

Overview of Austrian Adoption Law

Like most continental European countries, Austria reformed its adoption laws in the latter half of the 20th century. At the time of enactment of the Austria Civil Code in 1811, adoption was perceived as an institution designed to enable childless persons to transfer their name and wealth to posterity (an idea derived from Roman law and generally embraced by continental European legal systems), with adoption of adults being the basic model.

In 1960, Austria reformed its adoption law to integrate modern views on adoption, while keeping the traditional legal form of adoption. Adoption is now seen as an institution designed to provide children with a new family in order to further their well-being, or as a way to legitimize children born out of wedlock. However, while most other European countries have abandoned the “contract” model of adoption in favor of an “adoption by decree” system, Austria has kept the century-old tradition that the “parties” to an adoption – adopter and adoptee – must enter into a contract that requires approval by a court in order to perform the adoption. Thus today, adoption of children is the basic model, although adoption of adults is still possible, since there is no upper age limit for the adoptee.

Although adopter and adoptee enter into a contract, they are not free to choose the terms of the contract or the legal effects the adoption will have. Therefore, in practice this contract system generally does not lead to a more liberal legal regime as to the duties of adopters or the effects of adoption. The only exception is the rule that an adopter and an adoptee that has come of age may mutually agree to apply for cancellation of the adoption, which the court must grant. They are not required to state any particular reason when regulating cancellation.

Austria has ratified and implemented the Hague Convention on Protection and Co-operation in Respect of Intercountry Adoption (the “Hague Convention”), and the European Convention on the Adoption of Children of 1968.

I. General Acts and Regulations Governing the Adoption Process in Austria

Adoption is to a great extent regulated by Austrian federal law. The main provisions are found in Sec. 178 – 185a of the Austria Civil Code (*Allgemeines Bürgerliches Gesetzbuch* – ABGB), and the Federal Youth Welfare Act (*Jugendwohlfahrtsgesetz*), as well as the youth welfare acts of the respective Austrian states. Federal law sets up the basic structure of adoption and the regulations regarding court proceedings and authorizes states to handle the placement process. State law regulates the process of placement by the welfare authorities.¹

¹ Please note that Austrian federalism – like European forms of federalism in general – does not recognize the relatively strict separation of federal and state spheres and laws to be found in the U.S. but favors forms of “cooperate” federalism where state agents or courts do enforce federal law – like, for example, adoption law. There are no dual legal regimes.

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II. Substantive Conditions for the Making of an Adoption Order

A. Who may be adopted?

Due to the fact that adoption traditionally was seen as a means for childless couples to find a successor for their names and estates, there have never been many restrictions based on the adoptee's age, nationality or any other characteristic. This did not change in the reform of 1960.

Since adoption results in the establishment of legitimate descent – the adoptee is regarded as equivalent to a child born within marriage – between adopter and adoptee, the biological father may adopt his child if it was born out of wedlock.² Likewise, grandparents may adopt their grandchildren.³

B. Who may adopt?

1. Civil status requirements

Anyone who is legally competent and has not “promised solemnly the unwedded state” – such as a Catholic priest, a nun or a monk⁴ – may adopt.⁵ The adoption of a child by more than one person is only permissible if those persons are married.⁶ As a rule, spouses may only adopt jointly.⁷ Exceptions are possible: if the child of one spouse is to be adopted by the other; if one spouse is legally incompetent; if one spouse's whereabouts have been unknown for at least one year; if the couple has been separated for at least three years; or in other similarly grave circumstances.⁸

A person who has been appointed as the guardian of a child's property may only adopt if he or she has been released from this duty after proving that he or she has diligently cared for the child's property.⁹

There are no special rules with regard to gay couples. They cannot adopt jointly as a couple since homosexual/lesbian partners cannot be legally married; however, it is possible for one partner to adopt.

² Dittrich/Tades, Das Allgemeine bürgerliche Gesetzbuch. 36. ed., 2003, Sec. 179, E 2.

