# Content of the right to parental responsibility

*Experiences – Analyses – Postulates*

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# Content of the Right to Parental Responsibility

*Experiences – Analyses – Postulates*

Edited by

**Paweł Sobczyk**


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# Contents

# Notes on the Contributors

## Editor and Author

**Paweł Sobczyk** holds Post-doctoral degree in legal sciences in the field of law. Associate professor at the University of Opole, Dean of the Faculty of Law and Administration of the University of Opole, Head of the Department of State and Law Sciences, Coordinator of the Center for Research on Fundamental Rights, Deputy Director of Institut of Iustice in Warsaw. Member of several scientific societies, scientific and editorial committees ("Przegląd Sejmowy"). Author of over 100 scientific publications, over 30 expert opinions and legal opinions, over 70 publishing reviews. Research interests (in the classical sense): constitutional law, religious law, human rights. The latest scientific passions: axiology of law, multi-centricity of legal systems, the principle of justice.

## Authors

**Marek Andrzejewski** (born in 1959) is a Professor of the Institute of Legal Sciences at the Polish Academy of Sciences (INP PAN) and the Head of the Centre of Family Law and Children's Rights. He obtained an M.A. degree from Adam Mickiewicz University in Poznan, in 1982, and the Ph.D. degree in IPN PAN of Warsaw in 1987. After having been a tutor and caretaker in children's care home between 1987-1996, he awarded post-doctoral title (the so-called habilitation) in 2005 on the basis of scientific achievements and a book titled „Protection of children's rights in a dysfunctional family (Child – Family – State)" (Krakow 2003) by the Scientific Council of the INP PAN. Between 2004-2008, he was a member of the Codification Committee of Civil Law in the Ministry of Justice – a family law team. He specializes in the family law.

**Tímea Barzó** is Professor of Law at and Head of the Department of Civil Law of the Faculty of Law of the University of Miskolc. She specializes in family law and medical law. In addition, since 2016, she has been a second-time lecturer at the Department of Civil Law of the Faculty of Public Governance and International Studies of the University of Public Service in Budapest. She is also a member of the authors'

team of commentaries on the Family Law Book of the Civil Code of 2013, which was published by various publishers. She wrote a monograph in 2017 in the field of family law titled The Legal Order of the Hungarian Family. In addition, she has served as an attorney-at-law for more than two decades.

**Lilla Garayova** is the Vice Dean for Bachelor and Master Studies and International Relations of the Faculty of Law of the Pan-European University. She is an Associate Professor of international law at the Pan-European University as well as the Comenius University in Bratislava, while also practising corporate law as a director at a global Fortune 500 company. Her professional and publishing practice focuses on international family law and the protection of human rights. She is a member of the Scientific Council of the Faculty of Law of the Pan-European University, the Slovak Association of European Law, the European Association of Private International Law and the International Society of Family Law. She is a member of the editorial boards of several national and international scientific journals, including the Central European Journal of Comparative Law; Institutiones Administrationis – Journal of Administrative Sciences and Paneurópske právnické listy. Currently, she is one of the working members of the Central European Professors' Network.

**Aleksandra Korać Graovac** is a Full Professor, Chair of Family law, at the Faculty of Law, Zagreb. A member of several governmental commissions for the drafts of the family acts, the act of personal civil status and of the act on register partnerships persons of the same sex. Member of the National Commission for medically assisted procreation. Croatian representative of the Committee of Experts on Family Law (2006-2008), and member of ad hoc Committees of Experts on Family Law (2011 and 2012) of the Council of Europe. Full member of the Croatian Academy of Legal Sciences, member of the International Society of Family Law, member of the Central European Professors Network. She is a Scientific Counselor of the Constitutional Court of the Republic of Croatia.

**Gordana Kovaček Stanić** has been a Full Professor of Law at the University of Novi Sad, Serbia since 2002. She is the Head of the Civil Law Chair and teaches courses in Family Law, Comparative Family Law, Comparative Child Law. She is a member of the Executive Board of Directors of the International Academy for the Study of the Jurisprudence of the Family, a member of Academic Network on Family Law in Europe (current project: Legal Protection and Empowerment of Vulnerable Adults). She is a member of the International Society of Family Law and of the Central European Professors' Network. Author of several books in Serbian (Legal Aspects of Parenthood 1994; The Right of a Child to Know His/Her Origins 1997; Comparative Family Law 2002; Family Law: Partnership, Child and the Guardianship Law 2014; Legislation on Human Reproduction with Biomedical Assistance 2008) and over 100 academic papers published in national and foreign journals.

**Zdeňka Králíčková** is a Professor of Civil Law at the Faculty of Law, Masaryk University, Brno, Czechia. Besides the academic sphere, she has been a member of the Czech Bar Association and the Association of Family and Guardianship Judges. Based on the experience as a member of the Ministry of Justice's commission on family law reform, she has published many family law articles, books, textbooks and significant parts of commentaries to the Civil Code. Last but not least, she has been a long-term member of the International Society of Family Law and its Executive Council (Ex-Co ISFL), the Defence of Children International (DCI), the International Academy for the Study of the Jurisprudence of the Family (IASJF) and the Family Law in Europe: Academic Network (FL.EUR).

**Suzana Kraljić** is a Full Professor at the University of Maribor, Faculty of Law. She teaches and researches family law (especially child law), medical law, and succession law. She was a visiting lecturer in Novi Sad, Marburg, Vilnius, Brno, Tallin, Bucarest, Hannover, Budapest, Ordu in Čakovec. She has also cooperated in various international projects as a national reporter. She had a number of presentations at domestic and international conferences (Nassau, New York, Hamburg, Istanbul, Warsaw, Brisbane, Oslo, Vienna…). She is editor of the journal Medicine, Law & Society, and head of the Center for medical law. Her bibliography contains seven books and a number of book chapters and articles, published national and foreign journals She is the author of the first Slovenian commentary on new Slovenian Family Code (2019) and co-author of the commentary on new Slovenian Non-Contentious Civil Procedure Act (2022).

**Michał Poniatowski**, born in 1983, is a Doctor of Laws (LL.D) in the field of canon law (2012), adjunct at the Faculty of Canon Law at the Cardinal Stefan Wyszyński University in Warsaw, lecturer at the District Bar Council in Warsaw, secular attorney, church attorney. He specializes in ecclesiastical law, marital law, law relating to non-governmental organizations, as well as in branches of law such as criminal law, civil law and administrative law with appropriate procedures, in particular in a comparative perspective. He has experience in appearing before many courts as an attorney of the parties in the above branches of law (including family law). His court practice allows to analyze the law in terms of effectiveness, as well as the application of the rights and obligations of parties before the judiciary, but also to observe the parties' reactions to the court's decision after the end of the proceedings.

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# Introduction

Paweł Sobczyk

In European legal culture (shaped by Greek philosophy, Judeo-Christian religion, and Roman law), the concepts of family, parenthood, motherhood, and fatherhood are among the fundamental values whose traditional meaning has been questioned in the last few decades. Therefore, there has been a need for scientific reflection on one of the key aspects in this area—parental responsibility—in the legal systems of Central and Eastern European countries based on a similar constitutional axiology, belonging to the same legal culture, and having many similar historical, cultural, legal, and social experiences.

With the above in mind, the Central European Academy University of Miskolc appointed, at the beginning of 2022, the research team "Content of the right to parental responsibility," which comprises Prof. Aleksandra Korać Graovac (University of Zagreb, Croatia); Prof. Zdeňka Králíčková (University of Brno, Czech Republic); Prof. Tímea Heinerné Barzó (University of Miskolc, Hungary); Prof. Suzana Kraljić (University of Maribor, Slovenia); Prof. Lilla Garayová (Pan-European University, Bratislava, Slovakia); Prof. Gordana Kovaček Stanić (University of Novi Sad, Serbia); Prof. Marek Andrzejewski (Polish Academy of Sciences, Poland); Prof. Paweł Sobczyk (University of Opole, Poland); and Dr. Michał Poniatowski (Cardinal Stefan Wyszyński University in Warsaw, Poland).

One of the basic tasks and effects of scientists' work is this monograph. At the outset, the team of researchers assumed that a multi-author scientific monograph, which will be created as part of the team's work, will be published under a title identical to the name of the team. Nevertheless, detailed analyses and discussions during an international scientific conference led to the verification of the initial research assumptions and the change of the title of the monograph to *Content of the right to parental responsibility. Experiences – Analyses – Postulates*.

Paweł Sobczyk (2022) Introduction. In: Paweł Sobczyk (ed.) *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates,* pp. 11–12. Miskolc–Budapest, Central European Academic Publishing.

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When starting the research, it was assumed that the work's individual chapters would be devoted to the analysis of the title issues from the perspective of national law and the jurisprudence of the European Court of Human Rights in Strasbourg. It was initially assumed that each chapter would consist of 12 basic points, within which detailed issues determined by the researchers will be discussed. It was considered crucial to focus the analyses on the following issues (while maintaining the researchers' autonomy and the freedom of choice of matter): (1) introduction, (2) axiological and constitutional foundations for the protection of parental responsibility, (3) protection of parental authority in the system of legal sources, (4) the concept of a parent, (5) the concept of a child, (6) principles of parental responsibility, (7) the rights and obligations of parents and children resulting from parental responsibility, (8) sexual education of children and parental responsibility, (9) detailed issues related to parental responsibility, (10) parental authority in case of divorce, (11) the status of a child not subject to parental responsibility, and (12) summary and *de lege ferenda* conclusions.

The editors and authors of the publication express their sincere gratitude to Prof. Dr. János Ede Szilágyi, PhD, Head of Ferenc Mádl Institute of Comparative Law; Dr Katarzyna Zombory, PhD, Director General of Central European Academy; Prof. Dr Tímea Heinerné Barzó, PhD, Director General of Central European Academy and his colleagues, for having been invited to participate in international research; this publication is a product thereof.

Chapter I

# Content of the Right to Parental Responsibility in the Case Law of the European Court of Human Rights

Michał Poniatowski

*"It is easier to rule a country than raise four children"*
Winston Churchill

## 1. Introduction

The analysis of the content of parental responsibility requires examining not only the particular legal systems of Central and Eastern European countries individually but also as a whole.[1] These orders are not isolated from each other and are in an appropriate bilateral or multilateral relationship with each other; they are also elements of the European legal culture. Among them, for example, there may be a reception of law. The process of shaping the European legal culture was and is complex.

Bearing in mind parental responsibility, it is worth mentioning that, already in antiquity, the state had been defined by Aristotle as a community of families. To this day, the family is the basic unit of society. It is worth remembering that in international law, the definition of the family as the natural and fundamental cell of society

1 Cf. also Mostowik, 2014.

Michał Poniatowski (2022) Content of the Right to Parental Responsibility in the Case Law of the European Court of Human Rights. In: Paweł Sobczyk (ed.) *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates,* pp. 13–35. Miskolc–Budapest, Central European Academic Publishing.

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is widely regulated in both universal and regional acts.[2] The family as a value is one of the foundations of the European legal culture and, chronologically, it predates lawmaking in its existence.[3] The case law of the European Court of Human Rights (ECHR), operating under the Convention for the Protection of Human Rights and Fundamental Freedoms, has a special place in this legal culture.[4] Its analysis allows to examine the issue of parental responsibility from a broader perspective because parental responsibility is a universal topic that is naturally related to humans; it concerns not only the countries of Central and Eastern Europe but also other parts of Europe (or of the globe). Therefore, although the case law of the ECHR refers to individual countries, its legal argument often includes a reference to other states individually or a group of them, and in the comparative aspect, the Court refers to the legal orders of states—even from outside Europe—seeking certain international standards in them.

Several questions arise at this point in the context of the analysis of the Court's case law in the area of parental responsibility. First, how is the family itself judged as a value? Can we (or should we?) adopt solutions from other parts of Europe directly in the area of parental responsibility or promote our own solutions embedded in our constitutional axiology to be adopted in particular countries? Is pluralism in this respect possible? Do states have a margin of appreciation in shaping parental responsibility and what may be its limits?

Owing to the sensitivity of the value represented by the family (whose component is parental responsibility), it should be assumed that the case law of the Court should first classify this value as fundamental, analogically to the way it is defined in the legal order of a given state. Owing to the diversity of solutions in force in particular legal systems, states should, as a rule, exercise a margin of appreciation in

2 In the first case, it is possible to refer to Art. 16 sec. 3 of the Universal Declaration of Human Rights of 10 December 1948 (New York), according to which, "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State*." Similar regulations can be found in Art. 23 of the International Covenant on Civil and Political Rights of December 19, 1966 (New York), Art. 10 point 1) of the International Covenant on Economic, Social and Cultural Rights of December 19, 1966 (New York), preamble to the Convention on the Rights of the Child of December 20, 1989 (New York), preamble to the Convention on the Rights of Persons with Disabilities of December 13, 2006 (New York). In the second case, it is possible to refer to acts covering the African region [Art. 18 sec. 1 of the African Charter of Human and Peoples' Rights of June 27, 1981 (Nairobi)], America [Art. 17 sec. 1 of the American Convention on Human Rights of November 22, 1969 (San José), Art. 15 sec. 1 of the Additional Protocol to the American Convention on Human Rights of November 17, 1988 (San Salvador)] or of Europe [point 16, part I, Art. 16 part II of the European Social Charter of October 18, 1961 (Turin), point 16 part I, Art. 16 of Part II of the Revised European Social Charter of 3.5.1996 (Strasbourg)], where the family is defined as the basic, but not natural, unit of society.

3 It is worth adding that, according to the Polish Constitutional Court, the constitutional axiology is ahead of the law which should be consistent with it. Cf. Judgment of the Constitutional Court of December 8, 2009, file ref. no. SK 34/08, Journal of Laws No. of 2009, No. 215, item 1675, OTK ZU 11A / 2009/165.

4 Hereinafter referred to as the Convention.

shaping parental responsibility—this freedom, however, having its limits. Therefore, first, the axiological aspect of parental responsibility and, consequently, the relation of the judgments of the ECHR to the legal order of states, followed by its subjective and objective aspect, together with elements of a procedural nature, is presented in this study.

Owing to its framework, the study contains an analysis of selected judgments of the Court, disregarding detailed descriptions of the facts in specific cases. It attempts to reach conclusions resulting from selected lines of the ECHR's jurisprudence. Thanks to this, and comparing this chapter with the content of other chapters of this monograph devoted to individual countries of Central and Eastern Europe, it is possible to come to additional comparative conclusions.

In the case law of the ECHR, one can also find the content of "parental responsibility."[5] In this study, the abovementioned responsibility is understood broadly. It is worth adding, however, that in the Court's jurisprudence, in the context of the relevant legal orders, the concept of "parental authority" also appears,[6] as well as the concept of "parental rights" [7] or "parental care."[8] Sometimes, the Court uses

5 Cf. Judgment of the ECHR of April 5, 2005, Monory v. Romania and Hungary, application no. 71099/01; judgment of the ECHR of February 5, 2015, Furman v. Slovenia and Austria, application 16608/09; judgment of the ECHR of April 2, 2015, Ribić v. Croatia, application 27148/12; judgment of the ECHR of January 18, 2018. Oller Kamińska v. Poland, application no. 28481/12; judgment of the ECHR of March 6, 2018, Royer v. Hungary, application no. 9114/16. It is worth noting that the concept of "parental responsibility" is also analyzed by the Court through the definitions used in a given state's legal provisions. In the case of Great Britain, the Court indicated that "parental responsibility" in respect of a child automatically vests in the mother and, where she is married, in her husband. It may, additionally, be granted to certain other persons […]. "Parental responsibility" means all the rights, duties, powers, responsibility, and authority, which, by law, a child's parent has in relation to the child and their property (section 3 of the Children Act 1989—"the 1989 Act")," judgment of the ECHR of April 22, 1997, X, Y, and Z v. The United Kingdom, application 21830/93, § 25. It is worth noting an interesting solution in the form of the possibility of exercising parental authority also by entities other than the mother or her husband. 21830/93, § 25.

6 Cf. also judgment of the ECHR of May 18, 2006. Różański v. Poland, application 55339/00; judgment of the ECHR of June 29, 2007. Folgerø and others v. Norway [Grand Chamber], application no. 15742/02; judgment of the ECHR of March 23, 2016. Blokhin v. Russia [Grand Chamber], application no. 47152/06. Cf. also Judgment of the ECHR of December 21, 1999, Salgueiro Da Silva Mouta v. Portugal, application no. 33290/96; judgment of the ECHR of July 13, 2000, Elsholz v. Germany, application no. 25735/94; judgment of the ECHR of July 13, 2000, Scozzari and Giunta v. Italy, applications nos. 39221/98 and 41963/98; judgment of the ECHR of December 16, 2008. Kaleta v. Poland, application no. 11375/02; judgment of the ECHR of March 29, 2016, Kocherov and Sergeyeva v. Russia, application no. 16899/13; judgment of the ECHR of October 8, 2019 Zelikha Magomadova v. Russia, application no. 58724/14.

