

Determining who has custody of children after divorce in Vietnam:

A legal perspective from children's rights

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ABSTRACT The right of parents to custody of children after divorce is a significant privilege and obligation under marriage law, which is of interest to the legal systems of many countries, including Vietnam. The provisions regarding the right of parents to directly nurture their children post-divorce impose a responsibility on parents and contribute to the protection of children's rights. Competent state agencies and organisations are also responsible for protecting children when parents divorce and the family unit is no longer intact. Consequently, the rights and interests of children are guaranteed to be upheld in the event of a divorce.

Furthermore, the implementation of parental rights and responsibilities after divorce helps children avoid psychological complexes and trauma, thereby ensuring their optimal development in all domains. However, the right to custody of children by parents after divorce is not inherent in all divorce cases. This right is reserved for minors and adult children who have lost civil capacity, are unable to work, and have no assets to support themselves. To meet the objective requirements of societal and familial development, the current Vietnamese law on marriage and family, in general, and the law on protecting children's rights when parents divorce, in particular, have been developed. Nevertheless, the Vietnamese law on marriage and family still has disadvantages and inadequacies, which, in practical cases, create challenges in implementing the right to sole custody of children when parents divorce, alongside its positive aspects.

This article examines the legal issues related to the right to custody of children in the event of divorce under Vietnamese law. It also suggests strategies for enhancing the law using the legislative experiences of various jurisdictions worldwide.

KEYWORDS *family law, comparative law, Vietnamese law, child custody, divorce*

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1. Introduction

According to Vietnamese law, the settlement of child custody in the event of parental divorce is primarily governed by the Law on Marriage and Family.¹ The right to child custody post-divorce encompasses the right to directly look after, care for, raise, and educate the child, as determined by the Court's divorce decree. Post-divorce, parents retain the right and obligation to look after, care for, raise, and educate minor children, as well as adult children who have lost civil act capacity or are unable to work and lack the means to support themselves, as described by the Law on Marriage and Family, the Civil Code,² and other relevant laws. The parents may agree on who will raise the child and each party's obligations and rights post-divorce.³ Without such an agreement, the Court will assign custody to one parent based on the child's best interests.⁴

In other countries, the right to child custody is recognized under different terminologies. For instance, in the United States, it is referred to as a "physical custody arrangement,"⁵ which is a decision by the Court or an agreement between the parents regarding the child's post-divorce residence. Depending on the specific circumstances and the child's best interests,⁶ this arrangement can be assigned to one parent or shared between both. In the United Kingdom, it is termed a "child arrangement order,"⁷ a decision by the Court or a shared agreement between the parents,⁸ prioritizing the child's best interests. In Japan, the term "custody right" is used. The Family Court typically considers it in the

¹ Law No. 52/2014/QH13 was issued by The National Assembly on Marriage and Family on 19. 6. 2014, gazette number 52/2014/QH13. <https://thuvienphapluat.vn/van-ban/quyen-dan-su/Luat-Hon-nhan-va-gia-dinh-2014-238640.aspx>.

² Civil Code No. 91/2015/QH13 was issued by the 13th Vietnamese National Assembly on November 24, 2019. <https://thuvienphapluat.vn/van-ban/quyen-dan-su/Bo-luat-dan-su-2015-296215.aspx>.

³ Anh Tuan, "Child Custody After Divorce." *Communist Party of Vietnam Electronic Newspaper*, <https://dangcongsan.vn/ban-doc/luat-su-cua-ban/quyen-nuoi-con-sau-ly-hon-637700.html>. Posted on May 15, 2023. Accessed on March 6, 2024.

⁴ Dien Nguyen Ngoc, *Giáo Trình Luật Hôn Nhân và Gia Đình Việt Nam=Course Book-Law on Marriage and Family Vietnam* - Volume 1, (National Political Publishing House, 2022): 223–230.

⁵ CustodyxChange, "US child custody law," <https://www.custodyxchange.com/topics/custody/types/joint-physical-custody.php>. (accessed 05. August 2024).

⁶ See: June Carbone, "Child Custody and the Best Interests of Children—A Review of" From Father's Property to Children's Rights: The History of Child Custody in the United States," *Family Law Quarterly* 29, no. 3 (1995): 730–731.

⁷ Lancashire, "Children's Arrangement Order," https://www.proceduresonline.com/lancashirecsc/p_ch_arr_order.html (accessed 05. August 2024).