³ Dittrich/Tades, Das Allgemeine bürgerliche Gesetzbuch. 36. ed., 2003, Sec. 179, E 1.; Kerschner, Bürgerliches Recht, Vol. V, 2. ed., 2002, p. 80; Koziol/Welser, Grundriß des bürgerlichen Rechts, 1996, Vol. II., p. 269.

⁴ This clause only applies to persons who have vowed to remain unwedded due to Christian church law. Since other religions do not have a comparable legally determined structure, it does not apply to them even if they also have forms of vowed chastity, see Schwimann, “Das österreichische Adoptionsrecht nach seiner Reform.” Zeitschrift für das gesamte Familienrecht (FamRZ). 1973, Vol. 1, p. 345 [346].

⁵ Art. 179 (1) Civil Code.

⁶ Art. 179 (2) 1 Civil Code.

⁷ Art. 179 (2) 2 Civil Code.

⁸ Art. 179 (3) Civil Code.

⁹ Art. 179 (2) Civil Code.

2. Age requirements

The adopting father must have completed his 30th year, the adopting mother her 28th year.¹⁰ If a couple adopts jointly or if a person adopts the child of his or her spouse, this age limit does not apply, provided the child and adopting persons have already developed a parent-child relationship.¹¹

The adopting spouses must be at least 18 years older than the adoptee. However, if a parent-child relationship has already developed, an insignificantly smaller age difference is permissible.¹² If the child is the biological offspring of the spouse of the adopter or is related to the adopter, an age difference of 16 years is sufficient.¹³ All of these requirements attempt to model the adoption situation after what is perceived as a “natural family situation.”¹⁴

While there is no maximum age limit in the law, in practice persons who are beyond the age of 40 will be very unlikely to fit the prerequisites for an adoption (best interest of the child). The state of Vorarlberg even refers to age in the language of the law while discussing the welfare of the child. Sec. 23 of the Youth Welfare Act of Vorarlberg allows a placement for adoption only if the age gap between child and prospective adopter resembles that of parents to their biological children.

3. Religious / racial / other requirements

No legal rules address religious, racial or related cultural criteria with respect to adoption. However, these criteria will be taken into account in determining whether a particular adoption is in the best interest of the child. For example, the state of Oberösterreich has introduced language into its Youth Welfare Act requiring that a child’s “language, religious and cultural affiliation” be taken into account for an adoption placement.¹⁵

C. Adoption authorities

Civil courts must authorize the adoption contract. Prior to their decision, the process lies in the hands of the state youth welfare authorities. Sec. 24 (1) of the Federal Youth Welfare Act authorizes the state welfare authorities to place children with prospective couples or persons who wish to adopt a child. The state authorities may also recognize non-governmental welfare associations and groups as agencies for adoption placements.¹⁶ The Federal Youth Welfare Act

¹⁰ Art. 180 (1) 1 Civil Code. The age minimum was substantially lowered in the 1960 reform. Before, the minimum age was 40, due to the scope of adoption as an institution to transfer one’s name and wealth to another person.

¹¹ Art. 180 (1) 2 Civil Code. This relationship may not necessarily have been established if adopter and adoptee have only live together for one year, see Dittrich/Tades, *Das Allgemeine bürgerliche Gesetzbuch*. 36. ed., 2003, Sec. 180, E 1.

¹² Art. 180 (2) 1 Civil Code.

¹³ Art. 180 (2) 2 Civil Code.

¹⁴ See generally, Schwimann, at 346 and 347, n. 4.

¹⁵ Sec. 20 (1) No. 2 Youth Welfare Act of Oberösterreich.

¹⁶ Sec. 24 (3) Federal Youth Welfare Act.

delegates the task of placing a child for adoption abroad to the state youth welfare authorities; accordingly, state laws are required to provide regulations regarding that matter.¹⁷

All nine Austrian states have implemented provisions in their respective youth welfare acts. Most states restrict adoption placement to the public youth welfare authority. Only the states of Oberösterreich,¹⁸ Salzburg¹⁹ and Vienna²⁰ allow for the delegation of the task to non-governmental welfare groups.