7 Cf. also judgment of the ECHR of May 18, 2006. Różański v. Poland, application 55339/00; judgment of the ECHR of June 29, 2007. Folgerø and others v. Norway [Grand Chamber], application no. 15742/02; judgment of the ECHR of March 23, 2016. Blokhin v. Russia [Grand Chamber], application no. 47152/06.

8 Cf. also Judgment of the ECHR of February 1, 2018, Hadzhieva v. Bulgaria, application 45285/12; judgment of the ECHR of February 2, 2021. X and others v. Bulgaria, application no. 22457/16; judgment of the ECHR of April 8, 2021. Vavřička and others v. The Czech Republic (Grand Chamber), application nos. 47621/13 and 5 others.

these terms in this regard in the same case.[9] Sometimes the Court, pointing to these concepts in the legal order of a given state moves on to its own legal argumentation without even referring to these concepts.[10] In the case law of the Court, the nomenclature in this respect is not uniform.

## 2. Axiological aspect

This is where the fundamental question arises: does parental responsibility have its source only in the juridical text itself? What if this issue was not regulated by law? Would parents stop protecting their own children? It is difficult to imagine a society in which parents would not be responsible for their own children owing to the lack of legal regulations. It is almost intuitive to say that parental responsibility is the natural foundation of communities such as family and society. It is worth pointing out that within the constitutional standards (which, in principle, have primacy over international law), there is a position that law should result from constitutional axiology.[11] This is the position of, among others, the Polish Constitutional Court or the Supreme Court, according to which the constitutional axiology should be considered (1) when creating law (the obligation of the legislative authority)[12] and (2) when applying the law (the obligation of the executive and judiciary authority).[13] These responsibilities should not be separated from each other, rather they should be held by particular authorities in conjunction with each other.[14]

Therefore, it should not be surprising that the analysis of the ECHR' case law in the field of parental responsibility first requires to present the axiological outline of the countries in this part of Europe. In the opinion of the Constitutional Court

9 Cf. also judgment of the ECHR of July 6, 2010, Neulinger and Shuruk v. Switzerland, application no. 41615/07; judgment of the ECHR of November 26, 2013, X v. Latvia, application 27853/09; judgment of the ECHR of September 3, 2015, M and M v. Croatia, application no. 10161/13; judgment of the ECHR of February 7, 2017, Wdowiak v. Poland, application no. 28768/12; judgment of the ECHR of October 30, 2018, S.S. v. Slovenia, application no. 40938/16; judgment of the ECHR of October 8, 2019, Milovanovic v. Serbia, application no. 56065/10; judgment of the ECHR of October 28, 2021, Kupás v. Hungary, application no. 24720/17.

10 Cf. Judgment of the ECHR of July 26, 2011, Shaw v. Hungary, application no. 6457/09.

11 Simultaneously, it is worth adding that the Community's law also emphasizes that the Union is based on values such as the dignity of the human person. Art. 2 of the Treaty on European Union (consolidated version). Cf. also Andrzejewski, 2021, p. 168.

12 Cf. Decision of the Constitutional Court of March 30, 2009, file ref. no. SK 38/07, OTK ZU 3A / 2009/43; the judgment of the Constitutional Court of May 7, 2014, file ref. K 43/12, Journal of Laws 2014, item 684, OTK ZU 5A / 2014/50.

13 Cf. Judgment of the Supreme Court of February 14, 2008, file ref. no. II CSK 532/07.

14 For example, through the demand to change the law.

itself, the Convention protects specific values.[15] As shown in the previous example of approach, the Convention should also be interpreted through the prism of these values.[16] The issue of fundamental values also applies to Art. 8 of the Convention, which protects the right to respect for private and family life.[17] Therefore, from the point of view of the Constitutional Court, axiology cannot be underestimated. The analysis of a specific case—without reference to the constitutional axiology of a given state—only by pursuing the interpretation of a legal text conceived in a given legal system not only seems to be incomplete, but it may also turn out to be faulty. Since quoting only the norms of a given state—and even more so, of several unrelated states—for the purpose of a comparative study may be insufficient, a holistic approach should be adopted by supplementing the interpretation of a legal text with an appropriate analysis of the axiology underlying a given norm, in particular in unprecedented cases.[18] Systemic and functional interpretation should be of particular importance.

15 Cf. Judgment of April 9, 2009, Šilih v. Slovenia [Grand Chamber], application no. 71463/01. According to § 147 of that judgment: "The Court reiterates in this connection that Article 2 together with Article 3 are amongst the most fundamental provisions in the Convention and also enshrine the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324)," whereas, according to § 163 of that judgment: "However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner." In this judgment, a parallel reference can be made to both the values recognized in democratic societies and the values underlying the Convention. Thus, these values should be taken into account when considering individual cases.

16 Pursuant to § 101 of the judgment of February 4, 2005, Mamatkulov and Askarov v. Turkey [Grand Chamber], applications nos. 46827/99 i 46951/99, "In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (see *Soering*, cited above, p. 34, § 87, and, *mutatis mutandis*, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 18, § 34)."

17 Pursuant to § 66 of the judgment of July 16, 2014 [Grand Chamber] Hämäläinen v. Finland, application no. 37359/09: "They concern the importance of the interest at stake and whether 'fundamental values' or 'essential aspects' of private life are in issue (see *X and Y v. the Netherlands*, cited above, § 27, and *Gaskin*, cited above, § 49), or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment conducted under Article 8 (see *B. v. France*, 25 March 1992, § 63, Series A no. 232-C, and *Christine Goodwin*, cited above, §§ 77-78)." Cf. also § 43 of the judgement of December 2, 2008 K.U. v. Finland, application no. 2872/02: "While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is, in principle, within the State's margin of appreciation, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions (see X and Y v. the Netherlands, cited above, §§ 23-24 and 27; August v. the United Kingdom (dec.), no. 36505/02, 21 January 2003; and M.C. v. Bulgaria, no. 39272/98, § 150, ECHR 2003-XII)."

18 Often, the Court simply lists standards from individual countries without further scrutinizing them. Cf. Judgment of March 11, 2011, Lautsi and others v. Italy [Grand Chamber], application no. 30814/06, § 26-28.

Axiological links between states can be found in particular regions of Europe and often throughout it. As for the countries of Central and Eastern Europe, they also have many common experiences; in this regard, experiences from the twentieth century ought to be mentioned, although earlier centuries shall not also be forgotten, where, apart from economic or cultural exchange, countries had to cooperate to protect not only their own borders and security but also their faith as the then religious states within the so-called bulwark of Christianity. One can mention, for example, the reign of the king of Poland and Hungary, Louis of Hungary, in the fourteenth century. Christianity represented, at that time, a kind of bond not only in this part of Europe.

In the analyzed countries of Central and Eastern Europe, Christian values were particularly entrenched, serving to protect against real threats. What is characteristic of the Middle Ages is that the values embodied by Christianity were universal in nature when it came to Europe's area. The importance of the family should also be clearly emphasized, since the Holy Family occupies a special place in Christian theology. The protection of the family or marriage was also guaranteed by canon law, which applies to believers regardless of their nationality.[19] At that time, in some legal systems, canon law or the law of other religious communities frequently influenced the regulation of family matters.[20] The centuries-old functioning of such regulations also had an impact on constitutional axiology; therefore, the heritage of this part of Europe should not be forgotten.

The twentieth century is, for the countries of Central and Eastern Europe, a period of common experiences of the conflagration of World War I and II and those related to the totalitarian systems: fascist, Nazi, or communist, respectively.[21] Some of the countries in this part of Europe had to experience, in a short time, the functioning of even more than one of these systems, which also wreaked havoc in the axiological sphere. One of the assumptions of these systems was the maximum subordination of man to the state,[22] hence the systemic struggle of the state with family ties, which allowed for the individual's greater dependence on the state. An example here is the German institution named Lebenborn operating in the Third Reich; its organizational units were also created in the occupied territories, where children taken from local families were Germanized. As for Poland, it is also worth mentioning the case of the so-called children of the Zamość region[23]: in the years 1942–1943, over 30,000

19 Simultaneously, this law was universal (within the framework of the universal Church) and local (within particular churches).

20 This influence could be observed even in the twentieth century through the role of the Code of Canon Law of 1917. Cf. Paździor, 2013, p. 523.

21 Cf. also Lenkovics, 2021, p. 22.

22 It is worth mentioning here the philosophy of law and, for example, G. Hegel, who was accused of his philosophy being the source of modern totalitarianism owing to the concept of making sacrifice for the state. Cf. Gadacz, 1988, pp. 12–13. Simultaneously, according to this philosopher, the ethical community has its own developmental forms, ranging from the family, then the civil society, to the state. Ibid., p. 6. The appropriate subordination of the individual to society can be seen in the philosophy of another German philosopher: Marx. Cf. Iwasiński, 2015, pp. 154–155.

23 Zamość is a town located about 100 km from Lublin.

children were displaced from these areas by the Germans. Many of them were later murdered in concentration camps, such as 14-year-old Czesława Kwok, who was killed with a phenol injection and whose famous symbolic photo was taken in Auschwitz-Birkenau.[24] The communist authorities also used family-law instruments to fight the opposition.[25] The above examples illustrate the attitude of totalitarian states toward family values and related parental responsibility.

It should come as no surprise, then, that after Central European states regained their sovereignty, their constitutional axiologies came to include the extensive protection of the family.[26] This protection was already included at the constitutional level. After regaining their sovereignty, individual states had the opportunity to shape this protection on their own without the need to obtain approval from external communist authorities, as was the case after the end of World War II. The constitutions were adopted shortly after. Simultaneously, they concluded international agreements, both multilateral and bilateral. In the first case, it is worth mentioning the Convention on the Rights of the Child of November 20, 1989[27]; interestingly, its preamble indicates the functioning of "the human family" based on the dignity of the human person. Simultaneously, in the preamble, the Convention expresses the conviction that the family—as the basic unit of society and the natural environment for the development and well-being of all its members (especially children)—should be provided with the necessary protection and support so that it can fully fulfill its obligations in society. These two fragments of the Convention undoubtedly testify to the great value of the family in the international space. In particular, the reference to the "natural" environment refers, in its essence, to axiology. This is not overlooked by the ECHR, which, while analyzing individual cases, often looks for international standards.

24 https://polishhistory.pl/my-name-was-czeslawa-kwoka/ (of May 21, 2022).

25 An example is how prisoners of the communist regime who had previously served in the Home Army were deprived of parental rights. Cf. https://trojka.polskieradio.pl/artykul/2745419 (Accessed: May 21, 2022).

26 For example, pursuant to Art. 48 of the Constitution of the Republic of Poland of April 2, 1997, "1. Parents have the right to raise their children according to their convictions. This upbringing should take into account the child's level of maturity, as well as the freedom of their conscience and religion and their beliefs. 2. Limitation or deprivation of parental rights may take place only in the cases specified in the act and only based on a final court decision," whereas, pursuant to Art. 53 section 3 of this constitution, "Parents have the right to provide their children with moral and religious education and teaching in accordance with their convictions. The provision of Art. 48 sec. 1 shall apply accordingly." Simultaneously, according to Art. L of the Constitution of Hungary of April 18, 2011, "(1) Hungary shall protect the institution of marriage as the union of one man and one woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. The mother shall be a woman, the father shall be a man. (2) Hungary shall support the commitment to have children. (3) The protection of families shall be regulated by a cardinal Act." English translation: https://www.parlament.hu/documents/125505/138409/ Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178 (Accessed: May 21, 2022). Cf. also Stanić, 2021, pp. 194–195.

27 In Poland, it entered into force on July 7, 1991, Journal of Laws 1991 No. 120, item 526.

In the case of bilateral agreements, it is worth mentioning the concordats which, thanks to bilateral relations, are more detailed and closer to the constitutional axiology of a given state than in the case of multilateral international agreements. For example, in accordance with Art. 11 of the Concordat between the Holy See and the Republic of Poland of July 28, 1993,

> The Contracting Parties declare their will to cooperate in the defense and respect for the institution of marriage and the family that are the foundation of society. They emphasize the value of the family, and the Holy See, for its part, reaffirms the Catholic teaching on the dignity and indissolubility of marriage.[28]

Thus, the parties to this international agreement emphasized *expressis verbis* the value of the family, which is recognized but not created in this act. Importantly, this value had been previously recognized in the two autonomous and independent legal systems of the parties to the concordat.

It should also be emphasized that axiology is not a single-element set, but it consists of many elements; further, there may be a conflict of values, for example between parental responsibility and the religious freedom enjoyed by children.[29]

Simultaneously, it is impossible to define the hierarchy of all values at once as there is no one-size-fits-all answer. Of course, at the forefront of all values is the dignity of the human person as the source of human rights. However, many values rank differently depending on the circumstances of the case and the different value that is contrasted with them,[30] and in this case, it is necessary to maintain the balance. Potential conflicts may occur at the same level of normative acts that are carriers of particular values but also at different levels. The easiest way is when the conflict is between standards that occupy a different place in the hierarchy of sources; then, it is enough to apply the classic conflict of laws rules.

Considering the above, it can be concluded that parental responsibility is based on axiology. This basis is of broad rather than individual nature, and these values

28 Journal Of Laws 1998 No. 51, item 318.

29 Religious freedom is one of the fundamental values protected by the Convention. Cf. Judgment of December 4, 2008, Dogru v. France, application no. 27058/05. According to § 72 of that judgment, "[…] Having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognized and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention." The examples illustrate the scale of potential practical problems. It is possible to imagine a child at the age of 17 who loses the faith of their parents and, exercising their own religious freedom, changes their faith to their chosen one. However, what if, in a shared house, the child wanted to remove the religious symbols of the parents' faith from every room? At this point, a conclusion can be reached in the form of the principle of religious freedom "growing in importance" along with the degree of the child's maturity. However, this is not a legal principle but only a legal rule. The religious freedom of a child (like that of the parents) is also not absolute.

30 A good illustration of the weighting of individual values is provided by the legal argument of the ECHR in the judgment of January 15, 2013, Eweida and others v. The United Kingdom, applications nos. 48420/10, 59842/10, 51671/10 and 36516/10.

are fundamental not only from the perspective of the Convention. It is the duty of the legislature, and then the executive and judiciary authority, to respect this axiology. This applies to both lawmaking and law application.

The Convention protects certain values as being fundamental, including respect for family life and the right to found a family. In the Court's opinion, the Convention should also be interpreted with due regard to the values it protects.

The axiology expressed in the Convention, like the constitutional axiologies of individual European countries, consists of many elements. Conflicts can arise between individual values. In such a case, these values should be weighed, and the appropriate balance should be maintained between them.

The countries of Central and Eastern Europe have a similar axiology, which is mainly owing to their similar history and cultural heritage.[31] As a consequence, their legal systems should also be similar, with particular emphasis on the values of the family. It can be said that axiology determines the "normativization vector."

In the context of the ECHR's case law, a postulate may be proposed that the constitutional axiology of a given state (or in the comparative aspect, of a group of axiologically similar states) should be analyzed each time before the ECHR issues a judgment, with special attention being paid to the guidelines for linguistic, systemic, and functional interpretation. In particular, in matters of parental responsibility, judgments issued within the legal system of states operating under a different axiology should not be cited without reflection.

## 3. Relation of the ECHR's case law to the states' legal system

At this point, reference should be made to the relation of the ECHR's case law to the legal system of individual countries. First, it should be noted that the ECHR functions based on an international agreement concluded by individual states in the form of the Convention for the Protection of Human Rights and Fundamental Freedoms, which was drawn up in Rome on November 4, 1950.[32] The conclusion of this agreement was established as a result of the Convention's operation prior to the Court's case law. Therefore, the ECHR's case law is, by its nature, applied by individual states based on the voluntary acceptance of the international principle of *pacta sunt servanda*. It should be noted that the individual states that concluded this agreement co-create European standards but are not to supposed to compulsorily apply the Convention in isolation from the aforementioned axiology. The

31 Cf. also Garayová, 2021, p. 223; Graovac, 2021, pp. 37–38, 72.; Kraljić, 2021, p. 255; Králíčková, 2021, pp. 81–82; Lenkovics, 2021, 16.

32 In Poland, this agreement was published in the Journal of Laws (Journal of Laws of 1993, No. 61, item 284).

ECHR's case law does not, in principle, precede the provisions of the constitutions of particular states as well as the constitutional axiology itself.[33] However, one can imagine, for example, a state that shapes the constitution so as to form a totalitarian system. It would introduce, for instance, the death penalty for political crimes. In such a case, the Court may refer to international standards (e.g., shaped by the Convention) disregarding the provisions of such a constitution and even the constitutional axiology shaped by society influenced by propaganda. Such a legal argument should, however, be applied with caution and cannot be treated instrumentally.

