65</sup> and the right to information, expression and representation according to Section 189 of the General Civil Code. The parent who is not entrusted with parental responsibilities may represent the parent who is fully entrusted with parental responsibilities in matters of daily life if circumstances so require and the

62 Explanatory notes to the Governmental Proposals, 2004 of the addenda to the stenographic protocol of the national council, XXIV. legislation period 18.

63 Even if parental responsibilities are shared with the other biological parent, each of them is the recipient of all rights and duties in matters of parental responsibilities under s 158 *et seq* General Civil Code.

64 *Fischer-Czermak*, Beistandspflichten und Vertretung in Obsorgeangelegenheiten nach dem FamRÄG 2009, EF-Z 2010/2 (6); *Hopf*, Neues im Ehe- und Kindschaftsrecht – Änderungen des ABGB und des EheG durch das FamRÄG 2009, ÖJZ 2010/19 (156); *Smutny* in *Kletečka/Schauer*, ABGB-ON, vers 1.07 (2019) s 90 General Civil Code, marg No 29.

65 S 186 *et seq* General Civil Code; *Roth*, Außerstreitverfahrensrecht, 7<sup>th</sup> ed (2023) 138.



child lawfully stays with that parent at that time.<sup>66</sup> This right resembles the right of stepparents as portrayed above. However, the rights and duties of the other biological parent and the stepparent do not contradict each other because the biological parent, who has no parental responsibilities, can only exercise the duty of representation if the child is currently staying with him/them. On the other hand, if the child is staying with the stepparent and with the biological parent who has full parental responsibilities and a situation arises in which the biological parent is unable to exercise their parental responsibilities, the stepparent may exercise their duty of representation pursuant to Section 90(3) of the General Civil Code, Section 8(2) of the Registered Partnership Act or Section 139(2) of the General Civil Code. However, if such a situation occurs while the child lawfully stays with the other biological parent based on the right of contact, this parent is obliged to act pursuant to Section 189(1) para 2 of the General Civil Code. This in turn means that conflicts between the other biological parent and the stepparent are *de facto* excluded in this scenario as well.

### 3.3 Role of the child's place of residence

Pursuant to Section 179(2) and Section 180(2) sentence 3 of the General Civil Code, parents have to determine in which household the child should predominantly reside, even if they share parental responsibilities. Since the 2015 ruling of the Constitutional Court<sup>67</sup> and its adoption by the Supreme Court,<sup>68</sup> the indication of the main residence should only be a nominal factor for other legal claims.<sup>69</sup> This leads to the applicability of the double-residence model, which states that children can legally live in one household with their mother and in a different one with their father.<sup>70</sup> The prerequisite is the equal care of the child and thus mostly joint parental responsibilities.<sup>71</sup> It is therefore obvious that the father's new partner and the mother's new partner can become stepparents of the child and receive rights and obligations. As long as the biological parents have joint parental responsibilities, the stepparent is only obliged to act according to Section 90(3) of the General Civil Code or Section 8(2) of the Registered Partnership Act and 139(2) of the General Civil Code if both biological parents are unable to exercise their parental responsibilities. In this case it is unclear which of the two stepparents is obliged to represent the biological parents. A logical solution is that the stepparent with whom the child is staying in such a situation has to fulfil the duty of representation.

66 S 189 General Civil Code; Explanatory notes to the Governmental Proposals, 2004 of the addenda to the stenographic protocol of the national council, XXIV. legislation period 30; Roth, *Außerstreitverfahrensrecht*, 7<sup>th</sup> ed (2023) 141.

67 Austrian Constitutional Court, Judgement of 9.10.2015, G 152/2015.

68 *I.a.*, Austrian Supreme Court, Judgement of 24.8.2016, 3 Ob 121/16i.

69 *E.g.*, in Registration Law.

70 Fischer-Czermak, *Doppelresidenz aus obsorge- und kontaktrechtlicher Sicht*, EF-Z 2019/6 (250).

71 It is also conceivable that the child could live with both parents, but only one parent has full parental responsibilities, as the application here is based on the parent's comprehensive right of access. As a rule, however, the double-residence model is mainly applicable when the parents have joint parental responsibilities, see Fischer-Czermak, *Doppelresidenz aus obsorge- und kontaktrechtlicher Sicht*, EF-Z 2019/6 (254).