Generally, placement of children for adoption abroad has been delegated to the relevant state government. State laws generally provide that a child may be placed in a foreign adoption only if this promotes the welfare of the child to a greater extent than would a domestic adoption,²¹ or if the welfare of the child would be jeopardized by not allowing the foreign adoption.²²

D. Standard applied before making an adoption order

Art. 180a (1) of the Civil Code defines the standard for adoption:

The adoption has to be granted if a relationship corresponding to the relations between parents and their own children exists or shall be developed. It must serve the welfare of the adoptee if the adoptee is a minor. In case the adoptee has reached the age of majority there must be a justified interest of the adopter and the adoptee.”²³

An adoption is considered to serve the welfare of the child if it is to be expected that the development of the child would improve by the adoption. If the child's situation and opportunities would not be improved by adoption, the approval must be denied and the child will remain in his or her current status.²⁴

An adoption may not be approved if the interests of the biological children of the adopter are at stake, especially if their upbringing and education would be endangered. Other economic disadvantages of the biological children are not to be taken into account except if the adopter is acting with the sole or predominant intent to damage his or her biological child.²⁵

¹⁷ Sec. 25 Federal Youth Welfare Act.

¹⁸ Sec. 28 (3) Youth Welfare Act of Oberösterreich.

¹⁹ Sec. 36 (1) Youth Welfare Act of Salzburg.

²⁰ Sec. 30 (1) Youth Welfare Act of Vienna.

²¹ See, e. g., Sec. 26 Youth Welfare Act of Burgenland.

²² This is the standard in Sec. 31 Youth Welfare Act of Vienna.

²³ “Die Annahme ist zu bewilligen, wenn eine dem Verhältnis zwischen leiblichen Eltern und Kindern entsprechende Beziehung besteht oder hergestellt werden soll. Sie muß dem Wohle des nicht eigenberechtigten Wahlkindes dienen. Ist das Wahlkind eigenberechtigt, so muß ein gerechtfertigtes Anliegen des Annehmenden oder des Wahlkindes vorliegen.”

²⁴ Dittrich/Tades, Das Allgemeine bürgerliche Gesetzbuch. 36. ed., 2003, Sec. 180a, E 4.

²⁵ Art. 180a (2) Civil Code.

Today, this standard also applies to the adoption of an adult.²⁶ However, there is legislation pending to alter the standard regarding adoption of adults as defined in the last sentence of Sec. 180a (1) Civil Code. The language of the law has made it relatively easy to use adult adoption as a way to facilitate immigration since the “justified interest” was easy to show and a low standard has been accepted by case law.²⁷ Thus, the government has introduced legislation to require, in cases of adult adoption, a showing that the parties have already established a parent-child relationship. This standard would be met if adopter and adoptee have lived together for five years, or if adopter and adoptee have a guardian relationship. The bill is set for a vote of parliament at the end of May 2004. If approved (which is considered likely), the new Art. 180a (1) Civil Code would take effect July 1, 2004.²⁸

III. Adoption Procedure

A. Who makes the adoption order?

To finalize an adoption, adopter and adoptee must sign a contract and the court must grant validity to this contract on a motion for such permission by one of the parties.²⁹ If permission is granted the adoption takes effect from the moment the contract was entered into.³⁰ If the child is a minor, his or her guardian (or a biological parent represented by the youth welfare authorities) must enter into the contract with the adopter. However, the court may dispense with this requirement if the adopter or adoptee so petitions the courts and if the guardian’s denial is unjustified.

The competent court is either the guardian court (*Vormundschafts- oder Pflegschaftsgericht*) or – if no special guardian court is established in a given district – the district court (*Bezirksgericht*).³¹ The rules for the court proceedings are regulated in the Act on Procedure on Non-Contentious Matters.³²

Before granting the order, the court must hear from:³³

- the child, if she or he is at least five years of age and has not lived with the adopter since the age of five;
- the biological parents of the adoptee, if the adoptee has not reached the age of majority;

²⁶ See, generally, Schwimann, at 347, n. 4.

²⁷ See Dittrich/Tades, *Das Allgemeine bürgerliche Gesetzbuch*. 36. ed., 2003, Sec. 180a, E 10

²⁸ The status of this legislation may be traced at www.parlament.gv.at by typing “FamErbRÄG 2005” in the search slot.

