



EFFECTIVE LAW IN AN EFFECTIVE STATE

*Local conditions in the global context in the face
of 21st century challenges of fighting crime.*

Legal solutions for establishing parental custody after the breakup of a relationship in Switzerland (judicial and extrajudicial)

Author of the analysis:

Prof. dr hab. Ewa Tuora-Schwierskott¹

Translated by:

Agnieszka Janczak

¹ Habilitated doctor, Professor at Collegium Witelona, President of the Deutsch-Polnische Juristen Vereinigung (German-Polish Lawyers Association) in Berlin, ORCID: 0000-0003-0926-2173.



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1. Legal basis

Arranging contact with a parent after parents' divorce is of great importance for the child's psyche. Irrespective of the divorce, children should still be able to have contact with both parents. Swiss civil law – Civil Code (Zivilgesetzbuch – ZGB) states: “Parents who do not exercise parental custody or guardianship and their minor child have a mutual right to appropriate personal contacts”². The legal standard concerns family law regarding the parent-child relationship. Art. 176 Sec. 3 of the Swiss Civil Code ZGB states that if the spouses have minor children, the court will take the necessary measures in accordance with the provisions on the effects of divorce and contact in relation to children³.

Art. 133 of the Civil Code states that the court decides on the parental rights and obligations in accordance with the provisions on the effects of exercising custody of a child. Family court decides on parental custody, childcare, arranging personal contacts with the child and the amount of child support⁴.

The court considers all circumstances important for the child's well-being, including the parents' requests and - if possible - the child's opinion⁵. The court may determine the amount of support upon the child reaching the age of majority and in the standards of divorce proceedings⁶.

When deciding, the court must consider the legal norms of Art. 9 of the UN Convention on the Rights of the Child⁷ and Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁸ regarding the right to cohabitation or to personal contacts

² Swiss Civil Code of December 10, 1907, last amended on September 1, 2023, Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907, https://www.fedlex.admin.ch/eli/cc/24/233_245_233/de#a176, accessed on 20.10.2023.

³ Art. 176 Sec. 3 of the Swiss Civil Code ZGB.

⁴ Art. 133 Sec. 1 of the Swiss Civil Code ZGB.

⁵ Art. 133 Sec. 2 of the Swiss Civil Code ZGB.

⁶ Art. 133 Sec. 3 of the Swiss Civil Code ZGB.

⁷ Convention on the Rights of the Child adopted by the United Nations General Assembly in 1989, <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19911200526/O/D19910526.pdf>, accessed on 20.10.2023.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, https://www.echr.coe.int/documents/d/echr/convention_pol, accessed on 20.10.2023.

between family members, including between the child and parents after the end of the parental relationship, also when the parents no longer live together or are divorced.

To protect the rights of the child and the relationship between parents and children, including the possibility of maintaining this relationship through the right to contact or visitation, the Court of Justice of the European Union attaches great significance to human rights and the rights of the child. It is easy to deduce from its ruling, which assumes that contact with each parent is in the best interests of the child. However, it should be noted that jurisprudence and legal norms do not specify how often the right to contact with a child should be exercised. The main guideline regarding personal contact is the child's well-being, which should be assessed based on the circumstances of a specific, individual case⁹. Best possible solution should be sought for a child considering all the specific circumstances. However, the well-being of the child is the deciding factor, and not the interest of the parent. Visitation rights must be determined on an individual basis. When deciding, the family court uses its discretion in matters relating to determination of visitation rights¹⁰.

⁹ Judgements of the Federal Tribunal 5A_230/2022 Erw. 4.1; 5A_968/2020; 5A_848/2018.

¹⁰ Andrea Büchler, Sandro Clausen, Das «gerichtsübliche» Besuchsrecht- Betrachtungen zum angemessenen Besuchsrecht im Lichte der Rechtsprechung und der jüngsten Gesetzesentwicklungen, FamPra.ch 3/2020. Staempfli Verlag AG, Bern – 2020, p. 539.

2. Parental custody and care for a joint child

The term parental custody is not equivalent with childcare. Parental custody means the right to raise the child, custody of the child's property, legal representation of the child's affairs, care for the child's education and determination of the child's place of residence. If one of the parents has sole parental custody, the child's place of residence is that of this parent under civil law (Art. 25 of the Swiss Civil Code - ZGB)¹¹.

The right to care for a child means taking care of the child's daily matters¹². The term childcare involves the right and obligation to satisfy the child's daily needs without involving the other parent in these daily decisions¹³.

While performing duties arising from the right to childcare, none of the parents must generally interfere in the way the other parent takes care of the child (e.g. the child's diet, sports and educational activities, daily medical care, e.g. in the event of a cold, etc.). The freedom to exercise childcare is limited where the child's well-being is at risk¹⁴.

¹¹ Swiss Civil Code of December 10, 1907, last amended on September 1, 2023, Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907, https://www.fedlex.admin.ch/eli/cc/24/233_245_233/de#a176, accessed on 20.10.2023.

¹² <https://www.gerichte-zh.ch/themen/ehe-und-familie/kinder/elternrechte-pflichten/elterliche-obhut.html>, accessed on 20.10.2023.