As a consequence of this relation, in this Court's case law, one can notice cases of multiple examination of a given state's legal system, along with its relevant jurisprudence, and compare it with that of other European countries' and even of those from outside Europe, such as the case law of the American Supreme Court.[34] As part of its study, the ECHR may conclude that some regulations represent a universal standard[35] but also that some issues do not fall within a certain European standard.[36] In practice, however, it is difficult to determine what is already to be deemed a standard and what not, and transitional forms are also possible. It is not easy to establish that, for example, if there is a solution in place in most European countries, it is already a standard. In particular, this concerns such sensitive issues as the national regulation of parental responsibility issues, which consists of many elements.[37] In fact, this type of assessment boils down to prudence and is generally directed toward individual protection in light of the Convention's norms.

The Court's case law includes a second perspective, since, depending on the result of the Court's study, a given country may operate within the so-called margin of appreciation, potentially benefiting from the existing pluralism of legal solutions.[38] Within this doctrine, the margin of appreciation is balanced with individual interests, whereas the protection of private and family life makes this margin narrower.[39];

33 It is easy to imagine a dispute resulting from the inconsistency of the ECHR's judgement and the one issued by a particular Constitutional Court. Similar disputes can be observed between the case law of the Court of Justice of the European Union, which promotes the primacy of the Community's law, and the jurisprudence of individual constitutional courts.

34 Cf. Judgment of the ECHR of January 15, 2013, Eweida and others v. The United Kingdom, applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 48.

35 For example, issues related to pre-trial detention and the right to a fair trial or to the prohibition of torture.

36 For example, no universal ban on the use of religious symbols exists in public places.

37 For example, issues related to the religious upbringing of one's own children.

38 This type of broad argument was presented by the court in the Lautsi case. Cf. Judgment of the ECHR of March 11, 2011, Lautsi and others v. Italy [Grand Chamber], application no. 30814/06. Regarding the margin of appreciation, a broad argument can also be found in studies in the field of legal sciences. Cf. also Nowicki, 2021, pp. 358–360.

39 Cf. ibid., p. 360. According to this author, "*From the court's case law it can also be concluded that restrictions on the exercise of rights that are particularly important in a democratic society, such as freedom of the press, personal freedom, protection of private and family life, require stricter control, causing, consequently, a restriction of that margin of appreciation*."

thus, the Court's case law subsequently influences the very legal system of a given state. This influence takes place without the direct consent of the state concerned.

However, one may see the indirect expression of this consent during the conclusion of the abovementioned international agreement. The Court must operate within its own competence in the framework of this original consent and permitted interpretation of the Convention. The doctrine emphasizes that this interpretation is not of static nature.[40] However, the Court should not arbitrarily interpret the Convention and disregard the historical aspect. Simultaneously, it is worth noting that the Convention was not adopted by European states even in a similar period. In the case of the countries of Central and Eastern Europe, the imposed communist regime was an obstacle; when this disappeared, the Convention had already been in force for several decades, and the development of the Court's case law already significant.[41]

It is also worth noting that the judgments of the Court concern specific cases and that transferring the jurisprudence theses themselves to different legal system may lead to defective conclusions, in particular when the aforementioned axiology functioning in the legal system of a given state has been omitted.

Considering the above, it can be concluded that the relation of the ECHR's case law to the legal system of states may be assessed from the perspective of a given state's legal system (*ad intra*) and from the perspective of the Court's case law (*ad extra*). These two perspectives shall not be isolated from each other, but both the state and the Court shall take into account the Court's case law and the legal system of the state (including axiology), respectively, so that the Court's case law does not *de facto* and *de jure* replace or limit the role of state authority without legal basis, and the state authority protects the rights guaranteed by the Convention that it had voluntarily agreed to respect.

As part of the ECHR's case law, the key of a given line of jurisprudence is often to determine the scope of the so-called margin of appreciation. Depending on the determination of the scope of this freedom, the judgment of the Court stays in a greater or lesser relation to a given state's legal system, following the rule that the smaller the freedom, the greater the Court's intervention. Simultaneously, it should be noted that the ECHR's case law is not uniform and that individual judgments can—and even need to—be analyzed critically. In particular, theses of judgments issued in relation to other countries shall not be uncritically transferred.

40 Cf. ibid., p. 352.

41 For example, in Poland, the Convention entered into force on January 19, 1993. Interestingly, its norms were referred to by the Polish Constitutional Court to be an international standard before it entered into force in Poland. For example, in the judgment of January 30, 1991 file ref. no. K 11/90, publ. Z. U. 1991/29, OTK1986-1995 / t3 / 1991/29, the Constitutional Court referred to Art. 2 of the first Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

## 4. Subjective aspect

Parental responsibility is essentially based on a relationship where it is possible to distinguish between subjective and objective aspects. Therefore, first, it is necessary to determine to whom parental responsibility applies. The analysis of the ECHR's judgments in the above subjective aspect requires reference in the first place to the source of the law—in other words, to the Convention, pursuant to which decisions are made in matters of parental responsibility. It is therefore worth quoting Art. 12 of the Convention, according to which "*men and women of marriageable age have the right to marry and to found a family in accordance with the national law governing the exercise of this right.*" This article refers to the family model that is traditional in European legal culture, composed of a man and a woman and a child or children. It should be emphasized that this article was included in the original text of the Convention in 1950. However, the articulation of the right of men and women to found a family referred to in Art. 12 of the Convention was not, even at that time, a novelty in the field of international law.[42] Nevertheless, in the current case law of the Court, the interpretation of the text of the Convention is so dynamic[43] that the above notions—although lexically seemingly unambiguous—may be understood differently by the Court itself. For example, in some cases, the Court accepted that the right to consent to same-sex marriage belongs to individual states.[44]

In subjective terms, the wording of Art. 8 sec. 1 of the Convention, "*Everyone has the right to respect for his private and family life, his home and his correspondence*" is broader. This article was preceded in international space by the norm contained

42 This type of standard can be found in Art. 16 sec. 1 of the Universal Declaration of Human Rights of 10/12/1948 (New York), according to which "*Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution*." Similar regulations can be found in other international acts of a universal nature. Cf. Art. 23 sec. 2 of the International Covenant on Civil and Political Rights of December 19, 1966 (New York). As regards acts of a regional nature, one can point to Art. 17 sec. 2 American Convention on Human Rights of November 22, 1969 (San José). However, in Art. 15 sec. 2 of the Additional Protocol to the American Convention on Human Rights of November 17, 1988 (San Salvador), the terms "men" and "women" were replaced with the term "everyone." Indirectly, one can point to Art. 6 sec. 1 of the European Convention on the Legal Status of a Child born out of wedlock of October 15, 1975 (Strasbourg), which indicates the father and mother of a child born out of wedlock. However, Art. 9 of the Charter of Fundamental Rights of the European Union of December 7, 2000 (Nice) includes no indication that a family can be founded by a man and a woman.

43 Cf. also Nowicki, 2021, pp. 352–355.

44 Cf. also the judgment of the ECHR of December 14, 2017, Orlandi and others v. Italy, applications nos. 26431/12, 26742/12, 44057/12, 60088/12, §§ 201-203. In this judgment, the Court noted the movement in European countries regarding the legal recognition of same-sex couples (as married or registered partnerships) and found that more than half of the countries of the Council of Europe have enacted provisions for such recognition (24 out of 47 as per the day of that judgment). A similar move, according to the Court, is to be observed in the Americas, Australia, and Oceania, Ibid., § 204.

in Art. 12 of the Universal Declaration of Human Rights of December 10, 1948.[45] In the case of this article, the Convention introduces the possibility of limiting this right.[46]

As far as the subject is concerned, it should be noted that both Art. 8 and Art. 12 of the Convention do not only apply to citizens; thus, parental responsibility also applies to persons without the nationality of a given state.[47] The Convention's protection is therefore broad in this respect, which corresponds to the broad protection of the rights enshrined in the Convention as human rights. However, in some cases, differences may exist between the laws on parental responsibility of nationals and other nationals—for example, in the context of the possibility of starting a family by adopting a child who has the citizenship of a given country. There is a relationship—albeit not an exclusive one—between articles of the Convention such as Art. 9 (concerning freedom of thought, conscience, and religion)[48]; Art. 14 of the Convention (concerning non-discrimination)[49]; as well as Art. 2 of Protocol No. 1 (concerning the right to education). In terms of subjects, these articles also contain general quantifiers that are not limited to citizens only.

Bearing the above standards in mind, it is possible to distinguish direct and indirect subjects in the field of parental responsibility. The first category explicitly includes parents and the child. It is worth adding that, in some legal orders, the subjectivity of the family itself is questionable.[50] However, in this relationship related to parental responsibility, other entities, such as public institutions or even

45 According to this article, "*no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks*." Similarly, among other acts of a universal nature, Art. 17 sec. 1 of the International Covenant on Civil and Political Rights of December 19, 1966 (New York) can be mentioned. In the case of the American region, a similar norm is contained in Art. 11 sec. 2 of the American Convention on Human Rights of November 22, 1969 (San José). In the case of Europe, it is worth mentioning Art. 7 of the Charter of Fundamental Rights of the European Union of December 7, 2000 (Nice) and Art. 16 part II of the European Social Charter of October 18, 1961 (Turin). Cf. also Banach-Gutierrez, 2005, pp. 69–84.

46 Pursuant to Art. 8 sec. 2 of the Convention, "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

47 See Cf. also the judgment of the ECHR of May 12, 2022, Sudita Keita v. Hungary, application no. 42321/15, §§ 21, 35-36. In this judgment, the Court proceeded in the context of the violation of Art. 8 of the Convention even though the party had the status of a stateless person. In other cases, such a status did not constitute an obstacle to proceeding also in the context of Art. 14 of the Convention. Cf. Judgment of the ECHR of April 26, 2018, Hoti v. Croatia, application no. 63311/14, §§ 3, 128.

48 Cf. also Abramowicz, 2006, pp. 227-244.

49 Regarding the withdrawal of parental rights owing to religion, the Court pointed to the conjunction of Art. 8 and Art. 14 of the Convention. Cf. also the judgment of the ECHR of June 23, 1993, Hoffman v. Austria, application no. 12875/87, §§ 30-36.

50 For example, the subjectivity of the family in administrative law is debatable. Cf. also Poniatowski, 2017, pp. 197-218.

nongovernmental organizations, may implicitly appear, for example acting in co-operation with the state. Furthermore, parental responsibility does not fulfill the concept of family life, which in terms of the subject (and also object) constitutes a larger collection. For example, according to the Court's case law, family life may concern—apart from parents and children—also grandparents. However, pursuant to that case law, the relationship between parents and children must be distinguished from the one that is between grandparents and grandchildren, which, in principle, requires less protection.[51]

Traditionally, parents are necessary to start a family. The Convention also indicates, in Art. 12, that it takes two persons to do so. It is worth noting that the assumption is one thing, and the functioning of the family is another thing. In the latter case, the family may, in some cases, consist of only one parent and a child or children. After all, it is not controversial to call a widow with children a family. In addition, the concept of parents in the traditional sense did not raise any major doubts. The classical presumption was already formulated in Roman law: *mater semper certa est, pater quem nuptiae demonstrant*. Of course, over the centuries, individual legal orders have differently addressed this presumption, *inter alia*, supplementing it with more detailed standards. In this case, the Court may examine particular legal systems.[52]

However, it is only the development of sciences that makes the classical presumption fail in seemingly obvious circumstances. For example, one can point to the issue of the so-called surrogates[53] or sperm donors, which have arisen extensive discussions not only among lawyers. In the first case, for example, the still valid question of whether the mother is the woman who gave birth or that from whom the egg was taken can be asked. Does the European standard apply in this respect? In the case law of the Court, one can find a position according to which states can determine the issue of the so-called foster parenting[54]; thus, adequately paraphrasing the classic presumption in light of the judgments of the ECHR, a woman who gave birth to a child is not always sure of parentage.

Moreover, the aforementioned presumption was of a dualistic nature, namely embracing a mother and a father. Even this dualism is contested in the case law of the Court. In the context of some Western European countries, the Court also considered a relationship of two people of the same sex to be a family.[55] Attention should be paid to a specific attempt to transmit this type of position to other legal systems using the case law of the Court, in particular through cases in which individuals

51 Cf. Judgment of the ECHR of April 16, 2015, Mitovi v. The Former Yugoslav Republic Of Macedonia, application no. 53565/13, § 58.

52 Cf. also the judgment of the ECHR of December 8, 2016, L.D. and P.K. v. Bulgaria, applications nos. 7949/11 and 45522/13.

53 Cf. also the judgment of the ECHR of July 16, 2020, D. v. France, application no. 11288/18.

54 Judgment of the ECtHR of June 26, 2014. Mennesson v. France, application no. 65192/11, § 79.

55 For example, in the case against Italy, such recognition by the Court allows for obtaining a residence permit for family purposes, cf. judgment of the ECHR of June 30, 2016, Taddeucci and McCall v. Italy, application no. 51362/09, § 83.

obtained such status in another country and demand, within the arguments relating to, *inter alia*, to prohibition of discrimination, to recognize this status in another state against its axiology and legal system.

Less controversial is the argument line of the ECHR' case law, in which, apart from the classic concept of family, there exists a tendency to broadly understand the family qualifying as such, for example, single mother with a child,[56] large families, and so on.[57] In families understood in this way, the issue of parental responsibility also appears, which—it is also worth adding—may undergo a subjective change, such as when a widow remarries.

In contrast to the concept of parents, it seems easier to define the concept of a born child,[58] although there may also be questions about whose child a given person is, which may be the case, for example, in the case of a surrogate child. The Convention itself does not define a child; however, such definitions can be found in other acts of international law.[59] Adopting the concept of a child as a person who has not yet reached adult age results in parental responsibility itself lasting, as a rule, until the child reaches the age of majority.[60] Although, in this study, the explanation of the concept of a child follows that of the concept of parents for chronological reasons, the analysis of international law, of which the Convention is an element, and the Court's case law itself lead to the conclusion that the protection of the child's best interests is fundamental owing to the child's essential nature; children have fewer

56 Judgment of the ECHR of December 13, 1979. Marckx v. Belgium, application no. 6833/74, § 12-13, 45. In the opinion of the Court, the protection of family life referred to in Art. 8 of the Convention imposes on the state an obligation to act, which enables the normal development of family ties, which is difficult if the child of the unmarried mother does not become a member of the family. According to the Court, a single mother enjoys the protection of family life in the context of recognition of adoption in another state. Cf. Judgment of the ECHR of June 28, 2007, Wagner and J.M.W.L. v. Luxembourg, application no. 76240/01.

57 It is worth pointing out that the Polish Constitutional Court has a similar position. Pursuant to the judgment of April 12, 2011, file ref. act SK 62/08, publ. Journal of Laws of 2011 No. 87, item 492, "*The provisions of the Constitution do not define the concept of the family, although the status of this basic and natural social unit is determined by a number of provisions of the Fundamental Act. […] In the light of the constitutional provisions, therefore, a "family" should be considered any long-lasting relationship of two or more people, consisting of at least one adult and a child, based on emotional and legal ties, and usually also on blood ties*."

58 The nature of the concept of a conceived child and the scope of its protection are highly complex and close to the axiological aspect.

59 In Art. 2 letter c) of the Council of Europe Convention on Contact with Children of 15.05.2003 (Strasbourg), a child is understood as a person under the age of 18, although contracting states may indicate this age differently in terms of contact. It is worth adding that, in some legal orders, full legal capacity may be granted to persons under 18 years of age—for example, in relation to women, in order for them to get married. This is the case, for example, in Art. 10 § 1 of the Act of February 25, 1964, the Family and Guardianship Code (consolidated text: Journal of Laws 2020, item 1359, as amended), according to which "*a person under the age of eighteen may not enter into marriage. However, for important reasons, the guardianship court may allow a woman who has reached the age of sixteen to contract a marriage, and the circumstances indicate that the marriage will be in accordance with the good of the established family.*"

60 Cf. Nowicki, 2021, p. 841.

opportunities to defend their rights or perform their duties than their parents. This does not mean, however, that the protection of the child's best interests takes *ex lege* precedence over the parents'.[61]

In the subjective aspect of parental responsibility, public institutions are also worth mentioning. In some cases, they may intervene and thus indirectly be the subject of these relationships. The essence of the intervention is a likelihood of their compulsory nature—for example, withdrawing parental authority in the event of a threat to the child's life. The position of the Court is that arbitrary or disproportionate interventions may be the basis for finding a violation of the Convention by the Court[62]; therefore, it should be postulated that the rights of the organs be interpreted narrowly. In addition to public institutions, this relationship may also include nongovernmental organizations that, for example, provide family counseling for charity. Their operation, unlike that of public institutions, is generally voluntary and requires parental consent.

At this point, it must be concluded that the notions of parents, family, and child are not interpreted uniformly by the Court, and the Convention contains no legal definitions in this respect. This does not mean, however, that appropriate definitions cannot be found in other international treaties and used to assist in the interpretation of the Convention. In general, a tendency toward a broad understanding of individual concepts can be noticed in the case law of the Court. Simultaneously, the values adopted by individual European societies may differ, which leads to differences among legal systems, which should be considered by the Court when interpreting subjective concepts in specific cases. The Court's task is to take these differences into account in an appropriate manner, preserving the essence of the Convention.