⁸ See: Edward Kruk, *Child custody, access and parental responsibility: The search for a just and equitable standard* (Father Involvement Research Alliance, 2008), 31.

child's best interest⁹ to remain in their "usual residence," often granting sole custody to the parent who has most recently cared for the child. However, shared custody is also possible, always focusing on the child's best interests.¹⁰ In Germany, the term "Sorgerecht" is used, and it involves a court decision or an agreement between the parents regarding the child's residence post-divorce. The German legal system prioritizes the child's best interests. It encourages shared parental responsibility.¹¹ Nonetheless, one parent can independently delegate custody to the other based on mutual agreement and the child's best interests. Generally, the right to custody post-divorce, across various countries, is either a court decision or an agreement between the parents regarding the child's residence, care, and upbringing, with the child's best interests being the paramount consideration.

It can be concluded that the right to custody of children when parents divorce is an agreement between the couple regarding who the child will live with and who will primarily raise and care for them. If the parents cannot agree, the Court will decide who will raise the child based on the child's best interests. After the divorce, parents retain the rights and obligations to look after, care for, raise, and educate minor children, as well as adult children who have lost civil act capacity or are unable to work and lack the means to support themselves, under the Law on Marriage and Family. The husband and wife can agree on who will directly raise the child. The law ensures the child's rights during divorce proceedings, and agreements between husband and wife on child custody after divorce are always encouraged. This article analyzes the legal regulations on parents' rights to custody of children after divorce in Vietnam, based on comparisons with the laws of other countries and their reference values for Vietnam. The study also identifies shortcomings in the legal regulations on the right to custody of children of parents after divorce in practice. It proposes recommendations to improve the law in Vietnam.

⁹ Takao Tanase, and Matthew J. McCauley, "Divorce and the best interest of the child: Disputes over visitation and the Japanese family courts," *Pac. Rim L. & Pol'y J.* 20 (2011): 576–577.

¹⁰ Australian Embassy Tokyo, "Japan Child Custody Law,"

<https://japan.embassy.gov.au/tkyo/familylaw.html#:~:text=In%20Japan%2C%20married%20parents%20have,be%20considered%20under%20certain%20circumstances>. (accessed 05-03-2024).

⁸ Anwalt, "Law on child custody, rights and responsibilities between parents and children,"

https://www.anwalt.org/sorgerecht/#%E2%80%9EGeteiltes_Sorgerecht%E2%80%9CRechte_und_Pflichten. (accessed 05 August 2024).

¹¹ Sabine Walper, Christine Entleitner-Phleps, and Alexandra N. Langmeyer, "Shared physical custody after parental separation: Evidence from Germany," *Shared Physical Custody* 25 (2021): 285.

2. Sole custody of the child after divorce: who has the right

The legal relationship between marriage and family and the relationships arising from emotional or blood ties involve individuals within the family. Termination of marriage due to divorce is an act of will by one or both spouses, formalized by the Court's decision. The marital relationship ceases to exist immediately after the Court's judgment or decision on divorce takes legal effect. Post-divorce, the personal rights and obligations between husband and wife end entirely, regardless of mutual agreement, as determined by the Court. Obligations from marriage, such as love, respect, care, mutual support, and fidelity, naturally terminate.

However, the relationship between parents and children remains unaffected by the marital status. Raising and educating children are both a right and an obligation of parents, encompassing issues such as child custody, child support, and changes in custody post-divorce, as regulated by the Law on Marriage and Family.¹² After divorce, the Court assigns the right to raise the child directly to the spouse deemed qualified to care for, raise, and educate the child. Parents retain the right and obligation to look after, care for, raise, and educate minor children, as well as adult children who have lost civil act capacity or are unable to work and lack the means to support themselves, in accordance with the Law on Marriage and Family, the Civil Code, and other relevant laws. The settlement of sole child custody rights can occur at the time of divorce and at different times if there is a request to change custody arrangements post-divorce. Thus, the right to child custody can be subject to change based on the requests of either parent. Husbands and wives, as parents, possess equal rights and obligations in loving, raising, caring for, and educating their children. There is no distinction between biological and adoptive parents; both hold the same rights and responsibilities towards their children. Adoptive parents are endowed with the same rights and obligations as biological parents, including the duty to love, care for, and educate their children. This parity extends to situations of divorce, where adoptive parents retain the right to raise their children, akin to biological parents.

Post-divorce, the responsibility for the education of minor children, as well as adult children who are disabled, lack civil capacity, are unable to work, and have no means of self-support, must be determined based on the actual conditions of the parents. The paramount consideration is the best interests of the children in all aspects. The court must evaluate each parent's moral character, employment status, economic conditions, and available time to ascertain who is better equipped to care for, raise, and educate the child. Additionally, the court should consider the emotional bond between the child and each parent when resolving custody matters. When parents mutually agree on child custody and support arrangements, the court must intervene only if such agreements are deemed unreasonable or fail to protect the child's interests.