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#### 4. Stepparents functioning as foster parents

Under certain conditions stepparents may also be foster parents. If the legal parents are unable to fulfill their duties, priority is given to entrusting parenthood to foster parents or grandparents in accordance with Section 178(1) of the General Civil Code. Only if these options are not viable should another suitable person be appointed in accordance with Section 204 of the General Civil Code.<sup>72</sup> Foster parents within the meaning of Section 184 of the General Civil Code wholly or partly take care of the upbringing of a child with whom they have a relationship comparable to the parent-child relationship.<sup>73</sup> A foster care relationship can be implied<sup>74</sup> if the conditions are met,<sup>75</sup> which is often the case between a stepparent and a stepchild.<sup>76</sup> Foster parents can only assume parental responsibilities if the responsibilities are assigned to them by the court upon application pursuant to Section 185 of the General Civil Code.<sup>77</sup> If parental responsibilities are transferred to a foster parent, they must always be transferred as a whole. A foster parent cannot be entrusted with joint parental responsibilities together with a biological parent.<sup>78</sup> In other words, as long as the stepparent's partner is entrusted with parental responsibilities for their child, a stepparent cannot be granted parental responsibilities.<sup>79</sup>

A stepparent may only be entrusted with parental responsibilities if they fulfill the requirements as foster parents<sup>80</sup> and if his/their partner who has sole parental care is deceased, their residence has been unknown for at least six months or contact cannot be established or can only be established with difficulty.<sup>81</sup> If the absent parent shares parental responsibilities with the other parent, there is no possibility

72 Recently the Austrian Supreme Court deemed the 'rigid hierarchy' in the assignment of parental responsibilities as detrimental to the child's best interests. This is because individuals closely related to the child, such as siblings of the legal parents, are not considered for assuming parenthood unless they already have a close relationship with the child at the time of the transfer (Austrian Supreme Court, Judgement of 30.5.2022, 2 Ob 42/22y). The Constitutional Court followed the Supreme Court's request and annulled the relevant sections of the law (Austrian Constitutional Court, Judgement of 9.3.2023, G 223/2022-26).

73 Roth, *Außerstreitverfahrensrecht*, 7<sup>th</sup> ed (2023) 131.

74 Deixler-Hübner in *Kletečka/Schauer*, ABGB-ON, vers 1.07 (2019) s 184 General Civil Code, marg No 5; Austrian Supreme Court, Judgement of 26.8.2003, 5 Ob 187.

75 In order to meet the definition of 'foster parent', it is sufficient if a person actually provides care and upbringing in whole or in part and at least intends to establish a personal relationship that comes close to the relationship between biological parents and children. Austrian Supreme Court, Judgement of 14.12.2011, 3 Ob 165/11b.

76 Barth/Neumayr in *Fenyves/Kerschner/Vonkilch*, *Großkommentar zum ABGB*, 3<sup>rd</sup> ed (2008) s 186 General Civil Code, marg No 15.

77 Deixler-Hübner in *Kletečka/Schauer*, ABGB-ON, vers 1.07 (2019) s 185 General Civil Code, marg No 3.

78 Weitzenböck in *Schwimann/Neumayr*, ABGB: Taschenkommentar, 5<sup>th</sup> ed (2020) s 185 General Civil Code, marg No 3; Austrian Supreme Court, Judgement of 25.9.2002, 7 Ob 144/02f.

79 Austrian Supreme Court, Judgement of 25.9.2002, 7 Ob 144/02f and Resolution of 30.11.2011, 7 Ob 124/11b.

80 S 184 General Civil Code.

81 Gitschthaler in *Schwimann/Kodek*, ABGB: Praxiskommentar, 5<sup>th</sup> ed (2020) s 178 General Civil Code, marg No 3.