One can reach an additional conclusion that since individual concepts are not independent in the context of parental responsibility, they should be interpreted in relation to other concepts of a subjective nature, with particular emphasis on the directives of systemic and functional interpretation.

In the Court's case law, one can find a specific openness to the consequences of social changes in the field of parental responsibility.[63] An analysis of this case law in the subjective aspect leads to the conclusion that the Court adopts a broad interpretation and does not, in principle, protect the traditional family model as

61 Cf. also the judgment of the ECHR of February 26, 2002, Fretté v. France, application no. 36515/97. A similar position can be found in the doctrine. Cf. also Nowicki, 2021, pp. 839–840.

62 Cf. Judgment of the ECHR of January 5, 2010, Frasik v. Poland, § 90, application no. 22933/02. In this judgment, par. 88 indicates that contracting marriage is not completely free and is in the margin of appreciation.

63 These changes are also to be observed in the doctrine. In line with R. Reed, "*The new century has seen the proliferation of new family arrangements, and any distinction between married and unmarried fathers might I think be more difficult to justify. The age of criminal responsibility being set at 10 was already considered very low in the 1990s: whether it is acceptable today seems to me to be even more questionable. Understanding of the developmental psychology of children has also evolved further since then, and will be reflected in expectations as to how children are treated if detained in custody.*" https://newjurist.com/the-protection-of-childrens-rights-under-the-echr.html [Accessed: May 21, 2022]

a pan-European standard; in its opinion, no such standard exists. Simultaneously, However, there are currently no other family models that, in the Court's opinion, would constitute such a standard.

## 5. Objective aspect

The subjective aspect is not independent, and it is constitutively dependent on the objective aspect of parental responsibility; for example, a parent has no parental responsibility toward themselves. These two aspects constitute parental responsibility only when they are taken together at an appropriate level and are complementary to each other. As mentioned above, holders of parental responsibility have specific rights and obligations that are mutually related,[64] and the whole difficulty lies in properly arranging them in relation to each other in a specific case.

As the Convention does not contain an extensive catalog of rights and obligations, it is important to analyze the case law of the ECHR as the entity interpreting the norms of the Convention,[65] such as the right to start a family. In the Court's case law, one can also find a reference to the so-called fundamental elements of family life,[66] one of which is the mutual relationship of parents and children, even in the form of each other's company.[67] In the Court's case law, one can notice that the scope of parental responsibility is broad, and this responsibility may be of internal or external nature. In the first case, the parents may decide to raise the child directly in accordance with their religious beliefs. In this respect, parents have the right, for example, to pray together with their children in a private place (e.g., in their own apartment), exercising religious freedom referred to in Art. 9 of the Convention. Simultaneously, in this respect, conflict with a child's religious freedom may arise

64 Cf. also Barzó, 2021, pp. 315–322.

65 However, in many agreements of international law, such catalogs appear and are of an extensive nature. For example, parents have the right of priority in choosing the type of education for their children [Art. 26 sec. 3 of the Universal Declaration of Human Rights of 10/12/1948 (New York)]. Although, children have the right, for example, to be raised in a family environment, in an atmosphere of happiness, love, and understanding for the full and harmonious development of their personality [cf. preamble to the Convention on the Rights of the Child of December 20, 1989 (New York)]. Consequently, the creation of the abovementioned environment for children can be indicated as the parents' responsibility.

66 For example, pursuant to § 52 of the judgment of the ECHR of August 7, 1996, Johansen v. Norway, application no. 17383/90: "The Court recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 (art. 8)".

67 Cf. ibid.

in certain situations.[68] Such conflicts have been and will be present, and they may be within the family (*ad intra*) or of external nature (*ad extra*). In the first case, the legislator often contains conflict-of-law rules (for example, hierarchical order). In the second case, the legislator does not explicitly contain such norms, and a complex interpretation is needed: linguistic, historical, systemic, and functional.

In the latter case, a greater number of judgments by the Court can be found, the first example of which is the aspect of religious freedom in the public forum. Parental responsibility was so broad that the child's mother could initiate proceedings that could result in the removal of religious symbols from the public space as a consequence of the Court's judgment.[69] This effect could, in practice, apply to all public schools and not just the one in which the conflict had arisen. In this case, the mother's intent coincided at least with the presumed will of the children she represented. It is worth noting that the final position in this case was taken by the Grand Chamber of the Court, which, weighing various values, indicated that such symbols can function in the public space. However, an individual could initiate such a procedure.[70]

Moreover, it can be noted, from a temporal perspective, that parental responsibility extends over the child's whole life; an example are the Court's judgments on the issue of parents' decisions to provide the child with medical treatment. In this case, it is important to note the juxtaposition of parental responsibility with the great value of the child's health. The health condition does not always result in the parents being unable to decide on the method of treating their child.[71] Although parental responsibility obviously relates to the period of the child's life, it is also worth mentioning that the parents have the right to decide on the child's funeral.[72]

From a "territorial" point of view, it is worth referring to the Court's case law in the field of family ties.[73] Many ECHR's judgments protected family ties and protected children against deportation (even of children who have committed a crime), and in

68 For example, in the dissenting opinion of Judge Sabato to the judgment of the ECHR of May 19, 2022, T.C. v. Italy, application no. 54032/18, one can find a position according to which: *"While the role of religion vis-à-vis family law and the plurality of family types in Europe has been widely investigated in recent years from a comparative perspective, including sociological aspects,* https://hudoc.echr.coe.int/eng – *_ftn5* […] *one strand of research has addressed the issue – very relevant in my view – of the child's own "right to religious freedom" in international law".*

69 Cf. Judgment of the ECHR of March 11, 2011, Lautsi and others v. Italy [Grand Chamber], application no. 30814/06.

70 Although Art. 8 was not the subject of the study in this case; however, it remains in a proper relation to Art. 9 of the Convention.

71 The situation becomes even more complicated when parents make decisions about their child's health based on grounds resulting from their religious beliefs.

72 In this case, attention should be paid to the relationship between the right to respect for private and family life. Pursuant to § 27 of the judgement of the ECHR of June 2, 2005, Znamenskaya v. Russia, application no. 77785/01, *"However, it has also been the Convention organs' traditional approach to accept that close relationships short of "family life" would generally fall within the scope of "private life"* […]."

73 Cf. Judgment of the ECHR of June 28, 2011, Nunez v. Norway, application 55597/09, §§ 68-70.

these cases, the Court weighed different values and related norms.[74] Such protection undoubtedly emphasizes the position of parental responsibility and related family ties to such an extent that even security issues were, in some cases, assessed as requiring less protection.

In the objective aspect, it can be noted that in the Court's case law with respect to some Western European countries, there is a position regarding the interpretation of legal provisions concerning parental responsibility and the right to custody irrespective of sexual orientation and in the interests of the child.[75] In the Court's opinion, the argument about a traditional Portuguese family was not sufficient to establish discrimination based on religious orientation. The Court's case law is not uniform in this respect and has recently undergone a change in this regard.[76]

In the Court's case law, one can find the opinion that the positive obligation of the state resulting from Art. 8 of the Convention applies, in particular, to the procedures to be implemented by states to protect family life. In particular, these procedures must ensure an appropriate time to consider cases so that the exercise of the rights guaranteed by the Convention is real and not illusory. Considering the above, it can be concluded that the ECHR adopts a broad interpretation in terms of both the objective and subjective aspects.

The analysis of the above case law leads to the conclusion that the objective aspect requires, in the first place, to determine the individual rights and obligations of the child and parents (or the parent), assess their mutual relationship, and use an appropriate balance. It is worth adding that it is not always possible to weigh the individual rights of the parties to this relation as these rights can essentially complement each other.

74 In line with the above judgment of the Court, "*the Court recalls that, while the essential object of this provision is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation* […]." Ibid. § 68. The positive obligations under Art. 8 of the Convention were also pointed out by the Court in the judgment of October 30, 2001, Pannullo and Forte v. France, application no. 37794/97, § 35: "*The Court points out that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective "respect" for family life*."

75 Cf. also judgement of ECHR of December 21, 1999, Salgueiro Da Silva Mouta v. Portugal, application no. 33290/96.

76 Cf. also judgement of ECHR of June 24, 2010, Schalk and Kopf v. Austria, application no. 30141/04, § 96. Pursuant to § 99 thereof: "*While the parties have not explicitly addressed the issue whether the applicants were in a relevantly similar situation to different-sex couples, the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship*." The change in the Court's case-law after this judgment was emphasized in the judgment of the ECHR of December 14, 2017, Orlandi and others v. Italy.

In the objective aspect, one can also find judgments in which the Court examines the so-called the margin of appreciation of individual states. The Court emphasizes not only the obligation to protect family life against unjustified interference but also the obligation to issue positive norms serving this protection. Contrary to the legal orders of individual states, which try to regulate the issues of parental responsibility in a comprehensive manner, the Court's case law is not of this nature. In its essence, it relates to decisions in specific cases, which results in its casuistic nature. It is clearly visible in the objective aspect of religious responsibility. On the one hand, precedent judgments in this regard can be expected, and Simultaneously, the existing case law may also be subject to appropriate changes, as illustrated in the above-presented argumentation.

## 6. Final conclusions

Bearing the above in mind, several final conclusions can be drawn. The starting point before issuing any specific Court's judgment should be, as a rule, the axiological aspect at the level of a given state, which allows to adopt an appropriate approach to assessing a possible violation of the Convention's norms in relation to a given state's legal order.

Owing to quite convergent historical experiences—and in particular, owing to the totalitarian experience of the twentieth century—the countries of Central and Eastern have quite similar constitutional axiologies. This similarity also results from the earlier relations of these states within the Christian community. This does not mean, however, that this axiology is the same, which translates into differences in the regulations on parental responsibility. It is visible, in particular, when comparing the legal systems of Central and Eastern European countries with those of Western Europe in the aspect of parental responsibility—even in its subjective aspect. There are different rules of parental responsibility across Europe, which should protect the pluralism of legal solutions. In the case law of the ECHR, there is a position that since social changes occur in different countries, this may lead to the establishment of European standards in the field of parental responsibility. On the other hand, in the same case law, the family in its traditional understanding is repeatedly contested; nevertheless, no pan-European standard exists for the exclusive determination of parental responsibility.

Parental responsibility itself is a complex concept and consists of both subjective and objective aspects that are closely interrelated. In both aspects, the Court' case law shows a broad approach that has been subject to changes.

The case law of the Court in the area of parental responsibility is not permanent and uniform in nature and is variable not only in one direction; however, owing to the lack of pan-European standards, the Court leaves the margin of appreciation to

individual states in the area of parental responsibility, which leads to the maintenance of the existing pluralism of legal solutions in this area. Within this margin, according to the Court's case law, states have both obligations of a negative nature, consisting in the protection of family life against unjustified interference and, supplementarily, those of a positive nature, consisting in implementing the protection of this life.

In addition, parental responsibility may, in some situations, conflict with a child's rights or obligations, which is reflected in many constitutional and international norms in the context of a child's religious freedom.

The countries of Central and Eastern Europe can promote their own axiologies and the legal solutions adopted based thereon. The legitimization in this regard results, among others, from the experience of those countries having seen a period of lack of sovereignty and being able to relate to the issue of parental responsibility in terms of its actual protection.

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Chapter II

# Croatia: The Content of the Right to Parental Care

Aleksandra Korać Graovac

## 1. Introduction and historical remarks

The relationship between parents and their children in contemporary law is reflected in the rights, duties, and responsibilities that parents have when exercising their parental role in helping children gain their independence in social, psychological, emotional, and legal senses.

The relevant legal concept has undergone many changes, from the *patria potestas* in Roman law, to the pertinent *ius vitae et necis,* to the father's power (whereby, in later historical periods, the "power" was also given to the mother), to both parents as the parental right, and finally, to parental care.

The evolution of understanding the relationship between parents and children has been developing toward an ever-greater emphasis on the parents' duties, increasingly stressing the child's interest, finally culminating with the Convention on the Rights of the Child[1] and its incorporation in national legislations.

The recent Croatian legal history has been particularly interesting. At the beginning of the twentieth century, after WWI, no uniform family-law regulation existed in the territory of Yugoslavia (first the State of Slovenes, Croats, and Serbs, and later, the Kingdom of Yugoslavia) but only various regulations that were in force in individual administrative parts of Croatia. The Austrian General Civil Code (1811) was applied in the territories of Croatia and Slavonia. In Dalmatia, in a part of Istria,

1 *Convention on the Rights of the Child*, 20 November 1989, *United Nations*, *G.A. Res 44.*

Aleksandra Korać Graovac (2022) Croatia: The Content of the Right to Parental Care. In: Paweł Sobczyk (ed.) *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates,* pp. 37–72. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2022.pscrpr_3

in Slovenia, and in the region of Prekomurje, the same Code was applied but amended by the First and Third Amendments of 1914 and 1916.[2] The First Amendment increased the protection of children from the father's abuse of power, as well as in cases where the father fails in fulfilling his duties regarding his children. There was a possibility that to protect children, the father was equated with a tutor (para. 178). Both amendments contained provisions that improved the position of children born out of wedlock and their mothers. In the Yugoslavia of that time, the Islamic Code applied to all Muslims, and its main characteristic was the patriarchal system that gave the father significant rights in relation to the children. In case of divorce, the children continued to live with their father and his family.[3]

In the socialist Croatia (which was a part of the Federative People's Republic of Yugoslavia), the regulation of 1947, governing the relationship between parents and children, was effective (Basic Act on the Relationship between Parents and Children)[4] and was amended in 1956[5] and in 1965.[6] The Basic Marriage Act[7] provided for the legal consequences of divorce regarding children and established the rules applying to children born in marriage that was proclaimed to have been nonexistent or was annulled.

The republican (Croatian) legislation on marriage in Yugoslavia was adopted in 1978 (Marriage and Family Relations Act),[8] further increasing the protection of the right of children, highlighting the role of welfare centers as institutions that had a preventive role in protecting them. Their primary task was to provide assistance to parents and intervene into parental care as necessary. The view that each republic, regardless of the number of inhabitants, was authorized to organize family relations resulted from the standpoint that any family legislation must be in harmony with the existing social relations, which were diverse and depended on the level of development of the existing entities. This approach may be appreciated today in the European Union as it was in the state of some 22 million inhabitants.

The socialist family law legislation introduced a major change in the relations between parents and children but was marked with both positive and negative characteristics. A significant step forward toward a better protection of women was a legal transition from the patriarchal model into that of the egalitarian family. It was also reflected in the viewpoint that parental rights belonged to both

2 Cf. Prokop, 1966, pp. 17–19.

3 Ibid, p. 22.

4 *Osnovni zakon o odnosima roditelja i djece,* Official Gazette FNRY, No. 104/47. Official Gazette SFRY, No. 10/65 and Officcial Gazette of the RoC, No. 52/71 i 52/73.

5 *Zakon o izmjeni i dopuni Osnovnog zakona o odnosima roditelja i djece,* Official Gazette FNRY, No. 53/56.

6 *Zakon o izmjenama i dopunama Osnovnog zakona o odnosima roditelja i djece,* Official Gazette SFRY, No. 10/65.

7 *Osnovni zakon o braku,* Official Gazette FNRY, No. 29/46.

8 *Zakon o braku i porodičnim odnosima,* Official Gazette of the RoC, Nos 11/78, 27/78, 45/89, 51/89 – consolidated text Nos 59/90, 25/94, 162/98.

the father and the mother, and in the betterment of the legal position of children born out of wedlock, first only in relation to parents and later also to third parties. However, it was still necessary to preserve the concept of legitimation because the legal system did not fully equated children born out of wedlock with those born in wedlock.

The main characteristic of the socialist period was the beginning of understanding that parental rights included a whole set of rights and duties (the then-valid legislation highlighted the duty of maintenance, the duty of care for life and health, and the duty of raising children, whereas in legal theory, representation was also interpreted as the duty of parents).[9] According to such understanding, "*the rights were exercised by parents, so they could in a better and more efficient way fulfill their duties and exclude any third party illicitly encroaching upon their rights*."[10]

However, a strong ideological component was obvious, according to which parents exercised their rights and duties to care for the person and for the rights and interests of their minor children "and raise them to become useful and conscientious citizens of the Socialist Federative Republic of Yugoslavia", as Art. 1 of the Basic Act on the Relations between Parents and Children requested. This doctrine gained its true form in the interpretation that it is in the "children's interest to become… morally and politically correct…" to be able to act in both their own interest and in the interest of the community.[11] The following was subsequently clearly formulated in Art. 70 of the Marriage and Family Relations Act:

> It is the parents' duty and right to raise their minor children in the spirit of loyalty to their socialist homeland, to develop their working habits and to prepare them for their independent lives as active members of the socialist self-management society.