¹² Linh Thi My Nguyen, Giang Thi Truc Huynh, and Qui Khac Tran, "A legal perspective on child support obligation after divorce: The Vietnamese case," *CTU Journal of Innovation and Sustainable Development* 15, no. 3 (2023): 116.

Under specific legal provisions, parental rights may be restricted at the request of either parent, other family members, the Procuracy, other agencies or individuals. Changes in the person directly raising the child can be requested by family members other than the parents, the Procuracy, other agencies or organizations if such changes serve the child's best interests. In exceptional cases, the court may decide to place the child in the care of grandparents or other relatives if both parents are found unqualified or lack the necessary conditions to care for, raise, and educate the child.¹³

In addition to parents asserting their right to directly raise their children post-divorce directly, there are instances where both parents relinquish this responsibility. Consequently, grandparents or other relatives may assume the right to raise the children upon the parents' divorce.¹⁴ Article 108 of the Law on Marriage and Family of Vietnam delineates the rights and obligations of paternal and maternal grandparents towards their grandchildren. It states that grandparents have the right and responsibility to look after, care for, and educate their grandchildren, live exemplary lives, and set good examples for their descendants. Specifically, in cases involving minor grandchildren, adult grandchildren who have lost civil capacity, or those unable to work and lack property to support themselves, grandparents are obligated to raise them.

According to the law, if a minor or an adult who has lost civil capacity or is unable to work and has no property to support themselves, lacks parental or sibling care, the paternal and maternal grandparents have the right and obligation to raise them. Clause 2, Article 87 of the Law on Marriage and Family stipulates that child care and custody will be assigned to a non-parent guardian under the following conditions: (i) both parents have limited rights over the minor child; (ii) one parent is not restricted but is unqualified to raise, care for, and exercise rights and obligations towards the child; (iii) one parent has limited rights over the minor child and the other parent is unidentified. Article 52 of the Civil Code outlines the natural guardianship order for minors, prioritizing biological siblings. If siblings are unqualified, the next biological sibling becomes the guardian. Without qualified siblings, the natural guardians are the paternal or maternal grandparents.

Thus, grandparents can only gain custody of their grandchildren when both parents have restricted custody rights, are unqualified to raise the children, or when the grandchildren express a desire to be raised by their grandparents, as per Clause 2, Article 81 of the Law on Marriage and Family. Grandparents must meet additional conditions to obtain custody, including: (i) both parents have limited custody rights, or one parent has limited custody rights, and the other is unqualified to raise the child; (ii) no siblings are qualified to raise and care for the child. Based on these provisions, according to the law, grandparents have the

¹³ Dien Nguyen Ngoc, “*Giáo Trình Luật Hôn Nhân và Gia Đình Việt Nam=Course Book-Law on Marriage and Family Vietnam*” - Volume 1. (National Political Publishing House, 2022), 223–230.

¹⁴ Huyen Le Thi Le, “Quyền của con chưa thành niên sau khi cha mẹ ly hôn = Rights of minors after parental divorce” (PhD diss., Trường Đại học Trà Vinh, 2021), 31–33.

right to raise their grandchildren in exceptional cases.¹⁵ The priority order in the Law on Marriage and Family regarding custody when a child has no parents or when parental rights are limited prioritizes siblings. Without qualified siblings, grandparents have the right and obligation to raise the grandchild directly.

Therefore, the party entitled to sole custody of the child post-divorce is determined based on the mutual agreement of the child's parents. Without such an agreement, the Court will decide on the custodial arrangement, prioritizing the child's best interests and considering both material and spiritual conditions. In exceptional circumstances where parents have limited rights over their minor children, the Court may assign custody to grandparents, siblings, relatives, or guardians. The custodial rights may vary depending on the specific case, as stipulated by the Law on Marriage and Family and the Civil Code.

In summary, the primary custodians in the context of divorce within the legal framework of marriage and family are biological parents for their biological children and adoptive parents for their adopted children. Additionally, other particular custodians such as grandparents, biological siblings, other relatives, or guardians may be granted direct custody of the children after divorce.