¹³ Judgement of the Federal Tribunal 5A_281/2020 consid 4.2, https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F27-04-2021-5A_281-2020&lang=fr&type=show_document&zoom=YES&, accessed on 20.10.2023.

¹⁴ Judgement of the Supreme Court Tribunal BGE 142 III 617.

3. The principle of the best interests of the child as a primary principle in jurisprudence

When determining the rules for the custody of a joint child during a divorce, the family court asks for the opinion of the Office for Children and Youth Affairs (Kinder- und Jugendhilfezentren - kjz)¹⁵.

When determining custody of a child, the court is never bound by the opinion or will of the parents. However, the adjudicating court hears the parents' opinion and tries to accept it but is ultimately and primarily guided by the best interests of the child. Similarly, in the case of a dispute regarding child custody, the court decides based on the best interests of the child. The child's best interests override the parent's interests¹⁶. If the court has good reasons to do so, it may also dismiss recommendations of the Office for Children and Youth Affairs¹⁷. Alternating custody can only be ordered if parental custody is still shared¹⁸.

Even in the event of a formal objection by the parent, the court is obliged - at the request of the parent or the child - to examine, in accordance with the requirements set out in the Swiss Civil Code, whether it is in the child's best interest to decide on alternating custody¹⁹.

¹⁵ <https://www.fuerslebengut.ch/obhut-kontaktrecht-unterhalt/>, accessed on 20.10.2023.

¹⁶ 5A_230/2022 consid 4.1; 5A_968/2020; 5A_848/2018; BGE 142 III 617.

¹⁷ _277/2021 ; 5A_271/2019.

¹⁸ 5A_320/2022; Recommendation 8.

¹⁹ Art. 298 of the Civil Code; judgement of the Federal Tribunal 5A_46/2015, confirmed by act 5A_888/2016.

4. Alternating custody of a joint child

4.1. General principles

For a long time, it was common practice to award parental custody to only one parent. Since 2017, the legislator has been promoting the alternating custody model which is essentially characterized by three aspects: both parents take turns caring for the child, the child has a place of residence (home) with each parent, and parental custody is entirely shared by the father and mother.

Alternating custody means that custody of a child is divided between both parents. This means that the father takes care of the child for a certain period of time and then the mother takes care of the child for a similar period of time. During the care period, parents have full responsibility for the child's affairs. These are the situations where for example, a child lives in an apartment with their father for seven days and then again for seven days with their mother. However, a clear distinction must be made between extended visitation rights and the model of joint, alternating custody of the child. In the case of alternating custody, the parents assume all parental custody for the period in which the child stays with that parent.

In the case of a divorce involving parents with children, the family court is obliged to take into account the amount of child support and which parent should take care of the child. At the same time, parental custody is transferred by law to both parents - the family court first tries to provide the child with care and contact with both parents.

If the child's father and mother have equal parental rights, custody of the child will be awarded to the parent who is best able to care for the child in person. Because many mothers only work part-time in Switzerland, they have more time to take care of the child.

4.2. Models of time division of alternating custody

Childcare is part of parental custody. The family court decides on issues such as the child's place of residence, whether the child lives permanently with one parent or under the care of both parents. The family court determines who deals with the child's daily affairs (e.g. meals), who takes responsibility for everyday and urgent decisions regarding the child.

Family courts strive for equal division of responsibility in childcare²⁰. In this way, the courts try to satisfy the principle of justice while satisfying the child's psychological needs for a specific routine in their life²¹. In the alternating custody model, the parents' share in the care must be at least 30%, because a smaller scope of care and time spent with the parent does not satisfy the psychological needs of the child - a share in the care of the child shorter than 30% can only be considered as extended rights of contact with the child (visits).

That is why family courts often adopt a relatively equal time division, for example: 14 / 14 days = the child spends half of the month with the father and the other half with the mother. 4 / 4 / 2 / 2 = First the father takes the child for 4 days, then the mother does so. This is then reduced to two days each. First and foremost, the best interests of the child must be considered.

4.3. Requirements for alternating custody

The requirements for alternating custody have been clearly defined in jurisprudence. Certain requirements must be met to make alternating custody possible, namely: parenting capacity of both parents, a healthy relationship between the parent and the child, personal care for the children, supportive environment (especially social environment), parents' place of residence and location of the child's school (education), parents' willingness to communicate and cooperate, agreement to promote mutual contacts, age-appropriate arrangements for the division of care and changes according to the child's wishes²². When considering granting custody of a child during divorce proceedings, the courts take into account such factors such as the distance to the other parent's home, because according to jurisdiction, it is necessary to

²⁰ Judgements of the Federal Tribunal 5A_230/2022 Erw. 4.1; 5A_968/2020; 5A_848/2018.

²¹ 5A_230/2022 Erw. 4.1; 5A_968/2020; 5A_848/2018; BGE 142 III 617.

²² Governmental website for family counselling, <https://www.familienrechtsinfo.ch/sorgerecht/alternierende-obhut/>, accessed on 20.10.2023.

consider that the child is not too often separated from their usual social environment and does not have to travel unreasonably long distances. The primary focus should be on the child's well-being.