Following the independence of the Republic of Croatia, the concept of "parental rights" (*roditeljsko pravo)* was replaced by that of "parental care" (*roditeljska skrb)*. The Croatian legal system has no legal term "parental responsibility" (*roditeljska odgovornost*), although both *parental responsibility* and *parental care* have almost same content and legal effects. However, the new Family Act firstly emphasized the rights of children, and only secondly did it emphasize parental responsibilities, duties, and rights.[12] Parental care, as a subjective and also human right, was highlighted within the parental right to freely decide on the children's upbringing and education and the right to make sure that third parties—or the state itself—do not encroach illicitly upon parental right. In the contemporary family-law literature, the following is highlighted:

9 Prokop, 1966, p. 186.
10 Ibid.
11 Ibid., p. 185.
12 Hrabar, 2007, p. 403.

> Parental care exists as a legal concept to enable children to exercise their rights because parents are called upon to provide, "in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights, recognized in the present Convention (Art. 5 of the Convention on the Rights of the Child). Additionally, parental care, as a legal concept, gives parents legitimacy and titulus erga omnes, i.e. in relation to third parties, to care for their child. Their primacy in terms of bringing up their children is derived from the provisions of Art. 18 of the Convention.

Parental care, as a legal concept, exists to make it possible for children to exercise their rights and to give parents legitimacy and legal basis in relation to third parties to care for their child.[13]

However, when speaking of the most severe measure taken by governmental bodies when encroaching upon parental care to protect the child's personal interests, the formulation "deprivation of the right to parental care" is used.

It seems that by overemphasizing parental care, the parents' legal position toward third parties can be diminished; "responsibility" is important because of the parents' functional role in ensuring the protection of their children and in exercising their rights. Professional-legal terminology has not been chosen by accident, but it possesses both the content of values and a message. These duties adjust parental rights as (possibly) the opposite to children's rights.

One of the contests of parental care is also highlighted as a human right, namely the right of the parents to freely decide on their children's upbringing and education: "*in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions*", according to Protocol 2, Art. 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In the contemporary, postmodern society characterized by its markedly pluralist nature, this duty of the state may be extremely demanding; however, it seems to be necessary owing to the many contrary viewpoints and various value systems whose formation is impacted by the parents' religious and philosophical convictions. This is particularly obvious in the field of the so-called health education, in the organization of events in schools where confessional officials participate, and most recently, in the civics. Sometimes, this leads to frequent tensions in different legal argumentations at both the national and international levels. Therefore, this complex issue is yet another reason for a re-examination of the legal definition of parental care, which must include not only the content but also who is considered a "parent" (who can be entered as "parent" in the birth register) and the meaning of the concept "holder

13 Hrabar, 2021, p. 194.

of parental care," which is used in some contemporary international documents.[14] It must be pointed out that the concept of the "holder of parental responsibilities" is alien to Croatian law because only parents (adopters as well) are entitled to parental care by the very fact that they are entered in the register as the child's parents.

A certain deviation from such views occurred in the Family Act of 2014,[15] where an attempt was made to introduce a provision that not only parents, but also other natural or legal persons, could provide parental care along with parents or instead of them on the basis of a court's decision, as well as other persons who had temporarily been entrusted by the parents to provide parental care to the child.[16] Owing to the excessive deficiencies, this act was suspended by the Constitutional Court.[17] In the new and amended Family Act of 2015, it was established that other persons could also provide (everyday) care to the child; this was a significant change, particularly since parental care was stipulated both as a natural and personal as well as the parents' human right, which belonged to them by the very fact of the existing parent–child relationship.

As a rule, the child's origin is determined by both parents (for more about the term "parent" see *infra*). This competition between two holders of the right to the same child (who, in the contemporary legal system, is the third subject in this relationship), makes the whole legal situation even more complex.

In this paper, the Croatian (national) legal system is presented, together with some references to the relevant international framework by which the Republic of Croatia is bound.

In the national legislation, the concept of *parental care* is used; this will be used as equivalent to the concept of *parental responsibility* in this text as well.

14 Art. 2 of the European Convention on the Exercise of Children's Rights * Strasbourg, 25/01/1996: "The term 'b) holders of parental responsibilities' means parents and other persons or bodies entitled to exercise some or all parental responsibilities."
The Explanatory Report of this Convention in Chapter "European Treaty Series," No. 160, para. 24, explains as follows: "*The term 'holders of parental responsibilities' refers not only to parents who are entitled to exercise some or all parental responsibilities but also to other persons or bodies, including local authorities, entitled to exercise some or all parental responsibilities. Foster parents or establishments in which children are placed could therefore be included in this definition, where appropriate*."

15 Family Act, Official Gazette NN 75/2014.

16 Art. 102, para. 2 of the Family Act of 2014.

17 Decision of the Constitutional Court of the Republic of Croatia, No. U-I-3101/2014, 12. January 2015, Official Gazette, No. 5/2015.

## 2. Constitutional foundations for the protection of parental care

In the post-war Yugoslav State, Croatia was a part of Federative People's Republic of Yugoslavia (later named Socialist Federative Republic of Yugoslavia), which had constitutional texts at both the republican and federal levels. At the republican level, the constitutions were adopted in 1947,[18] 1963,[19] and 1974.[20] In the same years (with the exception of the Constitution of the FPRY of 1946), federal constitutions were also adopted, and Croatia was bound by them. The provisions of both the federal and republican constitutions of 1947 and 1974 on the citizens' rights and duties had the same content. The Federal Constitution of 1963[21] had separate provisions on the freedoms, rights, and duties of humans and citizens in Chapter II, but its version for Croatia did not contain them.

One of the characteristics of all socialist constitutions was their value system, whereby greater emphasis was on the needs, interests, and values of the political and legal order—in other words, of the dominant group as opposed to an individual (as well as the entire community)[22]—while the rights and freedoms of humans were scattered in different places in the provisions of the Constitution.

Some of the provisions provided for the relationship between parents and children, and the entire legal system was bound by them, while some of them only dealt with family law. For example, pursuant to Art. 27 of the Constitution of 1947, minors were under the state's special protection, and in 1963, this protection referred only to the minors without parental care. A similar provision also existed in the Constitution of 1974, and it was part of the social rights group – Art. 275, paras. 1, 2 and 4 of the Constitution of 1974, binding the legislator to determine the minimum social protection.

Children born out of wedlock also had their place in the constitutional provisions: the Constitution of 1947 established that the position of children born out of wedlock was stipulated by law and that parents have the same obligations and duties toward them, just like they do toward those born in wedlock[23]. However, those two groups of children were equated only in respect of the rights and duties toward their parents but not toward other relatives. It was only the Constitution of 1974 that established in Art. 271, para. 4 that *children born out of wedlock had the same rights and duties like those born in wedlock*, and it thus equated the rights of children born out of wedlock in all legal relations and in the relationship with any third party (which was

18 The Constitution of the People's Republic of Croatia, Official Gazette, No. 7/1947.
19 The Constitution of the People's Republic of Croatia, Official Gazette, No. 15/1963.
20 The Constitution of the Socialist Republic of Croatia, Official Gazette, No. 8/1974.
21 The Constitution of the SFRY, Official Gazette, No. 14/1963.
22 For more about the importance of social, personal, and common needs in the constitutions of that time, cf. Miličić, 1989, pp. 643–649.
23 Art. 27, para. 3 of the Constitution of 1947.

extremely important because of the effect of hereditary rights toward their parents' relatives). It did not specify any individuals toward whom they would have the same rights and duties.

The Constitution of 1963 expressly recognized the parental right to care for their children's upbringing and education in Art. 58, para. 3 of the Federal Constitution of 1963, transposed also to Art. 37 of the Croatian Constitution of the same year,[24] as well as Art. 271, para. 3 of the Constitution of 1974. The same provision of the Constitution of 1974 was reinforced by the principle of mutual family solidarity, according to which children were also obliged to care for their parents in case they needed assistance.

Before the adoption of the Croatian democratic constitution of 1990, two progressive principles had already been well established, adding considerable value to the European dimension of the protection of human rights: the principle of equality of the woman and man in family relations and the principle of equal legal position of children born in wedlock and those born out of wedlock. Although, in reality, the first principle had not been implemented to the full, both principles carved the way to changes in collective awareness and raised the level of the expected standard of protection for the rights of family members, departing from the patriarchal system of family relations. When speaking of parental care, what it means is that the mother and the father are equal holders exercising their responsibility, and they, Simultaneously, positively compete with each other, both aimed at protecting the well-being of their common child.

The Constitution of the Republic of Croatia of 1990 was mostly a continuation of the principles defining the process of building the family-law system on the already achieved positive standards of the protection of families and human rights in general.

One of the personal and political freedoms and rights of citizens has been that "*everyone shall be guaranteed respect for and legal protection of personal and family life, dignity, reputation and honor*", as stated in the Art. 35 of the Constitution. Since the possibility of providing parental care is part of the right to respect family life,[25] this constitutional provision guarantees legal protection in the cases of unjustified restriction of parental care.

The provision of Art. 62 of the Constitution of 1990 provides the following to other social rights: "*The State shall protect maternity, children and young people and shall create social, cultural, educational, material and other conditions promoting the right to a decent life*."

Indirectly, Art. 63, para. 3 of the Constitution deals with parental care, according to which "*physically and mentally disabled and socially neglected children shall have the right to special care, education and welfare*"; moreover, the provision states that

24 This was a single provision of the Constitution of the Socialist Republic of Croatia which also directly applied to family law. It found its place in Chapter II of the Constitution (Social System), under paragraph 2 (Education, Science and Culture), and it read as follows: "*Parents have the right and duty to care for their children's upbringing and education*."

25 See the case law of the European Court of Human Rights concerning Croatia. Cf. Hrabar et al., 2021.

"*the State shall take special care of parentless minors or parentally neglected children*", as stated in Art. 63, para. 4 of the Constitution. All these constitutional provisions are declaratory, and their content is determined by the legislator's political will and their application in practice.

As already said, when regulating the relationship between parents and children, the Constitution has adopted its principles, albeit only a year after the UN Convention on the Rights of the Child. Instead of dealing solely with parental rights, what is now emphasized are parental duties and responsibilities; it is established in Art. 63, para. 1 of the Constitution that "*parents shall have the duty to bring up, support and educate their children, and shall have the right and freedom to decide independently on the upbringing of their children*".

A *novum* has been the parents' constitutional right to decide independently on the upbringing of their children,[26] but this has indirectly been limited by their responsibility for ensuring the right of their children to a full and harmonious development of their personalities[27] and by their obligation to ensure that their children have the right to primary education that is compulsory and free.[28]

> The provisions of Art. 63, paras. 1, 2 and 4, among the rights and freedoms of man and citizen, lay down the following duties: "Parents shall have the duty….", "Parents shall be responsible….", "Children shall be bound…." These parental duties correlate with the rights of children that are not expressly emphasized. The provision may thus also be read as follows: "Children have the right to be brought up, supported and educated by their parents…"; or "The child is entitled to a full and harmonious development of its personality ensured by parents; or "Old and helpless parents are entitled to be taken care of by their children". The difference lies only in the wording, so that this formal inversion of the rights and duties does not change the meaning of the norm. According to the provision of Art. 64, para. 1, "everyone shall have the duty to protect children and helpless persons."[29]

The principles of family solidarity justness are reflected in the requirement that children are bound to care for old and helpless parents and by the duty of children of legal age to support their parents under the conditions determined by law.

The Constitution does not contain the definition of parental care or of the potential holder of this right; thus, the determination of the content and reach of these concepts is left to the legislator.

Having an insight in the case law of the Constitutional Court,[30] it is clear that in the last 10 years, the proceedings have mostly been conducted upon the complaints

26 This has been the impact of the Convention on the Protection of Human Rights and Fundamental Freedoms and the Convention on the Rights of the Child.
27 Art. 63, para. 2, Cfr. Alinčić, 2007, p. 16.
28 Art. 65, para. 2 of the Constitution.
29 Korać, 1996, p. 78.
30 https://sljeme.usud.hr/usud/praksaw.nsf, (Accessed April 25, 2022).

involving the violation of human rights when exercising parental care mainly in disputes between parents.

At the level of case law, the only court decision referring to the rights arising from parental care was that of the Constitutional Court of 2013, ruling on the request for a review of constitutionality of the school curriculum developed by the ministry competent for education. In this important decision, the Constitutional Court established the following:

> … a positive obligation of the state exists in the area of the public school system, within the meaning of Article 63.1 and 2 of the Constitution and Article 2 of Protocol no. 1 to the Convention. From the responsibility of parents to ensure the rights of their child to a full and harmonious development of its personality stems the obligation of the state, when forming teaching programs, to respect the different convictions of parents and their constitutional right and freedom to decide independently on the upbringing of their own children. This constitutional obligation of the state may only be implemented when the parents are included in the process of forming the teaching content.

Therefore, enabling parents to participate in the process of creating teaching content is the state's constitutional obligation toward the procedural nature, and it is especially important for teaching content relating to the differing "convictions" or "beliefs" of parents, in the sense described in point 12.1 of the statement of reasons for this decision.

Finally, it has already been said that the responsibility of parents, within the meaning of Art. 63 para. 2 of the Constitution, is limited by the child's right to a full and harmonious development of their personality. This also means that parents do not have the right to keep their children ignorant and prevent them from learning basic information or content that is important for such full and harmonious development. In this sense, it is the task of the public school system to be neutral and, in a balanced teaching program and in cooperation with the parents, to provide children with basic information that must be presented in an objective, critical, and pluralistic manner.[31]

## 3. Protection of parental authority in the system of legal sources

In addition to the constitutional protection of fundamental freedoms and rights of citizens, the Republic of Croatia is also bound, as a contracting state, by some treaties providing for the protection of the rights of man (e.g., of the International Pact on Civil and Political rights, the UN Convention on the Rights of the Child and

31 Para. 12.2 of the Decision of the Constitutional Court U-II-1118/2013 *et al.* of May 22, 2013.

its Protocols, the European Convention on the Exercise of the Children's Rights). Regarding bilateral agreements, it is important to single out the agreement with the Holy See on Cooperation in the Area of Education and Culture,[32] by which religious education was introduced in schools as an optional subject. Religious education includes other major religious communities as well (Islamic, Jewish, evangelistic, and so on). The Constitutional Court of the Republic of Croatia ruled that from a constitutional point of view, this is acceptable.[33]

The Republic of Croatia is a Member State of the European Union, and it is thus bound by EU law. However, since these rules regulate the issues of private international law concerning family matters, they are not addressed in this text, and neither are other multilateral agreements (those of the Hague Conference on private international law) or bilateral agreements dealing with the resolution of cross-border disputes.

The Constitutional Court of the Republic of Croatia often refers to the provisions of international agreements, while this is extremely rarely done by regular courts.[34]

The main source of law dealing with parental care is the Family Act, but many other regulations also have an impact on the way in which individual contents of parental care are exercised—in other words, the Act on the Education in Primary and Secondary School,[35] the Social Welfare Act,[36] Criminal Code,[37] the Protection of Family Violence Act,[38] the Hospitality and Catering Industry Act,[39] and others. Some of these legislative acts are also accompanied by the corresponding implementing regulations as well as some recommendations given by competent bodies to help parents exercise their parental care. For example, the Council for Electronic Media has launched Recommendations for the Protection of Children and Safe Use of Electronic Media.[40]

The importance of international agreements on the protection of parental rights is significant, and it can be seen in the example of the request that parents take part in the development of the content of school curricula. It is obvious that there is still a relatively high level of misunderstanding in public debate on the draft of theFamily Act of 2017. Some tensions arose regarding whether this right ought to be provided

32 The agreement with the Holy See on Cooperation in the Area of Education and Culture, Official Gazette – International Treaties, No. 2/1997. The agreement sets up Catholic religious education as a subject in all schools in Croatia and enables the Catholic Church in Croatia to found and run official schools and institutions of higher education financed by the state.

33 Decison of the Constitutional Court Nos. U-I-4504/2010, U-I-1733/2012 (2018). https://sljeme.usud.hr/usud/praksaw.nsf/fOdluka.xsp?action=openDocument&documentId=C12570D30061CE54C12583680043A4D1 (Accessed June 8, 2022.)

34 Korać, 2016, p. 130.

35 Zakon o odgoju i obrazovanju u osnovnoj i srednjoj školi, Official Gazette, No. 87/08, 86/09, 92/10, 105/10, 90/11, 5/12, 16/12, 86/12, 126/12, 94/13, 152/14, 07/17, 68/18, 98/19, 64/20.

36 Zakon o socijalnoj skrbi, Official Gazette, Nos. 18/22, 46/22.

37 Kazneni zakon, Official Gazette, Nos. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

38 Zakon o zaštiti od nasilja u obitelji, Official Gazette, Nos 70/17, 126/19 and 84/21.

39 https://www.iusinfo.hr/aktualno/u središtu/28690 (Accessed: May 1, 2022).

40 https://www.aem.hr/vijesti/vijece-za-elektronicke-medije-usvojilo-preporuke-za-zastitu-djece-i-sigurno-koristenje-elektronickih-medija (Accessed: April 23, 2022).

for in the Family Act, and some distinguished professors noted that it was a source of serious danger for the child.[41]

## 4. The concept of parent

According to family legislation, "parent" is a person from whom a child has inherited its origin, or a person who is registered as the child's parent in the birth register based on adoption decision issued by the competent body (a social welfare office).