to transfer the responsibilities to the stepparent, as the remaining biological parent receives full parental responsibilities *ex lege*.<sup>82</sup> Only if the deceased or absent parent had full parental responsibilities according to Section 178 of the General Civil Code, can the foster parent also be entrusted with full parental responsibilities.<sup>83</sup> The decision shall be taken by the court with particular regard to the best interests of the child. It is important to note that none of the persons mentioned in Section 178(1) sentence 2 of the General Civil Code takes precedence over another: stepparents are therefore on an equal footing with the stepchild's remaining biological parent and grandparents. The decision as to who parental responsibilities are ultimately assigned to is based on the emotional and social relationship the child has with the person in question.<sup>84</sup> Accordingly, if a stepparent can be considered a foster parent pursuant to Section 184 of the General Civil Code and if they are closely associated with the child at the time of the shift of parental responsibilities, the court shall transfer parental responsibilities to them instead of to the other biological parent with whom the child has almost no contact.<sup>85</sup> If both the remaining biological parent and the stepparent appear equally suitable to assume parental responsibilities the court favours the biological parent.<sup>86</sup> Stepparents who are considered foster parents are entitled to a childcare allowance according to Section 2(1) of the Childcare Allowance Act.<sup>87</sup> However, the entitlement of the stepparent only exists if no other parent receives benefits on the same legal grounds. The 2012 General Social Law Amending Act<sup>88</sup> opened the possibility for stepparents – irrespectively of whether they are spouses, registered partners or informal partners of the biological parent – to claim care leave for their stepchild<sup>89</sup> pursuant to Section 16(1) para 2 of the Annual Leave Act.<sup>90</sup> This, however, is only possible if the stepparent shares his/her common household with the stepchild.<sup>91</sup>

82 S 178 (1) sentence 1 General Civil Code.

83 *Gitschthaler* in *Schwimann/Kodek*, ABGB: Praxiskommentar, 5<sup>th</sup> ed (2020) s 178 General Civil Code, marg No 12; Regional Court of Linz, Judgement of 24.4.2014, 15 R 190/14p.

84 *Fischer-Czermak* in *Kletečka/Schauer*, ABGB-ON, vers 1.04 (2015) s 178 General Civil Code, marg No 9; Vienna Higher Civil Court, Judgement of 4.9.2007, 44 R 370/07y.

85 Explanatory notes to the Governmental Proposals, 296 of the addenda to the stenographic protocol of the national council, XXI. legislation period 52; *Volgger*, Die Hinderung eines Elternteils an der Ausübung der Obsorge, EF-Z 2011/57 (92).

86 *Fischer-Czermak* in *Kletečka/Schauer*, ABGB-ON, vers 1.04 (2015) s 178 General Civil Code, marg No 17; Vienna Higher Civil Court, Judgement of 1.2.2007, 45 R 18/07s.

87 Federal Law Gazette I No 103/2001, in the version dated 12.10.2023, Federal Law Gazette I No 115/2023.

88 Federal Law Gazette I No 3/2013.

89 The stepchild in this context must be the biological child of the spouse/partner of the stepparent.

90 Federal Law Gazette No 390/1976, in the version dated 12.10.2023, Federal Law Gazette I No 115/2023.

91 *Drs* in *Neumayr/Reissner*, Zeller Kommentar zum Arbeitsrecht, 3<sup>rd</sup> ed (2018) s 16 Annual Leave Act, marg No 14.

dr. Elmar Buchstätter

## 5. Conclusion

Today, those family forms compatible with European values are legally recognized and largely equal with regard to the establishment of a parent-child relationship. However, if family circumstances subsequently change, it is often the children who are most affected. As soon as a new *de facto* parent enters the scene, they are in a complex web of relationships involving their partner, the other legal parent and the child. In the absence of successive adoption redefining the family structure, an interwoven multi-person relationship arises.

The legal position of the stepparent towards the child depends on the form of the underlying relationship with the legal parent. In case of marriage between the stepparent and the legal parent, the stepparent's rights and duties arise from the legal relationship of the spouses and therefore exists only with respect to the other spouse but not with respect to the stepchild. This obtains regardless of whether the new spouse lives in a joint household with their stepchild or whether the legal parent has full or joint parental responsibilities. The mutual assistance obligation required of registered partners must be interpreted in the same broad way as the relevant provision for married couples, if only for consistency in a policy of equality. In addition to marriage and registered partnerships, informal partnerships did become increasingly popular in the past years but have hardly been recognized in the law so far. As there is no mutual assistance obligation between informal partners, a legal connection between the partner and the child can only exist if it is a direct one. Therefore, the legislature has created a rule that enables informal partners to intervene in parental rights and duties. The rule, however, applies only if the informal partner lives in the same household as the parent and the parent's minor child and has a close family relationship with the parent.

Considered positively, the existing rules widely avoid potential conflict situations between a stepparent and the other legal parent in representing the child. Furthermore, the possibility of foster parenthood by the stepparent ensures the preservation of the social family even in the case of a long-term unavailability of the legal parent. All in all, the increasing emphasis on determining roles within the family structure based on the best interests of the child provide a high level of protection for children in stepfamilies.