

Hearing children in family proceedings: Austria

1. General Obligation to hear children

- The right of children to participation is protected in article 4 of the Federal Constitutional Law on the Rights of Children (UNCRC, 2012, p. 6).
- In the civil context, children must be heard in court for all proceedings relating to care and education. The questioning must stop if the child's best interests are endangered or if a considered statement by the child cannot be expected due to his/her intellectual maturity (Außerstreitgesetz, §105(2)).

2. Minimum age

The minimum age to hear children is 10 years.

3. Who hears the child?

- Typically, the child is heard by the judge.
- For children below 10 years, or whose development/health condition so require, or when it is believed that the child will not express his or her uninfluenced opinion, the child may be heard by a youth welfare agency, the family court assistance, representative of the juvenile court office, or an expert in psychology or education. These institutions only report the child's statement. (Außerstreitgesetz, §105(1)) (see also Country Profile, 2015).

4. Specific rules for hearing children in child abduction cases?

- The provisions concerning the hearing of the child, the Kinderbeistand and the Kollisionskurator are not specific to abduction cases. The hearing has to take place in all proceedings concerning the child's care and education and the personal contact between the child and his/her parents. (of course there are exceptions: see below). The Kinderbeistand can be appointed in all proceedings concerning the same issues. The Kollisionskurator is appointed to look after a child's interest if his/her legal guardian has contrary interests. This is not restricted to child abduction cases.



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- The hearing of the child is mandatory (Gitschthaller/Höllwerth Kommentar zum Außerstreitgesetz §105 RZ 5), unless 1) if by the interrogation or the postponement of measures due to the interrogation the child's well-being is endangered, or 2) if a considered statement by the child cannot be expected due to his/her intellectual maturity. The judge must not refrain from interrogating the child unless one of these requirements are fulfilled.
- A child over 14 may bring its own motion to object return under Art. 13(2) of the Hague Convention. Assessing the maturity of the child for the purpose of Art. 13(2) will primarily lie in the judge's discretion. The child's opinion is always to be taken seriously, but it is not binding (Austrian Federal Ministry of Justice, 2010, pp. 17-18). This results from the general capacity of a child older than 14 years to act in proceedings concerning his/her care and education.
- In the case of highly contentious custody proceedings, the court may request a children's counsellor (Kinderbeistand) (CRIN, 2015). This is an independent, trained person to act as a spokesperson for the child in the procedure
- (Ausserstreitgesetz, §104a). This person does not represent the child in the formal proceedings, but assists the child to voice his or her opinion (Country Profile, 2015). In child abduction cases, the Kinderbeistand is usually appointed for children below 14 years of age, and in some circumstances below 16 (European Parliament Study, 2013, p. 306). If the court is convinced that neither the applicant nor the respondent can represent the child's interests properly, the court may appoint a guardian ad litem (Kollisionskurator) to represent the child's best interests in return procedures (Country Profile, 2015). Whether or not a Kollisionskurator can be appointed in these proceedings is controversial (LGZ Wien EF-Z 2008/51 (Nademleinsky)). A Kollisionskurator cannot be appointed for children as from the age of 14, since they have capacity to act. It has to be kept in mind that the Kollisionskurator is not a procedural institution. It is based on substantive law concerning the legal representation of the child.
- Concentration of jurisdiction is established on the level of first instance and in the Supreme Court (Austrian Federal Ministry of Justice, 2010, 4.1).

5. Cross-border element (i.e. hearing a child who is abroad in second-chance procedure Brussels IIbis?)

§ 111a Außerstreitgesetz, according to which the provisions of this section (7th section of the 2nd chapter) are applicable in proceedings under the Hague Convention.

6. Other relevant matters



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From 14 years onwards, a child has the capacity to plead in proceedings for care and education (e.g. when the parents' behavior endangers the child's interests), unless the Court declares that the child lacks the necessary maturity (Ausserstreitsgesetz, §104(1)). Fenton-Glynn (n.d.) adds that although children can bring their own motion before the court once they reach age 14, before this, they cannot participate except after the abducting parent has raised this as an issue.

7. Legal sources on hearing the child

- Federal Constitutional Law on the Rights of Children, Art. 4
- Ausserstreits-gesetz, §§104-105

8. Sources in literature

- [Austrian Federal Ministry of Justice](#), 2010
- [CEFL](#), 2005, p. 8; pp. 41-43
- [Concluding Observations UNCRC](#), 2012
- [CRIN](#), 2013, pp. 12-13
- [European Parliament Study](#), 2015, p. 306
- [Fenton-Glynn, n.d.](#) (access with google account)
- [Hague Convention Country Profile section 10.4](#) (update December 2015)
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