The Family Act contains the provisions on the child's origin, and based on these provisions, maternity is anticipated or established on presumption or by a court decision.

Pursuant to Art. 58 of the Family Act, the "child's mother means the woman who gave birth to this child."[42] According to Art. 59 of the Family Act, if maternity cannot be established by presumption, court proceedings may be conducted to establish maternity when it is not possible to accept the claim, but the court must conduct evidential procedure. In practice, a DNA test is conducted, whereby the child's right is exercised to know with absolute certainty the person from whom their genetic origin is derived.

Paternity may be established by presumption, acknowledgment, or a court decision. Presumption relates to children born in wedlock or within 300 days following an annulment, divorce, or death as declaration of death of a late spouse. In the case where a person has entered another marriage within a period of 300 days from the termination of marriage because of death, the mother's husband from the last marriage is considered to be the child's father, as regulated by Art. 61 paras. 1 and 2 of the Family Act.

Such presumption does not apply if the previous marriage had ceased by a court decision on divorce or annulment. In that case, the mother's husband from the previous marriage is considered to be the child's father, unless the mother's second

41 "We argued only over two or three points. First, there was a clear trend with some members of the group working on the Bill that parents have the right that their children 'are ensured upbringing and education in conformity with their parents' religious and philosophical beliefs'. This would mean, in my opinion, boycotting the reform of schooling and of everything it was supposed to bring. However, the decision of the Constitutional Court, which I respect, was that no one has the right to keep children in ignorance, let alone their parents. Children must be contemporary people and not those who stick to the world view of their parents." These were the words of distinguished Professor Marina Ajduković, who is a children's psychologist and expert.
https://www.jutarnji.hr/naslovnica/ugledna-psihologinja-vazno-je-urazumiti-bogate-roditelje-dionjih-ne-zna-za-probleme-siromasne-djece-ne-zanima-ih-siromastvo-9654421 (Accessed April 19, 2022)
Opposite approach: Hrabar, 2018, pp. 319–336.

42 Prior to the Family Act of 2014, this presumption had existed as *praesumptio iuris et de iure*, and after 2014, it was replaced by *praesumptio iuris*.

husband (if the child was born during the mother's second marriage and not more than 300 days had passed from the first marriage) has acknowledged his paternity with the consent of the mother and her first husband, as regulated by Art. 61, para. 3 of the Family Act. This provision implies the possibility that in the case of an early contraction of a new marriage, the child has probably been conceived with the man whom the mother subsequently married. However, the downside is that the acknowledgment of paternity is left to the autonomy of the interested parties; up to now, the Croatian order had not enabled the establishment of the paternity in marriage (also) by acknowledgment. Simultaneously, this provision does not imply the spouses' mutual obligation of faithfulness[43] as one of the value components upon which a marriage rests.

The acknowledgment of paternity is the least reliable in terms of truthfully establishing the child's origin because the verification of this truthfulness is entrusted to the persons giving their consent to the acknowledgment of paternity, namely the mother, the child, and/or their guardian, with the previous approval by the social welfare office in accordance with statutory preconditions. It is possible to imagine a situation where the aforementioned persons abuse these statutory provisions and make false statements regarding the child's origin aimed at the man to be registered as the child's father. In such situations, the social welfare office may appoint a special guardian to the child and thus try to challenge the acknowledged paternity. The abuse of the child's origin would constitute a criminal offense for changing the child's family status, as prescribes Art. 175 of the Criminal Code.

In the case of medical fertility treatment, the situation is even more complex because the legislator may accept either the rule that the child had been conceived by the woman who gave birth or by the woman whose egg had been fertilized. There is a general rule that the woman who bore the child is their mother if both the woman whose cell was (possibly) used in the fertility treatment procedure and the woman who gave birth to the child had given their consent to the medical treatment. If the corresponding consents had not been given, it is possible to initiate the proceedings for challenging maternity of the woman who gave birth to the child and subsequently establish the maternity of the woman from whom the child genetically originated.

Art. 31 of the Medically Assisted Procreation Act prohibits surrogate gestational motherhood,[44],[45] although it is known that some couples travel abroad and come back with a child born after the conclusion of a contract on surrogate motherhood. In the Republic of Croatia, "contracts, agreements and other legal transactions of bearing children for another (surrogate gestational motherhood) and handing over a child after a fertility treatment, with or without a pecuniary remuneration, are null and void". This provision is considered only if there is a dispute regarding taking

43 "The spouses have the duty to be faithful to each other, help and support each other, respect each other and maintain harmonious marital and family relations" (Art. 31, para. 2 of the Family Act).

44 The Act on Medically Assisted Procreation, Official Gazette No. 86/2012.

45 Cf. Hrabar, 2020b, pp. 171–212.

over a child. Up to now, the competent bodies have never checked how the data on the mother and father were entered in the birth register because these issues are considered extremely sensitive. The public only knew about the problem of non-recognition of the right to a maternity leave because a woman who came back from abroad with a child and registered as their mother could not prove that her pregnancy had been medically monitored, so that the Croatian Institute for Health Insurance initially withheld her rights ensuing from the maternity leave. However, the competent bodies failed to examine the circumstances under which the child had been conceived, and there was no legal sanction for removing the child, as was the case in the famous case *Paradiso and Campanelli v. Italy*.[46]

In the cases of determination of paternity, when the semen of another man was used, a similar rule applies: if the child's father and the man who is the mother's marital or extramarital partner had given their consent for medically assisted procreation with another man's semen, and the mother's extramarital partner had given his consent to the acknowledgment of paternity ahead of time, then the child's father is the mother's marital or the extramarital partner.[47]

When a child is adopted, the adoptive parents may be entered in the register of births as its parents (if the child, older than 12, has given its consent, and the adoptive parents have so agreed in front of the social welfare office). In such a case, a legal fiction is created that the adoptive parents are the child's parents by blood; thus, the child is also in a legal relationship with their blood relatives.

The Decision of the Supreme Administrative Court in April 2022[48] ruled that homosexual life partners as a couple should have the possibility to undergo a pre-adoption procedure in front of the social welfare office, and afterward, they might be declared suitable as adoptive parents. Such possibility was not enabled in the Family Act, but the Supreme Administrative Court has concluded that preventing homosexual couple from becoming adoptive parents should be considered as discrimination on the basis of sexual orientation. The best interest of the child has not been discussed, and how this possibility will be reflected in the way in which birth registry is conducted with regard to the current notion of parents as mother and father remains to be seen.

The legal theory has taken a stand in accordance with normative stipulation. It has always been clear in legal theory that the parents' legal position is established either by origin or by adoption. Only parents may be holders of the right to parental care. Indeed, the legislator has been highly consistent when stating the following in Art. 91, para. 1 of the Family Act: "Paternal care includes responsibilities, as well as the parents' rights and duties …".

To some extent, the Same-Sex Life Partnership Act departs from the Family Act. Although the same-sex partner cannot be registered as the parent of their life

46 ECHR, Paradiso and Campanelli v. Italy, Grand Chamber Judgment on January 24, 2017.
47 Art. 83 Paras. 1 and 2 of the Family Act
48 The High Administrative Court decision on April 20, 2022, No Usž-2402/21-4.

partner's child, the act envisages that parental care may be exercised by the parent's (same-sex) life partner if the court decides accordingly. A life partner may even share parental care not only with one but with both parents, and in the legal sense, the concept of "parent" has never been reconsidered.

Apart from life partners, Croatian family legislation does not envisage any other persons being able to exercise parental care, and for that purpose, some other concepts are used (daily care of a child, representation, and the like). Stepfathers and stepmothers do not have any specific rights involving children, except for some elements of parental care belonging to parents, such as the rights to a contact or the rights and duties of maintenance.[49]

## 5. The concept of a child

Croatian family legislation presents no definition of a "child," but Art. 117, para. 2 of the Family Act determines that a person acquires full legal capacity at the age of 18 or by entering into marriage. According to Art. 117, para 3 of the Family Act a person who has reached the age of 18 becomes of legal age—in other words, a major.

In legal theory, it is always emphasized that the concept of a child is defined in accordance with Art. 1 of the Convention on the Rights of the Child: "For the purpose of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."

Parents exercise parental care for the child until the child reaches the age of majority (18 years). As the child matures, they reach partial legal capacity by the age of 18 (they are entitled to make some statements of will regarding the issues of status—for example, after having attained the age of 10, 12, 14, 16 years…).

In 2014, the Family Act abolished the possibility that parents exercise parental care for their major child deprived of their own legal capacity, but they may be appointed as the child's guardian(s) in conformity with the general rules governing guardianship and the appointment of guardians.

If a minor marries and thus acquires legal capacity, the need for parental care ceases to exist; nevertheless, the child preserves all its specific rights guaranteed by the Convention on the Rights of the Child until they reach the age of majority.

The definition of the concept of "child" has also been harmonized in other branches of law. Interestingly enough, according to Art. 89, paras. 9 and 10 of the Criminal Code of 1997,[50] a person aged under 14 years was called "a child", and a person aged 14–18 years "a minor".

49 Cf. Winkler, 2019, pp. 75–92.

50 Criminal Code, Official Gazette No. 110/97.

The current Criminal Code considers a person aged under 18 years "a child" by accepting the definition established in the Convention on the Rights of the Child, but it envisages criminal liability only for children older than 14. Children under the age of 14 may only attain some features of a criminal offense.[51] The Croatian Criminal Code applies to all minor perpetrators of criminal offenses, and to major perpetrators under the age of 21, either the Criminal Code or the Juvenile Courts Act may apply (i.e., the criminal justice system for juveniles).[52]

Separate criminal proceedings also come into play when a criminal offense is committed against a child (pursuant to Art. 113, para. 2 of the Juvenile Courts Act, where it is also established that it applies to persons of up to 18 years of age) for a series of offenses involving sexual freedom and morality, marriage, family and youth, kidnapping, trade in human beings, slavery, and the like).

## 6. Principles of parental care

In the family-law theory, it is emphasized that

> parental … responsibility is a legal term, of personal and legal nature, and it is, therefore, classified into personal and subjective rights and it belongs to the personal status of an individual. Apart from being a personal right, parental care is also a human right. In the judicature of the European Court of Human Rights, it is defined, when possessed or exercised, as a part of the right for respect of everyone's family life (referred to in Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol No. 1 to the same Convention).[53]

On the constitutional principles, see *supra*. The principles relating to parental care are analyzed in more detail in the introductory part of the Family Act and listed as the principle of equality,[54] the principle of solidarity as the fundamental right of family life, mutual respect and assistance among all members of the family,[55] the

51 Cf. Dragičević Prtenjača, Bezić, 2018, pp. 1–37.

52 Juvenile Courts Act, Official Gazette, No. 84/11, 143/12, 148/13, 56/15, 126/19.

53 Hrabar et al., 2021, p. 193.

54 Art. 3 of the Family Act: "Both woman and man have the same rights and duties in all family and legal relations, and in particular regarding parental care."

55 Art. 4 of the Family Act:
"(1) Solidarity is the fundamental principle of family life. All family members must respect and support one another.
(2) Domestic violence is a particularly severe infringement of the principle referred to in paragraph 1 of this Article. Prevention, combatting and sanctioning any kind of domestic violence is provided for in a separate Act."

principle of the primary protection of the welfare and the rights of the child,[56] the principle of the primary parental right to care for the child and the duty of the competent bodies to assist them,[57] the principle of proportional and the least intervention in their family life,[58] the principle of consensual solution of family relations,[59] and the principle of urgent resolution of family-law matters involving children.[60]

The legislator's goal has been to balance all these principles, so that they correspond to the contemporary system of family relations. Some of them are applied within families (the principle of equality, the principle of solidarity, the principle of mutual respect and assistance, and the principle of consensual solution of family relations), while others deal with the relations between individual family members and third parties, in particular state bodies (the principle of the primary parental right to care for their child and the positive duty of state bodies to offer them assistance, the principle of proportional intervention in the family life, and the principle of urgent resolution of the proceedings involving families).

These principles are, *per se*, of declaratory nature, and only their transposition into implementation norms leads to their high-quality application.

## 7. The rights and obligations of parents and children resulting from parental care

In the Croatian Family Act, the right and obligation of protecting the child's personal rights to health, development, care and protection, its upbringing and education,[61] establishment of personal relations, and determination of the place of

56 Art. 5 of the Family Act: "The courts and public law bodies conducting the proceedings where, directly or indirectly, it is decided on the child's rights, must primarily protect the rights of the child and its well-being.
(2) The child is entitled to exercise personal relationship with both parents, unless this is contrary to the child's well-being."

57 Art. 6 of the Family Act: "Parents, before everybody else, have the right, duty and responsibility to live with their child and care for it, and they are offered assistance only if needed";

58 Art. 7 of the Family Act: "Measures encroaching upon family life are acceptable only if they are necessary and their purpose cannot successfully be accomplished by taking more lenient measures, also including preventive assistance or help offered to a family."

59 Art. 9 of the Family Act: "To encourage peaceful resolution of family relations is the task of all those who offer professional assistance to families or who decide on family relations."

60 Art. 10 of the Family Act: "In any proceedings dealing with family law matters involving children, the competent bodies must act in an urgent manner by protecting, Simultaneously, the child's well-being."

61 The Act on Primary and Secondary Education establishes that primary education is compulsory for all children (Art. 4, para. 2, point 1), unless the child suffers from multiple difficulties (Art. 19, para. 1 of), and it is free. The Constitution allows the establishment of private schools and institutions of higher education in conformity with law (Art. 67 of the Constitution of the Republic of Croatia). In schools, parents' councils are organized where parents give their opinions on the proposals of

residence are included in the content of parental care. The same is the case with the right and duty to manage the child's property and the right and duty to represent the child's personal and property rights and interests.

Parental care is *titulus*, but we must distinguish parental care *per se* from exercising parental care and from fulfilling its individual (or all) contents.

The content of parental care is further developed in other provisions of the Family Act—in particular, the ways of acting due to the competition between both parents who exercise their parental care, depending on whether they live together or separated.

When exercising parental care, parents must consider the rights of the child. In the contemporary legislation, particularly important is the parents' obligation to respect the child's opinion in accordance with its age and maturity, as stated in Art. 86 of the Family Act. Respecting the child's opinion does not mean that it must always be observed. Indeed, here we speak of the application of participatory rights referred to in Art. 10 of the Convention on the Rights of the Child in its family environment: participation means the exchange of information and a dialogue between children and adults based on their mutual respect, whereby children learn how both their opinions and those of adults are respected.[62] There is also a specific analysis of participatory rights in accordance with the European Convention on the Exercise of Children's Rights)[63] in administrative and court proceedings where it is (also) decided on the rights and interests of the child (see *infra* in this chapter).

The legislator does not differentiate, by way of greater or lesser importance, between the parents' rights and obligations making up the content of parental care. They are equal, and if any interpretation is necessary in terms of priority, the principle of the best interest of the child must be applied.

The child's duties are under the umbrella of the general principle of solidarity according to which according to Art. 4, para. 1 of the Family Act: "all family members must …… respect and help each other". Pursuant to Art. 89, "the child must respect its parents and assist them in getting things done in the family in accordance with its age and maturity and be considerate toward all its family members." This provision is of principled and moral nature; however, if the parents cannot properly raise their child and also need assistance, and the child threatens—among other aspects—the rights and interests of family members and other persons, the court may render its decision on entrusting the child with behavioral difficulties to a welfare institution—or a foster family—to assist in its upbringing.

With regard to children who are employed and earn by working, it is ruled in Art. 90 of the Family Act that they have an obligation to contribute to their own

school curricula, annual plans and programs, the Heads' reports on their realizations are discussed, the parents' complaints regarding the school's educational achievements are considered, measures to improve education are taken, and members of school boards are recommended (Art. 137, para. 4 of the Act on Primary and Secondary Education).

62 Korać Graovac, 2012, p. 118.

63 European Convention on the Exercise of Children's Rights (1996), European Treaty Series – No. 160.

maintenance and education. The amount allocated to their maintenance provided by their parents, or other eligible persons, is then reduced accordingly. The child is not bound to contribute to the maintenance of other family members as long as it is under legal age (a minor).

The most recent Family Act has failed to expressly include maintenance into the content of parental care (we consider it a nonintentional legislator's omission), although the family-law tradition has always interpreted maintenance as part of parental care.[64]

It seems that the legislator considers the protection of personal rights and interests of the child as more important than the protection of its property rights and interests because more provisions in the Family Act are obviously dedicated to the former. To some extent this is also logical because, by the nature of things, it is unusual for a child to have its own property of significant value.

## 8. Sexual education of children and parental care

Sexual education of children is provided in the school curriculum designed by the competent ministry. In 2012, the Ministry of Education tried to introduce a new content in the school curriculum—health education,[65] not as a separate subject but as a teaching content to be taught across various school subjects.[66] The curricula adopted by the minister bind all educational institutions—both public and private—and they are thus of extreme importance for children's education.