5. Sole custody of the child

Sole custody means the right and obligation of the parent to reside with the child in the same household and to take care of the child's daily needs. Custody should be distinguished from parental authority. Child custody usually exists jointly, and care is provided by the parent with whom the child usually resides. However, even in the case of sole custody, the parent who does not live with the child has the right to personally contact the child²³.

The parent exercising sole custody is entitled to support in the amount necessary to single-handedly cover the costs of childcare²⁴. This is to allow for the fact that caring for a child entails certain costs for the custodial parent, even limiting their ability to work and earn²⁵. Generally, the custody arrangements established at the time of the prior separation will be retained for the purposes of determining child custody arrangements in the event of a divorce unless there is a fundamental and lasting change in the parent's financial and living situation at that time²⁶.

If the custody of a child is entrusted to one parent, the other parent is generally granted the right to contact the child. If no agreement is reached between the parents, the court decides to grant custody (with the right to contact the child or alternating custody) based on the child's best interests criterion. If, contrary to the rules, parental custody has not been granted to both parents, the non-custodial parent cannot take care of the child. Childcare is therefore assigned to the custodial parent²⁷. The child's best interests are paramount in all considerations. The criteria for deciding on the right to contact a child are the same regardless of the type of relationship or the legal situation of the people deciding to split (divorce/separation/dissolution of a registered partnership/unmarried parents)²⁸.

²³ <https://www.familienrechtsinfo.ch/sorgerecht/alternierende-obhut/>, accessed on 20.10.2023.

²⁴ Art. 285 § 2 of the Swiss Civil Code ZGB.

²⁵ Judgement of the Federal Tribunal 5A_454/2017.

²⁶ Judgement of the Federal Tribunal 5A_549/2016.

²⁷ Judgements of the Federal Tribunal 5A_484/2020, 5A_472/2019.

²⁸ Judgement of the Federal Tribunal 5A_319/2013.

6. Examples from judicial practice

As a result, child custody is more often awarded in court adversarial proceedings. If both parents have the same professional responsibilities, the court is guided by the principle of child's best interests and the stability of their life situation. The adjudicating court wants to know with which parent the child spent more time before the divorce. If the child is old enough to be able to clearly express their wishes, the court must take their opinion into account. The older and more mature the child is, the more important their opinion and wishes are regarding staying with a particular parent²⁹. Other criteria may also be considered (ability to work with the other parent, special personal bond with the child, etc.). According to the judicial practice siblings should not be separated unless as an exceptional situation - for example if there is a big age difference between the children³⁰. Another exception is when a parent moves abroad with one of their children, while the other remains under the care of the parent who does not move and the child remains with them due to their choice of school (5A_637/2022). Another example (without specifying the reason for separation of siblings from the judgment): 5A_91/2022.

The principle that the court should not separate siblings gives the courts greater freedom to adjudicate. A joint child is not subject to the same custody arrangements as their step-siblings³¹.

Due to the stronger emotional bond with the father, the courts also grant custody of the joint child to the father as the sole custodian³². A mother who works only part-time and has approximately the same parenting skills as the father but does nothing to facilitate contact with the father, is still entitled to sole custody of the child because the court decided that she had more time for a child who has lived with her since the parties separated and whose behavioral problems could worsen as a result of a change of the custodian³³. The court confirms denying alternating custody for unmarried parents, in particular in the event of parental conflict and

²⁹ Judgement of the Federal Tribunal 5A_488/2017.

³⁰ Judgement of the Federal Tribunal 5A_901/2017.

³¹ Judgement of the Federal Tribunal 5A_637/2022.

³² Judgements of the Federal Tribunal 5A_159/2020; 5A_729/2020; 5A_455/2019.

³³ Judgement of the Supreme Court BGE 136 I 178.

a social welfare report that advises continuing the situation to which the children are used to and which guarantees regular relationships with parents³⁴.

³⁴ Judgement of the Federal Tribunal 5A_844/2019.



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7. Child support

Child support consists of benefits in kind (Naturalunterhalt - covering expenses related to childcare and education) and cash benefits (Geldunterhalt). Cash benefits are further divided into cash alimony and childcare alimony: cash alimony is to cover the child's monetary costs. These include costs of food, clothing and housing, as well as care such as day care and after-school care. Childcare alimony covers the costs that arise when a parent takes care of the child alone and is unable to work at that time or is only able to work in a limited time³⁵.

If the child is entrusted to the care of a third party (nanny, nursery, etc.) while the parent is working, the costs of this care should be included in the amount of child support³⁶.

³⁵ <https://www.zh.ch/de/familie/eltern-in-trennung/unterhalt-elterliche-sorge.html>, accessed on 20.10.2023.

³⁶ Art. 285 § 2 of the Civil Code.

Summary

According to Swiss legislation, courts deciding to grant custody rights in divorce proceedings are guided by the provisions of the Swiss Civil Code, bearing in mind the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Convention on the Rights of the Child. The court's primary interest is the child's welfare. The court may grant the parents alternating custody - then it is important that the parents care for the child at least 30% of the time. The court may also grant sole custody of the child while granting the other parent visitation rights.

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