3. Content and scope of child custody rights

According to the Law on Marriage and Family of Vietnam, when parents divorce, the right to raise the child is typically based on the mutual agreement of the father and mother. The Court will prioritize the child's best interests if no such agreement is reached. For children who are 7 years old or older, the Court must consider their wishes. For children under 36 months old, the mother is generally granted sole custody unless the mother is deemed unqualified to look after, care for, and educate the child or if the parents have another agreement that better serves the child's interests (Article 81). Husbands and wives have equal rights and obligations in looking after, caring for, raising, and educating their children. A Court decision assigning a child to one parent for direct care is not permanent and can be changed. Issues related to children are resolved based on protecting the child's interests in all aspects.¹⁶ Upon request from parents or other individuals or organizations as prescribed by law, the Court may decide to change the person directly raising the child. This change can be based on (i) an agreement between the parents that aligns with the child's interests or (ii) the current custodian being unqualified to look after, care for, raise, and educate the child. The wishes of children aged seven years and older must be considered. If both

¹⁵ Nguyen Huong, Nguyen Thi Hong Van, “Ông bà có được giành quyền nuôi cháu khi bố mẹ ly hôn? = Do grandparents have the right to raise their grandchildren when their parents divorce?,” 2022. <https://luatvietnam.vn/dan-su/quyen-nuoi-chau-khi-bo-me-ly-hon-568-35577-article.html>. (accessed August 25, 2024).

¹⁶ Thi Truc Giang Huynh, “The Principle of Protecting the Best Interests of the Child in Vietnamese Divorce Law,” *Essays of Faculty of Law University of Pécs, Yearbook of [year]* 1 (2024): 128.

parents are deemed unqualified to raise the child, the Court will assign a guardian in accordance with the Civil Code (Article 84).

The parent directly raising the child has the right to request the non-custodial parent to fulfill their support obligations as prescribed in Article 110 of the Law on Marriage and Family. They can also request that the non-custodial parent and family members respect their right to raise the child directly. The custodial parent and family members must not prevent the non-custodial parent from visiting, caring for, raising, and educating the child (Article 83).

In addition to the biological children of a couple, adopted children also require significant attention and legal protection. According to the Law on Marriage and Family of Vietnam, “Adoptive fathers, adoptive mothers, and adopted children have the rights and obligations of fathers, mothers, and children as prescribed in the Law on Marriage and Family from the time the adoption relationship is established according to the provisions of the Law on Adoption¹⁷” (Article 78). Although these children are not biologically related to their adoptive parents, the law recognizes the parent-child relationship as equivalent to that of biological parents and children. Consequently, after a divorce, adoptive parents must continue to fulfill their obligations to look after, raise, care for, and educate their adopted children until they reach adulthood, are capable of working, and have the means to support themselves.

In general, when parents divorce, they retain the right and obligation to raise their children, whether biological or adopted. The Law on Marriage and Family includes specific provisions to protect children’s welfare post-divorce, ensuring they are cared for and raised by both parents to develop generally in all aspects, thereby minimizing harm. The right to sole custody of children after divorce is considered for both biological and adopted children based on the principle of non-discrimination. Custody arrangements are primarily based on the agreement between the parents. If no agreement is reached, children under 36 months old are typically placed with the adoptive mother, and the opinions of adopted children aged seven years and older are considered.

Additionally, Precedent No. 54/2022/AL¹⁸ addresses the right to raise children under 36 months old in cases where the mother does not directly care for, raise, and educate the child. This precedent involves a case where a mother abandoned her very young child, failing to provide care. In contrast, the father provided good care, and the child became accustomed to those living conditions. In such cases, the Court must continue to entrust the child under 36 months of age to the father for direct care and nurturing by the spirit of Precedent No. 54.

¹⁷ Law No. 52/2010/QH12 was issued by The National Assembly’s Vietnam on Adoption on 17 June 2014, gazette number 52/2010/QH12 <https://thuvienphapluat.vn/van-ban/Quy-en-dan-su/Luat-nuoi-con-nuoi-2010-108082.aspx>.

¹⁸ As of September 2024, Vietnam has published and applied 72 precedents, and this is precedent number 52th <https://anle.toaan.gov.vn/webcenter/portal/anle/chitietanle?dDocName=TAND281185>.

4. Changing the person's custody of the child after divorce

Children's rights and parents' obligations are not solely determined during divorce but extend until the child reaches adulthood. Consequently, when a court issues a decision regarding the direct custody of a child in divorce judgments, any subsequent change in the custodial arrangement can be requested if the child's interests are not adequately protected (Art. 84). The care, upbringing, and education of children are considered the rights and obligations of parents. However, upon divorce, this right is exercised directly by only one parent. If the custodial parent fails to fulfil their responsibilities and does not ensure the child's rights and interests, either the non-custodial parent or the custodial parent may request a custody change.

According to the Law on Marriage and Family of Vietnam, any change in the custodial arrangement must consider the wishes of children aged seven and above (Art. 84). Before making a decision, the court must carefully evaluate the situation to prevent parents from using the child to satisfy their desires to gain custody. A change in custody can only occur if the current custodial parent cannot ensure the child's rights in all aspects. The non-custodial parent cannot use their better living conditions as a pretext to force the custodial parent to relinquish custody. Such changes can have negative consequences that disrupt the child's life. Therefore, the court will only accept requests for a change in custody in cases of extreme necessity to protect the child's legitimate rights and interests.