²⁹ Art. 179 bis (1) 1 Civil Code.

³⁰ Art. 179 bis (1) 2 Civil Code.

³¹ Sec. 113a Jurisdiktionsnorm - JN. The Jurisdiktionsnorm is an act determining subject matter jurisdiction and venue.

³² Sec. 257 to 260 Act on Procedure on Non-Contentious Matters (*Gesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen* – AußStrG).

³³ Art. 181a (1) Civil Code.

- the foster parents or the head of the institution where the child is living at the moment of adoption; and
- the public youth welfare authority.

All persons who have to be heard are also formal participants (*Beteiligte*) in the procedure on the adoption approval.³⁴ If one of the above acted as a guardian when the adoption contract was entered into, he or she does not have to be heard; neither does the court need to hear from a person whose whereabouts are unknown.³⁵

The court has to deliver a written opinion with the order of approval stating the reasons why the adoption will enhance the welfare of the child, as required by Art. 180a Civil Code.³⁶

There are no interim orders under Austrian law, such as for mandatory temporary placement. The court either has to approve the adoption contract or has to deny approval.

B. Consent required for making of adoption order

1. Consent requirements

Consent of the following persons is required:³⁷

- a) the biological parents of the child;
- b) the spouse of the adopter; and
- c) the spouse of the adoptee.

All persons who have to consent are also formal participants (*Beteiligte*) in the procedure on the adoption approval, and each has a right to appeal.³⁸ They must declare their consent in person before the court unless grave obstacles necessitate written consent;³⁹ however, they may also delegate their declaration of consent to an agent, provided a public notary certifies such delegation.⁴⁰

2. Circumstances in which consent is not required

Consent of the biological parents of the child, the spouse of the adopter, or the spouse of the child is not required if he or she acted as the guardian of the adoptee (as might be the case for

³⁴ Sec. 257 (1) AußStrG.

³⁵ Art. 181a (2) Civil Code.

³⁶ Sec. 260 (2) AußStrG.

³⁷ Art. 181 (1) Civil Code.

³⁸ Sec. 257 (1) AußStrG.

³⁹ Sec. 258 (1) AußStrG.

⁴⁰ Sec. 258 (2), (3) AußStrG.

the biological mother of the adoptee), if he or she is permanently incapable of communicating her or his will, or if his or her whereabouts have been unknown for at least six months.⁴¹

The court may also – on a motion by the adopter or adoptee – dispense with the required consent if he or she refuses to consent without justification.⁴²

C. Secrecy and anonymity of adoption procedure; possibility of origin tracing

Austrian law allows for either incognito adoptions or open adoptions.⁴³ The parties to the adoption contract may elect to enter into the adoption contract under the condition that the biological parents agree not to be informed on who will adopt. In practice there are three forms of adoption:

- Incognito adoption: The biological parents know nothing about the adopters but may be informed by the welfare authorities on the development of the child;
- Semi-open adoption: The biological parents know who will adopt but are required to refrain from contacting them. The welfare authorities inform them on the development of the child;
- Open adoption: The biological parents know who will adopt and may establish contacts with the new family of their child.

Incognito adoptions block the biological parents from information about the adopter, but not the adoptee. The adoptee may always access his or her official birth register kept in Austria and may thus learn the names of his or her biological parents.

IV. Legal Effect of an Adoption

Adoption creates the same legal relationship of legitimate descent between adopter and adoptee as if the adoptee had been born within marriage to the adopters.⁴⁴ If a married couple adopts, in the eyes of the law, the child is no longer the offspring of his or her biological parents as defined in Sec. 40 Civil Code.

However, adoption in Austria does not cut all ties. Some legal duties between biological parents and children stemming from family law are upheld after adoption. In principle, biological parents are still obliged to provide their child with maintenance, dowry and trousseau.⁴⁵ By the same token, the (adult) adoptee is still obliged to pay maintenance to his or her biological parents – a duty to support them financially should they become unable to support themselves⁴⁶ – unless the parents had grossly violated their duty to pay maintenance to the child

⁴¹ Art. 181 (2) Civil Code.

⁴² Art. 181 (3) Civil Code.