At a later stage, the fourth module of health education turned out to be disputable because of its component dealing with sexual education. A very broad social and professional discussion took place regarding this proposal of cross curricular health education, and it was guided by two conservative nongovernmental

64 Thus, for example, Prokop, 1966, pp. 188 and 189; Alinčić et al., 2007, pp. 262 and 268.

65 In Croatia, a minister competent for education adopts the national curriculum for individual levels of upbringing and education (primary and secondary) as well as the national framework curriculum. In addition to the national curriculum, the minister also adopts the curricula for individual subjects (containing the purpose and goals of learning and teaching a subject, the structure of individual subjects within the whole educational vertical, the educational outcome and/or content and other important data).
Teaching plans describe the form of conducting the curricula (obligatory, optional, facultative, cross-curricular, and/or interdisciplinary), specifying the annual number of teaching hours and their timetable by grades. Teaching plans may be common for a particular level or type at individual levels of teaching, and it can also be designed together with the curriculum of a particular subject. The curricula for all teaching subjects and plans are adopted by a decision issued by the minister competent for education.

66 https://mzo.gov.hr/istaknute-teme/odgoj-i-obrazovanhje/nacionalni-kurikulum/125 (Accessed: April 21, 2022).

organizations.[67] They claimed that what it was all about and highly disputable was the fact that children would not be informed but rather indoctrinated, that health education consisted of gender ideology, and that by teaching it, the parents' right to freely decide on their children's upbringing and education would be infringed. They also emphasized that in such a way, health education would inform children about LGBTQ+ topics too early.

One of the eminent authors of the Health Education Curriculum, Štulhofer, who is a professor of sociology and sexology, pointed out that despite the expressed resistance to sexual education, in the research he conducted,

> a large majority of participants (78,6%) supported the program. A significant association between familiarity with and support for the program was observed only after more (detailed) information about health education became publicly available. The teachers, trusted by parents, seemed to facilitate the parents' familiarity with the program. Considering the controversial character of sexuality education, timely and systematic efforts directed at providing parents with comprehensive information about the program may be crucial for its successful implementation.[68]

Since the minister competent for education is responsible for introducing the school curriculum by his decision, review proceedings were initiated before the Constitutional Court to examine its conformity with the Constitution. In its decision, the Constitutional Court held the following:

> 13.1. It follows, therefore, that only the part of the Health Education Curriculum, Module IV entitled "Sexual/Gender Equality and Responsible Sexual Behavior", deals with the questions that are still very sensitive in our society. In the Health Education Curriculum, it is stated that through this material, the desire is "to give pupils scientifically based information, but also an insight into different ways of thinking and a variety of value perspectives. The aim of the module is to enable pupils to acquire skills necessary for making responsible decisions that are important for preserving their physical and mental health and to help them, through an understanding of differences and critical thought, to build a positive relationship toward themselves and others.
>
> Despite the acceptability of these aims, it is not necessary to argue in particular that these are still topics which parents, as a rule, see as an area in which the guarantees of freedom and protection of their personal "religious or philosophical convictions" must be taken into consideration. This in itself is sufficient to bind the State and its competent bodies to provide parents and their children with an objective and critical, pluralistic and tolerant environment, in which these aims will be effectively realized,

67 https://www.bitno.net/vijesti/hrvatska/grozd-ministru-mornaru-dokinite-konacno-nestrucan-i-protuzakonit-zdravstveni-odgoj-u-skolama/ (Accessed: April 21, 2022).

68 Kureba, Elezović, Štulhofer, 2015, pp. 323–334.

> including the obligation of the State to ensure that the content and/or the manner of implementation of the teaching program of Module IV are neutrally shaped, with an active and effective participation of parents.

The Constitutional Court abolished the decision on introducing the controversial Health Education Curriculum for not having been adopted in the appropriate democratic process, particularly because its contents were highly sensitive for society.

> 13.2. …. In this specific case, the State has not met its procedural, constitutional obligation to align the content of health education in state/public schools in a balanced manner with the constitutional right and freedom of parents to bring up their children. The process of the legal formation of the content of health education in the Republic of Croatia showed a significant lack of a democratic and pluralistic approach.

The Constitutional Court also referred to the case law of the European Court of Human Rights:

> 12.4. In the case Folger and others v. Norway (judgment, Grand Chamber, 29 June 2007, application no. 15472/02), the ECtHR examined the applicant's complaint pursuant to Article 2 of Protocol n0.1 to the Convention, and in light of Article 8 (the right of respect to a private and family life) and Article 9 of the Convention (freedom of thought, conscience and religion) established violation of the Convention right to education, and violation of the positive obligation of the state to respect the right of parents to ensure the upbringing and education of their children in line with their own religious and philosophical convictions, or their parental responsibilities.

The protection of children from explicit sexual content is provided for in the Electronic Media Act[69] and in the Ordinance on the Protection of Minors in Electronic Media.[70] There is a general provision in the Electronic Media Act, in Art. 5, para. 1, according to which "*it is prohibited to harm minors physically, mentally or morally by audio-visual commercial communications*", but there is no explanation as to what this clearly means. Only the Ordinance in Art. 2 clarifies that "*the programs which may harm the physical, mental or moral development of a minor are all types of programs containing any scenes …. of sex and sexual exploitation*" unless they "*in an appropriate way and by justified contents illustrate or analyse topics in educational, documentary, scientific and informative programs*".

To protect children, television programs are divided into categories appropriate to particular ages, and they may be shown at the time of the day according to the existing classification. Before and while broadcasting a particular content, there is a

69 The Electronic Media Act, Official Gazette, No. 111/21.

70 The Ordinance on the Protection of Minors in Electronic, Official Gazette, No. 28/2015.

written recommendation regarding the age for which a particular program is not appropriate, so that parents can more easily have control of the contents to which their children may be exposed. Although neither the Electronic Media Act nor the Ordinance on the Protection of Minors in Electronic Media specify the content appropriate for a particular age or the time for broadcasting, the positive example "*of the Croatian Audiovisual Centre offers a database of films accompanied by appropriate age categorization*."[71]

In addition, the Electronic Media Agency, in cooperation with the professionals dealing with the protection of children and minors, as well as publishers, has issued the Recommendations for the Protection of Children and Safe Use of Electronic Media stating which and what kind of content is appropriate for a particular age.[72]

Pornographic TV contents may not be broadcast uncoded. Radio broadcasts must also transmit a sound signal as a warning that a content is inappropriate for children of a certain age. Not long ago (in September 2021), the European Commission sent a reasoned opinion to Croatia and many other EU countries for failing to provide information about the implementation of the EU Audiovisual Media Services Directive (AVMSD)[73] into their national laws. The new rules apply on all audiovisual media—both traditional TV broadcasts and on-demand services as well as video-sharing platforms.

Minors are also protected from "on-demand" contents that are presumed to be used by them even more frequently. Pursuant to Art. 20 (1):

> the on-demand audiovisual media services which might seriously impair the physical, mental or moral development of minors, are only available in such a way which ensures that minors will not in normal circumstances hear or see such on-demand audiovisual media services.

In the private sphere, regarding the accessibility of pornographic content on the Internet, the parents' role is more limited. It mostly depends on their interest for the sexual aspect of their children's upbringing by using Internet applications and social networks, as well as on their knowledge of how to use them.

71 Media Regulatory Authorities and Protection of Minors, Council of Europe, 2019, p. 43. https://rm.coe.int/0900001680972898 (Accessed: April 27, 2022.)

72 https://www.medijskapismenost.hr/preporuke-za-zastitu-djece-i-sigurno-koristenje-elektronickih-medija/ (Accessed: May 3, 2022.)
A conservative NGO started petition "Stop to homo-agenda of the state television Stop fake rainbow families, protect children and families" against broadcasting the documentary German movie "Jana's Rainbow Family" in the morning session. Another LGBTIQ+ NGO sued the conservative NGO, and the Supreme Court decided that this petition, due the the statement "*such environment is harmful for children and contributes to the formation of unhealthy individuals and an unstable society*" is disturbing and discriminatory. The NGO has been ordered to stop discriminating LGBTIQ+ persons, their families, and children through its website and other actions.

73 Directive (EU) 2018/1808 of the European Parliament and of the Council of November 14, 2018 amending Directive 2010/13/EU on the coordination of certain provisions established by law, regulation of administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

According to a research project conducted in Croatia, 27% of Internet users aged 10 to 16 have at least once been exposed to explicit sexual content, either intentionally or by chance.[74] Every service provider has some rules regarding protection, and the Croatian Regulatory Authority for Network Industries permanently organizes educational activities for parents and publishes various handbooks not only in connection with the protection of children from explicit sexual contents but also from other dangers lurking on the Internet.[75]

The Croatian Ministry of the Interior organizes various activities aimed at protecting children from online sexual harassment and from broadcasting pornographic contents and activities to children younger than 15. Specifically educated police officers work on the protection of children, and an action called "the red button" has been launched, enabling every child to report any online harassment.[76] In reality, it is expected that children's protection will depend on the established confidence between the child and its parents because parents who are not proactive do not have any adequate way of controlling their child, particularly if it is of older age.

## 9. Representation of the child as part of the content of parental care

A child becomes a legal entity by birth, but it only later acquires legal capacity—first only partially and then also fully—by reaching the age of 18 or by entering into marriage while still being a minor. Within the content of parental care, parents are entitled to represent their child in personal and property matters unless it is established otherwise. These general rules include exemptions in the areas of both personal law and property law declarations.

Because of the increasingly complex relations, the area of parental right to represent a child is slowly weakening, and increasing importance is attached to the child's opinion and will. A particularly obvious, specific trend in administrative and judicial proceedings decides on the rights and interests of a child to which a significant contribution has been given by the concept of a special representative of the child, as referred to in the European Convention on the Exercise of Childrens' Rights[77] also ratified by the Republic of Croatia.

74 Buljan Flander, Ćosić, Profaca, 2009, pp. 849–856.

75 Example: *Kako zaštititi dijete u svijetu interneta, mrežnih tehnologija i mobilnih telefona?* (How to Protect a Child in the World of the Internet, Network Technologies and Mobile Phones?) https://hakom.hr/UserDocsImages/2018/dokumenti/HAKOM_BROSURAmala.pdf (Accessed: April 18, 2022).

76 https://mup.gov.hr/ostalo-48/online-prijave/online-prijava-zlostavljanja-djeteta-red-button/281667 (Accessed: April 20, 2022).

77 Cf. Hrabar, 2012, pp. 103–116.

In the South European area, children's economic dependence on their parents is prolonged (according to the Eurostat data, in Croatia, children live, on average, up to 32,4 years of age in the same household with their parents),[78] and Simultaneously, the age limit for making legal declarations of will is lowered. In the recent past, after World War II, in the process of industrialization and migration of minors to cities, often without their parents, it became clear that it was necessary to recognize children's limited business capacity. Nowadays, because of the extended possibilities for recognizing such capacity, the reasons are totally different, prompted by understanding that a child is not "a small person" but one who, in line with their developmental needs, must recognize very specific children's rights, including the right of having an impact on decisions related to its rights and duties.

Pursuant Art. 86, paras 1, 2 of the Family Act, parents and other persons caring for children must respect their opinion depending on their age and maturity. This provision has the significance of a recommendation in everyday family and common life, although the meaning of this norm is strong and imperative. The right of the child to get to know the most important circumstances of the case, receive advice, express their opinion, and be informed about possible consequences of the respect of their opinion in proceedings deciding on their rights or interests is stipulated in the act with more details, even at the level of principle. Indeed, whenever a conflict of interest arises between a child and their parents, the child will not be represented in the proceedings by their parent/s but by a special guardian (*see infra*).

The child may—and by law must—make statements regarding particular status issues independently. Thus, for example, at the age of 12, the child alone gives their consent to adoption[79] and the consent to the change of their name and nationality following adoption[80]. At the age of 14, the child is entitled to give their consent to the recognition of paternity.[81] A 16-year-old child may recognize paternity if they are capable of understanding the meaning and legal consequences of consent, and a younger child may also recognize paternity but to be able to do it, the consent of the child's legal representative is necessary.[82] Art. 130, para. 2 of the Family Act recognizes the child's acquisition of the right that the court, in the proceedings dealing with the protection of its right and interests, may allow them to present facts, propose proofs, use legal remedies, and take other actions if the child can comprehend the meaning and the legal consequences of such actions, which must be assessed in every individual case. According to Art. 242, para. 6 of the Family Act every child above the age of 14 is entitled to lodge an appeal to a decision on the appointment of a guardian and has also some other procedural rights. Pursuant Art. 449, para. 1 a child who is older than 16 may bring an action to seek permission to enter into marriage.

78 https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=yth_demo_030&land=en (Accessed: April 20, 2022).
79 Art. 191, para. 1 of the Family Act.
80 Art. 198, para. 5 of the Family Act.
81 Art. 64, para. 1, point 4 of the Family Act.
82 Art. 63, para. 1, points 3 and 4 of the Family Act.

Medical issues are regulated by Art. 88 of the Family Act. Under family legislation, a child older than 16 who, according to a medical doctor's opinion, disposes of sufficient information to form their own opinion on the concrete matter and who is mature enough to make a decision on preventive, diagnostic, or therapeutic procedures aimed at their health or therapy, may independently give consent to an examination, a test, or a medical intervention (informed consent of the child). Though, a medical doctor is authorized to assess that it is a medical intervention connected with some risks of severe consequences for the child's physical or psychic condition as the patient and to seek the consent of the child's parents or other legal representative. If the parent(s) exercising parental care has (or have) a different opinion than the child on the application of a medical intervention, any of them may initiate court proceedings in which the court will render a decision on the protection of the child's well-being. General rule of Art. 16 of the Act on the Protection of Patients' Rights[83] applies in case of urgent medical intervention, when there is no need of the patient's consent when the patient's life and health are at risk.

The Family Act does not solve the issue of whether the termination of pregnancy is a medical intervention connected with serious risks, but in practice, a medical regulation is applied as *lex specialis* according to which a minor over the age of 16 may freely give her consent to the termination of pregnancy. If she is under 16, she will need the approval given by her parents or guardian, according to Art. 18, para. 2 of the Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth[84].

Criticism of such a decision is expressed in the legal literature, in particular with regard to the way in which a medical doctor may present a medical intervention or its consequences to a child.[85]

If the termination of pregnancy may severely impair the minor's health, or if it is performed after the 10th week from conception, the competent commission of the first instance is authorized to decide on the request for the termination of pregnancy. In that case, regardless of the minor's age, the parents or guardian must be informed

83 Act on the Protection of Patients' Health, Official Gazette, Nos. 169/04, 37/08.

84 Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth Official Gazette, Nos. 18/78, 31/86, 47/89, 88/09.

85 "It is sufficient to imagine a minor's pregnancy and her dilemma regarding the termination of pregnancy and on the other hand *pro-life* or *pro-choice* of the medical doctor and his information on the patient's health following the intervention. There is absolutely no doubt that the child's decision will depend on the manner in which the situation is presented to her. We are faced with the adults' influence (even those who are not related by blood) on the child's decision made on the basis of the opinion formed 'from the outside', by manipulating the truth." Hrabar, 2020a, p. 665.
"Not only that because of this principle the need of the parents and of guardians to care for the minor is increased, and in such cases the legitimate interest of the State to care for a young person is also strengthened. The care may be direct in the way that the consent of a state authority is sought to give its approval of the minor's termination of pregnancy (or the Social Welfare Office or the court). It can also be indirect, when the parents' or the guardian's consent is requested. In this concrete situation, the minor's interest to independently decide on the abortion are directly confronted with the interests of the State that by requesting the consent, the minor's best interests are met." Ritossa, 2005, p. 977.

about the referral to the commission, unless the minor has acquired civil capacity by entering into marriage.[86] Parents do not have the possibility to prevent the termination of pregnancy, but by informing them, if the termination of pregnancy has been approved, there is assurance that the parents are aware of their child's need for appropriate healthcare.

Considering property, parents should manage their child's property with the care of a responsible parent,[87] and it is the legal standard that jurisprudence must still take a stand on it. The legislator distinguishes the management of the child's income or property. According to Art. 97, paras. 2, 4 of the Family Act The former may only be used for its maintenance and only exceptionally for medical treatments of parents or the child's siblings when it is not used for the child's maintenance, medical care, and education. To use the child's income for other persons, it is necessary to receive the court's permission in a non-contentious procedure; however, as no control mechanisms for the use of income are envisaged, the initiation of the proceedings depend on the parents' knowledge of whether they should ask for it or not. The child's property may be alienated by parents only if they themselves do not have sufficient funds for the child's maintenance, medical care, or education, and the necessary funds cannot be provided in any other way. If parents want to alienate more valuable assets, they must obtain the court's permission, as required by Art. 97, para. 3, Art. 98 para. 3 in connection with Art. 101 of the Family Act.

Art. 85, para. 2 of the Family Act regulates business capacity of a child. A child who earns having reached the age of 15 acquires only limited business capacity and may independently bring legal actions, enter into legal transactions, and assume obligations amounting to their earnings and freely dispose of them. However, if by undertaking such legal actions or legal transactions a child jeopardizes their maintenance, or if this has a serious impact on their personal and property rights, to undertake these actions, the child must have the parents' or another legal representative's consent.