In decisions regarding changes in custody, children aged seven and older are allowed to express their wishes. After living with one parent, the child can express their feelings about whether their physical and intellectual development needs are met. However, this is not the sole factor in the court's decision. The child's wishes are merely one condition for the court to consider.

The second condition for the court to consider a change in custody is a request from one or both parents. Parents who care for and love their children the most understand their needs best and always strive to provide the best for them. Therefore, if parents feel that their current situation does not ensure the best development conditions for their child, they have the right to request a change in custody. The rights and obligations towards the child are vested in both parents, allowing them to request a change in custody to ensure the child's optimal development materially and spiritually.

Finally, upon request by the parties, the Court will consider the requests of both the father and mother, evaluating all aspects of the child's interests to decide on changing the custodial parent. Other entities, such as relatives, state management agencies for families and children, and the Women's Union also have the right to request a change in the custodial arrangement.

5. Sanctions for violating the right to child custody after divorce

According to the law, the responsibilities of looking after, caring for, raising, and educating children are parents' rights and obligations. Parents maintain legal

duties toward their children even after divorce.¹⁹ When parents fail to fulfill their direct commitments to raise their children or engage in actions that harm them, they must face the legal consequences of their misconduct.

Firstly, the non-custodial parent, after divorce, retains the right and obligation to visit the child and provide child support until the child reaches 18 years of age. However, there are numerous instances where the non-custodial parent fails to hand over the child to the custodial parent, thereby infringing upon the custodial parent's rights and interests emotionally and legally. In disputes over custodial rights, the Court enforces compliance based on Article 120 of the Law on Civil Judgment Enforcement: "The enforcement officer shall issue a decision to compel the handover of a minor to the person assigned to care for them according to the judgment or decision. Before forcibly handing over a minor to the person assigned to care for them, the enforcement officer shall coordinate with local authorities and socio-political organizations to persuade the party to execute the judgment voluntarily."

Suppose the person required to execute the judgment or the current caretaker of the minor fails to comply. In that case, the enforcement officer shall decide to impose a fine and set a five-working-day deadline for compliance. Should the individual fail to comply within this period, the enforcement officer will forcibly hand over the minor or request the competent authority to prosecute for non-compliance with the judgment (Article 120 of the Law on Civil Judgment Enforcement). According to Clause 1, Article 165 of the Law on Civil Judgment Enforcement,²⁰ violations are handled as follows: "A person who must execute the judgment intentionally fails to comply with the judgment or decision; does not voluntarily comply with the decisions on judgment enforcement shall, depending on the nature and seriousness of the violation, be subject to administrative sanctions or criminal prosecution by the provisions of law."

According to Clause 3, Article 64 of Decree 82/2020/ND-CP,²¹ administrative sanctions for failing to hand over children to the custodial parent after divorce include fines ranging from VND 3,000,000 to VND 5,000,000 for the following acts: (i) Failure to perform work required by the judgment or decision; (ii) Failure to cease work not required by the judgment or decision; (iii) Delaying the execution of the judgment when conditions for execution are present.

¹⁹ See Minh Nguyen Huu, "Các mối quan hệ trong gia đình ở Việt Nam: Một số vấn đề cần quan tâm = Family relationships in Vietnam: Some issues of concern," *Journal of Sociology* 120, no. 4 (2012): 93–96.

²⁰ Law No. 09/VBHN-VPQH was issued by The Office of The National Assembly of Vietnam on enforcement of civil judgments on 25 January 2022, can be downloaded from the link <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Van-ban-hop-nhat-09-VBHN-VPQH-2022-Luat-Thi-hanh-an-dan-su-547842.aspx>.

²¹ Decree No. 82/2020/ND-CP of the Government of Vietnam issued on July 15, 2020, Stipulating the handling of administrative violations in legal aid; administrative law; marriage and family; civil judgment enforcement; and bankruptcy of enterprises and cooperatives, can be downloaded from the link: <https://thuvienphapluat.vn/van-ban/Doanh-nghiep/Nghi-dinh-82-2020-ND-CP-xu-phat-hanh-chinh-linh-vuc-hon-nhan-thi-hanh-an-pha-san-doanh-nghiep-392611.aspx>.