⁴³ Sec. 259 AußStrG.

⁴⁴ Art. 182 (1) Civil Code.

⁴⁵ Art. 182 a (1) Civil Code.

⁴⁶ provided for in Art. 143 Civil Code.

before the child reached the age of 14.⁴⁷ However, these obligations are inferior to those resulting from the relationship between adopter and adoptee. The adoptee must first claim child support from the adopter. Likewise, any claim of the adopter for support from the adoptee will preempt those of the biological parents.

Similarly, inheritance laws continue to be applicable between biological parents and children, although adopting parents have some form of priority.⁴⁸

Upon adoption by an Austrian citizen, a foreigner does not automatically gain Austrian citizenship. However, the adoptee is automatically eligible for a residence permit.⁴⁹

A. Revocation and Cancellation

The judicial act approving an adoption contract may be revoked with retroactive effect *ex officio* or on application of one of the parties for grave reasons, such as the discovery that the signature on the adoption contract is by a legally incompetent person. However, as a matter of practice, in these cases the court will most likely not approve the adoption contract in the first place.⁵⁰

The court must cancel an adoption (with effect only from the time of the cancellation order onwards) if:

- one of the parties was enticed to enter into the contract by deceit or duress, so long as the party asks for cancellation within one year of discovering the deceit or of the cessation of the situation of duress;
- *ex officio* if maintaining the adoption would seriously impair the child's wellbeing;
- if the adoptee applies for cancellation because the marriage of the adopting parents has been dissolved or declared void, or if such cancellation is in the interest of the child because one parent has died and such cancellation would not impair the interest of the deceased; or
- if one of the legal parents and the legally competent child, *i.e.*, the child having reached the age of majority, apply for cancellation.⁵¹

As the final example shows, adopter and adoptee may mutually agree on canceling the effects of adoption.

Cancellation may be declared only if it applies to both adopting parents, unless their marriage has been dissolved or declared void.⁵²

⁴⁷ Art. 182 a (2) Civil Code.

⁴⁸ Art. 182b Civil Code.

⁴⁹ Art. 49 Alien Act.

⁵⁰ See the list of causes for revocation in Art. 184 (1) Civil Code.

⁵¹ Art. 184a (1) Civil Code.

Upon entry into legal force of the cancellation order, the biological parents regain their full parental rights.⁵³

V. Recognition of Foreign Adoptions

Austrian law does not provide for any procedure to recognize foreign adoptions *per se*. However, if in any other legal act or procedure the fact that a person was adopted under foreign law is at issue (e.g., in an application for citizenship), the authority or court will verify whether the adoption is valid and must be recognized. If non-Austrian citizens are adopting or are adopted in Austria, Sec. 26 of the Act on Conflicts of Laws (*Internationales Privatrechtsgesetz*) regulates the applicable law,⁵⁴ which means that the applicable law could be either that of Austria or the foreign nation.

Austria ratified the European Convention on the Adoption of Children of 1968 in 1980 and the Hague Convention in 1999. There is no special law implementing the provisions of the Hague Convention, but state and federal laws regarding adoption have been modified to suit the Convention's requirements.

Central Authorities under Sec. 6 of the Conventions are the respective state governments and the federal Ministry of Justice. In the state of Steiermark, the state government may delegate tasks under Article 9 of the Hague Convention to accredited welfare organizations.⁵⁵

VI. Resources

The Austrian government sponsors a website on all questions of government service, including adoption: www.help.gv.at. The link has an entry on "Adoption." While the site features general information in English, all information on adoption is in German.

For a comprehensive overview of all questions of adoption (including the texts of all relevant statutes), see www.adoptionsberatung.at (available only in German).

All Austrian laws, codes and regulations may be retrieved at www.ris.bka.gv.at/auswahl/. The few laws available in English do not pertain to adoption, however.

⁵² Art. 184a (2) Civil Code.

⁵³ Art. 185 Civil Code.

⁵⁴ Sec. 113a Jurisdiktionsnorm deals with the competence of Austrian courts in these cases.

⁵⁵ Sec. 34 (2) Youth Welfare Act of Steiermark.