Additionally, failing to hand over the child to the custodial parent can result in criminal liability. At a more serious level, this act can constitute failing to comply with a judgment under Article 380 of the 2015 Penal Code. Any person who has the means but fails to comply with a legally effective court judgment or decision may be imprisoned for three months to 2 years despite being subject to coercive measures or administrative sanctions. If the crime involves acts against enforcement officers, use of sophisticated and cunning tricks, or asset dissipation, the penalty increases to imprisonment from 2 to 5 years. The offender may also be fined from VND 5,000,000 to VND 50,000,000.²²

Secondly, parents must look after, care for, and educate their minor children after divorce. If the custodial parent fails to fulfill these obligations, they may face administrative sanctions for violating childcare and upbringing regulations. According to Decree No. 130/2021/ND-CP,²³ fines ranging from VND 10,000,000 to VND 15,000,000²⁴ may be imposed for failing to perform obligations and responsibilities in caring for and raising children, except in temporary isolation or alternative care prescribed by law. Fines from VND 20,000,000 to VND 25,000,000²⁵ may be imposed for parents or caregivers who intentionally abandon children (Point b, Clause 1, Article 21, Decree 130/2021/ND-CP).

According to these regulations, if the custodial parent fails to care for and raise the child or abandons the child after divorce, they will be fined from VND 10,000,000 to VND 15,000,000.²⁶ Additionally, they must fulfill their obligations to care for and raise the child as mandated by law.

6. Comparative Law on Child Custody After Divorce: China and Thailand

6.1 The People's Republic of China

The laws of the People's Republic of China regarding marriage and family relations are stipulated in the Civil Code of the People's Republic of China, effective from January 1, 2021.²⁷ The Chinese Civil Code provides for two methods of divorce: a simple divorce by joint application or a judicial divorce.²⁸

²² Equivalent to 180-1,840 Euros.

²³ Decree 130/2021/ND-CP of the Government of Vietnam issued on December 30, 2021, Imposing penalties for administrative violations in social assistance and children affairs, can be downloaded from the link:

<https://thuvienphapluat.vn/van-ban/Vi-pham-hanh-chinh/Nghi-dinh-130-2021-ND-CP-xu-phat-vi-pham-hanh-chinh-bao-tro-xa-hoi-va-tre-em-499523.aspx>.

²⁴ Equivalent to 370-550 Euros.

²⁵ Equivalent to 730-920 Euros.

²⁶ Equivalent to 370-550 Euros.

²⁷ The State Council of The People's Republic of China. "Part Five-Family Law Civil Code of The People's Republic of China,"

https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html (accessed 10 August 2024).

²⁸ See Lei Shi, "Divorce Procedure Reform in China," in *Routledge Handbook of Family Law and Policy*, ed. John Eekelaar and Rob George (Routledge, 2020), 115–124.

A divorce can only be registered with the competent authority if both spouses agree to divorce, sign the corresponding divorce papers, and voluntarily file for divorce. In a judicial divorce, the court initially acts as a mediator to prevent divorce and resolve conflicts.²⁹ If mediation fails and the court deems the marriage irreparable, it issues a divorce order.³⁰

The decision on the right to sole custody of children is made during the divorce process and is effective upon the court's ruling. Typically, the mother is granted custody if the divorced couple has a child under two years old. For children aged 2 to 8 years, if the parents cannot reach an agreement, the court decides which parent will have custody. The wishes of children older than eight years must be considered. During the divorce process, the court evaluates the parents' right to sole custody based on factors such as the parent's ability to care for the child physically and mentally, the child's relationship with the parents, and the child's health and development.

In some cases, parents can agree on custody arrangements after the divorce. The age at which children are given to the mother for custody is earlier in Chinese law compared to Vietnamese law, where children under 36 months are given to the mother. Additionally, Chinese law considers the wishes of children older than eight years, whereas Vietnamese law considers the wishes of children from 7 years old.

There are also provisions regarding maintenance payments and contact rights for the non-custodial parent. In some instances, such as domestic violence or when the other parent lives with a third party, the affected person may claim damages. In summary, the right to custody of children under Chinese law shares similarities with Vietnamese law in terms of parental agreements on child custody and prioritizing the child's interests³¹ during divorce. However, differences exist in the age at which children are given to the mother for custody and in considering the child's wishes.

6. 2 Thailand

Family and marriage relations in Thailand are governed by the Thailand Civil and Commercial Code,³² Part III and Chapter VI. Section 1501 regulates marriages terminated by death, divorce, or annulment by the Court. The divorce process under Thai law is similar to that of Vietnamese law, where divorce can be

²⁹ Xin He, "Divorce in China: Institutional constraints and gendered outcomes," *Fem Leg Stud* 29 (2021): 429 – 433.

³⁰ Youngjin Kang, and Weimiao Zhou, "Divorce in China: Institutional constraints and gendered outcome,," *Journal of Family Theory & Review* 14, no. 1 (2022): 97–103.

³¹ Jianghao Xia, "The best interests of the child principle in residence disputes after parental divorce in China," *International Journal of Law, Policy and the Family* 34, no. 2 (2020): 105–125.

³² Samuiforsale, "Thailand Civil and Commercial Code part III chapter VI Termination of Marriage," <https://www.samuiforsale.com/law - texts/thailand - civil - code - part - 3.html#1535>. (accessed 02 September 2024).

conducted through mutual agreement or a court decision. The relationship between parents and children after divorce is regulated by Section 1520, Chapter VI of the Thai Civil and Commercial Code.³³ In a divorce by agreement, the spouses must make a written agreement on exercising child custody rights for each child. If no agreement is reached, the Court will resolve the matter. In the event of a divorce by the court decision, the Court hearing the divorce case will also decide on the parental rights of each child.

Regarding child support after divorce, the Thai Civil and Commercial Code stipulates, “In the case of divorce by mutual consent, the divorce agreement shall include an agreement as to who, either the spouses or one of them, shall contribute to child support and in what amount” (Section 1522). If no agreement is reached, the Court shall make the final decision.

Generally, the Thai Civil and Commercial Code provides more detailed and specific provisions when the couple files for divorce in the Court. While the trial is pending, the Thai Court may decide to intervene in matters of child custody and maintenance if necessary. For example, while the divorce case is in progress, the Court may, upon application by either party, make any interim orders it deems appropriate, such as those relating to material assets (known as “Sin Somros”), accommodation, spousal support, and the right to custody and child support (Section 1530). The right to raise children continues through either mutual agreement of the parents or the Court’s decision when the marriage ends.

It can be seen that the right to child custody in the Thai legal system has many differences in determining the principle of child custody after divorce compared to Vietnam. Unlike in Vietnam, the primary principle under Thai law is to respect the agreement of the spouses when divorcing, and that agreement always includes the right to child custody. If the spouses disagree, the Court will decide on child custody after divorce. In contrast, the Law on Marriage and Family of Vietnam provides additional principles for the Court to choose based on the age and all aspects of the child’s interests³⁴ when resolving disputes over child custody after divorce. However, the Thai Civil and Commercial Code has more specific regulations on protecting the child’s rights during the trial stage when the judgment has not yet been enacted. The Thai Court considers it necessary to issue appropriate orders during this time on child custody to intervene and protect the rights of the children promptly. In general, Thai marriage and family law has new and different points to protect children’s rights, care, and support for children after their parents’ divorce.

³³ Kamonwan Yoowattana, “The study of ground of divorce under the civil and commercial code that affects quality of life,” *J. International Journal of Systems Applications, Engineering and Development* (2016): 2–3.

³⁴ See: Wei-Yun Chung, Wei-Jun Jean Yeung, and Sonja Drobnič, “Family policies and care regimes in Asia,” *International Journal of Social Welfare* 30, no. 4 (2021): 371–384.

7. Recommendation for improving the law on child custody after divorce in Vietnam

7.1 Statistics on settlement of disputes over the right to child custody

The divorce rate in Vietnam has increased over the years. From 2020 to 2023, the number of first-instance divorce cases rose by 9,725, representing an increase of 10.31%. Conversely, the number of divorce appeal cases decreased by 65, a reduction of 2.65%. Additionally, the number of first-instance cases involving disputes over child custody after divorce increased by 74 cases, an 8.14% rise. However, the number of appeal cases concerning disputes over child custody decreased by 34 cases, an 11.18% reduction. The ratio of appeal cases to first-instance cases on divorce and child custody has sharply declined.

Therefore, although the number of divorce cases and disputes over child custody is increasing, the number of appeal cases is decreasing. Nonetheless, disputes over the right to child custody after divorce remain complex, with many instances prolonged due to the inability of parents to reach an agreement.

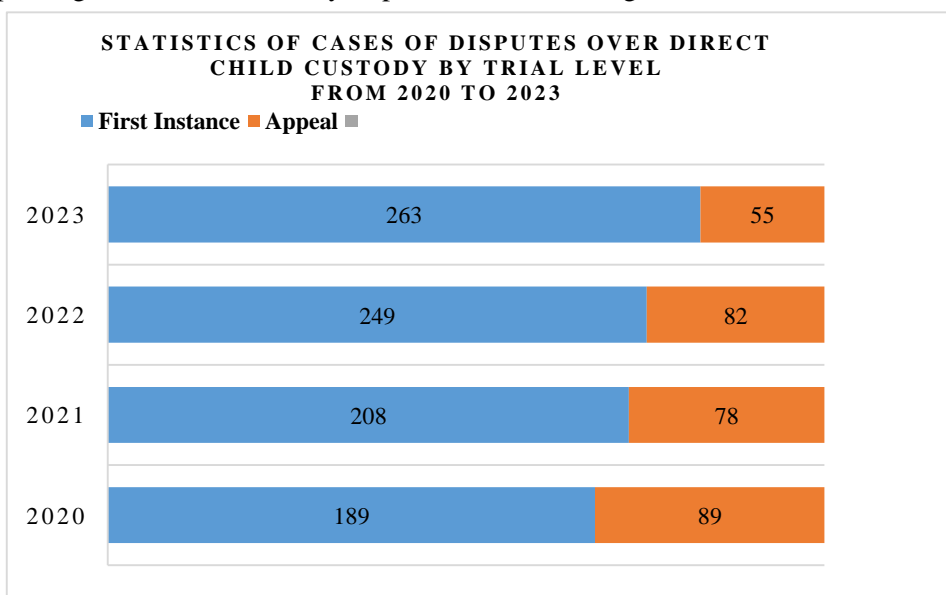


Figure 1. Statistics of child custody dispute cases by court level from 2020 to 2023³⁵

7.2 Proposal to recognize shared child custody after divorce

The current practice of determining child custody when parents divorce, as stipulated by the Law on Marriage and Family of Vietnam, has specific areas for improvement. The Court acknowledges the agreement between the husband and

³⁵ Statistics are obtained through search results by the keyword “judgment on the dispute over custody of children” on the website of: “Supreme People's Court Electronic Information Portal,” <https://congbobanan.toaan.gov.vn/>. (accessed August 06. 2024).

wife regarding who will directly raise the child and the rights and obligations of each party towards the child after the divorce. This recognition by the Court facilitates a swift and effective resolution of the divorce procedure. However, examining judgments or decisions recognizing consensual divorce reveals that the Court acknowledges the parties' agreement without verifying each party's ability to ensure the child's upbringing, care, and education.

Moreover, Vietnamese Marriage and Family Law should consider the concept of shared custody upon divorce, which is recognized in the laws of the United States,³⁶ England, France, and other countries.³⁷ Under Vietnamese law, only one parent, usually the mother, is typically granted custody after a divorce. This regulation can be limiting in terms of child-rearing and may cause psychological harm to children due to the absence of one parent. As practiced under French law, the division of custody between parents represents a significant advancement in promoting gender equality and protecting children's rights by ensuring they are cared for by both parents simultaneously.

This approach should be considered for incorporation into Vietnamese law to help reduce disputes over child custody during divorce,³⁸ ensure children receive optimal care and education from both parents, minimize harm to children, and foster increasingly civilized and progressive social relations.

8. Conclusion

Parental custody rights after divorce are crucial for the well-being of children and must be carefully considered and implemented by parents, family members, society, and national policies. Generally, each country may have different policies regarding child custody post-divorce, but the common goal is to ensure the child's overall welfare. This underscores that the primary principle in determining custody rights after divorce is to ensure the child's optimal development, respecting the parents' agreement and considering the child's wishes.

Vietnamese law recognizes that parents are free to agree on child custody after divorce; however, this agreement must ensure the child's comprehensive welfare. The court will resolve disputes based on the principle that if the child is under 36 months old, the mother is given priority for custody, and if the child is seven years old or older, the child's wishes are considered. However, there are

³⁶ Daniel R Meyer, Maria Cancian, and Steven T. Cook, "The growth in shared custody in the United States: Patterns and implications," *Family Court Review* 55, no. 4 (2017): 500–512.

³⁷ Mia Hakovirta and Christine Skinner, "Shared physical custody and child maintenance arrangements: A comparative analysis of 13 countries using a model family approach," *Shared physical custody: Interdisciplinary insights in child custody arrangements* (2021): 309–331.

³⁸ Thi Hong Tuyen Nguyen, "Thực trạng tranh chấp về nuôi con và cấp dưỡng nuôi con sau khi ly hôn= Current situation of disputes over child custody and child support after divorce," *Vietnam Lawyer Journal* (2022): 21–22.

exceptions to this principle. If a child under 36 months old is being directly cared for by the father and the mother is not fulfilling her caregiving role adequately, the father is given priority for custody, as reflected in Precedent No. 52.

Additionally, it is necessary to recognize shared custody alongside sole custody in Vietnamese law to align child custody practices after divorce with global development trends. The shared custody model has been adopted by many countries worldwide and is becoming a current trend. This approach provides children with comprehensive development and minimizes the negative impact of parental divorce, allowing them to grow up with the love and care of both parents.