In all cases where the parents' interests are contrary to the child's interests, a special guardian is appointed to the child. Children's guardians are also appointed in the following situations: in disputes and the proceedings challenging maternity or paternity; in other proceedings where it is decided on parental care, particular contents of parental care, and personal relations with the child where a dispute has arisen between the parties; in court proceedings pronouncing measures for the protection of personal rights and children's well-being; in the proceedings of rendering a decision replacing consent to adoption, when there is a conflict of interest between a child and their legal representatives in property matters or disputes, entering into legal transactions; in the case of disputes or transactions with a person exercising parental care; and in other cases when so provided in the provisions of the Family

86 Art. 20, para. 2 of the Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth.

87 This is a new legal standard for parents in the Croatian family legislation of 2014. Earlier, due care was required, which is a well-known concept of the law on civil obligations.

Act or special regulations, and if it is necessary for the protection of the child's rights and interests.[88]

These are cases involving various conflicts of interest between the child and their legal representatives or the proceedings in which it must only be established whether any reasons for the restriction of the right to parental care exist.

A special guardian is a lawyer who has passed a bar examination and is employed at the Centre for Special Guardianship, whose operation and organization are specified in a separate piece of legislation.[89]

## 10. Parental authority in case of divorce

Divorce is most certainly one of the most stressful events, having serious consequences for both the spouses and the child. The principle that parental care is a joint parental duty is exposed to major challenges both during and following divorce because the parents' personal and individual interests often take precedence over their common interest and duty to ensure their child's well-being.

Divorces may be classified according to level of conflict, which permeates the relations of the soon former spouses; after divorce, this is reflected in how they exercise their parental care for their common children.

The first and basic principle in any proceedings, as well as in those involving divorce, is the principle of the protection of the child's best interest. Therefore, the competent bodies are bound to take legal actions and render decisions by always implying and considering the protection of the child's best interest. The second important principle is the principle of amicable resolution of family matters, while the third principle refers to proportional and the weakest interference in family life.[90]

To ensure these principles before a divorce, mandatory counseling is pursuant Art. 7 of the Family Act obligatory for parents who have common children under legal age. If the parents succeed in reaching an agreement on their joint parental care agreement, the process of divorce will continue in non-contentious proceedings, where the court is authorized to confirm the agreement on divorce and the parents' joint parental care having established that their agreement is made in conformity with the best interests of the child.

If the spouses have not succeeded in reaching an agreement, divorce proceedings will continue as a civil lawsuit, and the spouse who has brought an action for divorce must take part in at least one mediation session. If they have agreed to initiate the proceedings, they must both participate in mediation. Mediation is, in principle—and

88 Art. 240, para. 1 of the Family Act.
89 Act on the Centre for Special Guardianship, Official Gazette, No. 47/2020.
90 Lucić, 2017, p. 406.

in majority of cases—conducted at the state's expense. Its purpose is to agree on the legal consequences of divorce and on the way in which they will exercise shared parental care.

The court must always, also *ex officio* in the lawsuit, decide on the legal consequences of divorce concerning the exercise of parental care; for example, with which parent the child will reside, how parental care will be exercised, the child's personal relations with the parent, and the child's maintenance.[91] On all these issues, the court may also decide in independent proceedings on the request of the authorized party.

The Family Act contains several complex provisions on the ways of joint exercise of parental care following a divorce. It distinguishes decisions on the child's important personal rights (in some of them, the other party's written consent is necessary, and in others, no such consent is necessary) and decisions on the child's valuable property rights (where, cumulatively, the consent of the other parent and the court's approval are needed).

If the parents have not reached an agreement on parental care, the court, in accordance with Art. 106 of the Family Act, may only decide that parental care will be independently exercised by the parent who lives with the child, or it may render a decision that when representing the child in regard to its personal rights,[92] that parent must obtain a (written) consent of the other parent who does not live with the child, as required by Art. 105, paras. 3 and 5 of the Family Act. Such stipulation due to which the parent not living with the child cannot participate in decisions and in the exercise of parental care has been strongly criticized by family-law theoreticians.[93] The case law is going in a *contra legem* direction: the court may render a decision on joint parental care whenever it is in line with the protection of the principle of the child's best interest.

Although a general provision establishes that the child takes part as a party in every proceeding where it is decided on its rights and interests, this is not expressly provided in non-contentious divorce proceedings.[94] The child's right to express its

91 Art. 413 of the Family Act.

92 Representation regarding the child's personal rights is the representation when changing the child's personal name and its permanent and temporary residence and when choosing or changing their religious affiliation.
For more on representation in basic personal rights, see in Lucić, 2017.

93 Cf. Korać Graovac, 2017, pp. 51–73.

94 In literature, there is still an interpretation that the child is a party to any proceedings—thus, also when joint parental care is planned. Aras Kramar, 2015, pp. 235–267.
Ensuring that the child can express their opinion is particularly important for the application of the Regulation Brussel II bis (Council Regulation (EC) No 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental care, repealing Regulation (EC) No 1347/2000 (Regulation Brussels II bis).
Pursuant to Article 23, "Grounds for recognition of judgments relating to parental care."
A judgment relating to parental care shall not be recognized:
"-(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought; …"

opinion was intended to be ensured by Art. 106, para. 5 of the Family Act, pursuant to which parents must introduce their child to the content of their parental care agreement and allow the child to express their views in compliance with their age and degree of maturity.

In civil proceedings, a special guardian is appointed to the child, representing them in lieu of their parents. It is the guardian's duty to make the child familiar with the circumstances of the case, to obtain the child's opinion if they are willing to give it, to represent the child as a party to the proceedings, and to make the child acquainted with the content of the court's judgment. As a rule, parents are not inclined to expose the child to additional conversations with a special guardian, and therefore, they usually try to reach an agreement to protect the child.

The main intention of the Family Act has been to encourage parents to reach an agreement because, otherwise, a special guardian will have to be appointed to the child as a party to the proceedings, which will become more complicated and often prolonged. However, it has been observed in practice that the parents' agreement does not always correspond to their actual will, and disagreements exist even after the formally consensually finalized divorce. Dissatisfied parents may initiate new proceedings for the protection of the child's rights or for the protection of their own rights as *clausula rebus sic stantibus* applies to all family-law decisions.

An agreement or a decision on parental care always contains a determination of contacts. The content of the plan on common parental care already contains many details on the manner of organizing contacts: the amount of time the child will spend with each parent (weekly, monthly, on holidays, and during school recess), also specifying the exact time and place of handing over/receiving the child of a younger age and the way of exchanging information in connection with the child (e.g., orally, by mail, telephone, telefax, SMS, e-mail, or in any other suitable way). It may also be agreed that another person will be present when the child is taken over as well as the mode of transport and who pays for it, as regulated by Art. 417, para. 2 of the Family Act. The court's decision, for the sake of legal security and easier enforcement, must be as specific as possible.[95]

If the parents can agree on things, they will be able to adjust the requirements of the decision to their life habits and needs, and if they have any difficulties with it, they may seek enforcement because of very clearly specified manner of organizing contacts.[96]

95 Cf. Pavić, Šimović, Čulo Margaletić, 2017, p. 23.

96 According to official data in 2020, as many as 2083 children did not exercise their right to contacts with the other parent, or they did exercise it, but in the scope lesser than what had been stated in the court decision (because of the manipulative behaviour of the parent with whom they lived). As many as 352 children were exposed to manipulation by the parent with whom they lived at the time their personal relations under supervision took place.
These data come from the annual statistical report on the applied rights to social welfare, the legal protection of children, youth, marriage, family, and persons deprived of business capacity and the protection of persons with physical or mental disabilities in the Republic of Croatia in 2020.

Pursuant to Art. 523 of the Family Act The means of punishment to enforce a decision for the failure to organize contacts can be a fine or imprisonment. This drew some criticism from theoreticians because the procedure of handing over the child is not foreseen[97] and because no gradation of the means of enforcement is envisaged.

The consequences of the child's refusal to have contact with a parent depend on the child's age: a child younger than 14 may be referred to the social welfare office for a conversation with a professional. If the child is over 14 and, even after this conversation, still objects to enforcement, this cannot be carried out.[98]

Legislation has only solved the issue of enforcement in relation to the person with whom the child lives, but no sanctions are envisaged for the parent who does not fulfill their duty (and the right) to have personal relations with the child.[99]

Changing the place of permanent residence is of particular importance because it may have impact the possibility of realizing personal contacts and is regulated by Art. 100 of the Family Act. Therefore, to change permanent residence, a written consent from the other parent is necessary. If a parent cannot get the other parent's consent, it may be given by the social welfare office if the change of permanent or temporary residence, or moving, do not have any serious impact on the realization of personal contacts with the other parent or if this is not absolutely necessary to protect the child's rights and interests . The ministry competent for families does not provide any data on the number of cases in which Social Welfare Offices have given their consent for the change of permanent residence, and no research of case law exists on that matter. It is well known among the professional public that courts rarely reject applications for the change of permanent residence of the parent who resides with the child on the basis of an enforcement decision.

Both the plan on the parents' joint parental care and the court's decision may undergo changes because of the application of the *rebus sic stantibus* clause Art. 107, para. 2 etc. It is sufficient to prove that has been a significant change of circumstances since the previous plan has been reached. Any parent—or the child—may seek a new decision on parental care from the court, or the parents may agree on a

However, "a special problem is the protection of the rights of children whose parents, after divorce, refuse to exercise their parental duties and obligations toward the child. Apart from taking the appropriate measures against parents, a child certainly needs to be granted support and assistance in overcoming the situation where he or she is told by the parent to be unwanted. In such cases, it is very important to re-examine the child's interests regarding the previous decision. Sometimes a parent, faced with the possible consequences of neglecting the child, starts insisting on exercising parental care but only to avoid possible sanctions. If that is the case, the child's needs and its feelings must be given priority, and any professional interventions in the relationship between the child and its parents must be carefully planned." Report on the ombudswoman's work, 2021, p. 26. https://dijete.hr/download/izvjesce-o-radu-pravobraniteljice-za-djecu-za-2021 (Accessed: April 15, 2022).

97 Pavić, Šimović, Čulo Margaletić, 2017, pp. 193, 194; Stokić, 2013, pp. 11, 12 and Šeparović, 2014, p. 223.

98 Art. 525 of the Family Act.

99 Cf. Korać Graovac, 2018, pp. 35–43.

new plan for their joint parental care, which must be approved by the court in non-contentious proceedings to acquire the capacity of an enforcement document.

## 11. The status of a child not subject to parental care

It is primarily the parents' duty to care for their children, while the duty of the state sets, only in a subsidiary manner, to protect children who do not enjoy proper parental care.

According to Art. 5, para. 1 of the Convention of the Rights of the Child,

> State Parties shall respect the responsibilities, rights and duties of parents …. In a manner consistent with the evolving capacities of the child, appropriate directions and guidance in the exercise by the child of the rights recognized in the present Convention.

In addition, according to Art. 18, para. 1 of the same Convention, "*Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basis concern*."

However, in many life situations when this is not possible and when it is in the child's best interest that someone else exercises parental care, the parents' rights may be more or less limited.

If children are left without parental care, they will be placed under guardianship,[100] and the guardian will become their legal representative, or they will be adopted. Adoption is the best form of family protection of the child left without parental care; however, it is not always the best solution for every child (for instance, if the child has close relatives who are prepared to accept the duty of a guardian or just foster them). Sometimes, it is not even possible to find adoptive parents because the child to be adopted is "difficult to adopt" owing to age, health status, and other factors.

Since 2014, the Croatian family law has introduced the concept of "dormant parental care,"[101] according to which parents do not permanently lose their right to parental care; however, the situation is only temporary, although it may be extended until the child reaches the age of majority.

100 In 2020, in the Republic of Croatia, 1,105 children were placed under guardianship, and in the course of 2020, 446 children.
Annual statistical report for RoC for 2020 of the Ministry of Labour, Pension System, Family and Social Policy.
https://mrosp.gov.hr/UserDocsImages/dokumenti/Socijalna%20politika/Odluke/Godisnje%20statisticko%20izvjesce%20u%20RH%20za%202020.%20godinu.PDF (Accessed: April 27, 2022).

101 Modelled on "*Ruhen der Elterliche Sorge*," Art. 1673 and Art. 1674, *BGB*.

Dormant parental care caused by the existing legal obstacles takes place when a child's parent is a person under legal age (a minor) or a person deprived of legal capacity not capable to exercise parental care.[102] Nevertheless, although a parent is not allowed to exercise parental care, they can still provide daily care to the child either alone or together with the other parent or the child's guardian. However, that parent may not represent the child, but the social welfare office must place the child under guardianship and appoint its guardian.

The parent whose parental care is dormant, as well as the child alone (if they do not agree how the guardian wants to represent the child when dealing with important decisions), may initiate non-contentious proceedings where the court will determine who is going to represent the child in a particular matter.

A parent under legal age may always choose the child's personal name in conformity with the Personal Name Act.[103]

When the aforementioned reasons cease to exist, dormant parental care ceases to exist *ex lege*.

Art. 115 of the Family Act regulates another group of reasons for dormant parental care: if a parent is absent, their temporary residence is unknown, or they are prevented from exercising parental care for a longer period of time for objective reasons. The court must render a decision in non-contentious proceedings, and the parent may not exercise parental care until the court has established that the circumstances (for which dormant parental care had been ordered) ceased to exist (regardless of if, in the meantime, the parent has returned and wants to assume direct parental care for the child).

In all these situations of dormant parental care, the child is placed under guardianship. The child is also placed under guardianship if its parents have died, disappeared, are unknown or deprived of the right to parental care, are absent or prevented from caring for their child, and, Simultaneously, they have not entrusted the child's care to a person fulfilling the conditions for being a guardian, or they have given their approval for the child's adoption.[104] For the sake of legal security, all examples should name in the same article, although it is not the case, what is challenging for legal security.

The social welfare office issues a decision on the appointment of a minor's guardian and determines the child's address. More than a single guardian may be appointed with different tasks. When bringing its decision, the office must take into consideration the child's wishes (in conformity with their age and maturity) regarding the selection of the guardian, unless they are contrary to the child's well-being. The guardian's consent is a crucial condition for this responsible position, but the guardian does not necessarily have to live with the child.

102 Art. 114 of the Family Act.
103 Personal Name Act, Official Gazette, Nos 118/2012, 70/2017, 98/2019.
104 Art. 224 of the Family Act.

The deceased parent's will (if the parent had exercised parental care before their death), may be expressed in an advanced directive, drafted in the form of a notarial instrument according to Art. 116 of the Family Act. The social welfare office must take the advance directive into consideration, unless it is contrary to the child's well-being.

The court must deliver its decision on the appointment of a guardian to a child older than 14 and to a younger child only if they are capable of understanding its meaning and if it is in conformity with the child's well-being. The decision must also be delivered to the child's parents, to the appointed guardian, to the person named as a guardian in an advanced directive (unless the social welfare office has taken into consideration the parent's wishes), to the competent registrar, and to the land registry (if the child owns any immovable).[105]

Guardianship may be discontinued if the parents have regained their parental care, if their right to parental care is reassumed, if their legal capacity concerning parental care is (again) established, and if the child's parents under legal age have reached the age of majority or gotten married, having thus gained legal capacity. Guardianship also ceases if the child is adopted or if the same-sex life partner has acquired the partner's care under Art. 44 of the Same-Sex Life Partnership Act.[106]

Guardianship is always terminated when the child reaches legal age. If a child with special needs is involved, and if there are reasons to deprive them of legal capacity, it is necessary to conduct the proceedings and place them again under guardianship as an adult.

All the rights of the child that they are entitled to in relation to their parents, they are also entitled to while under guardianship.

## 12. Summary and *de lege ferenda* conclusions

In Croatia's recent legal history, the family-law system of the relationship between parents and children has changed from patriarchal to egalitarian. From a bilateral one which includes the parents, it has become trilateral, and it is often like a triangle whose base are the children. It is marked by the ideas referred to in the Convention on the Rights of the Child, dedicating full attention to the child as the most important subject in family relations owing to the concept of the child's best interests.

In a society such as the Croatian one, characterized by Mediterranean and southern influences but also by a highly traditional mentality, children are considered to be of exceptional value. In the family legislation of Croatia, the relations

105 Hlača, 2021, pp. 385, 386.
106 Act on Same-Sex Life Partnership, Official Gazette, Nos 92/2014, 98/2019.

between parents and children are based on a paradigm of the protection of children's rights to such an extent that may easily be considered as pedocentric. The principle of the protection of the child's best interests is of paramount consideration when speaking of legislation; however, the social protection of children—although strongly proclaimed—always suffers owing to the weakness of the social and judicial systems.

Moreover, the family-law system, by also deriving support from international documents for the protection of human rights, still emphasizes the parents as primary educators. In the Croatian system, the concept of "parent" has so far been reserved for the mother and father and for adoptive parents, although genetic parenthood does not always correspond with the legal one, when the child is conceived by medically assisted insemination by heterologous methods. Medically assisted insemination is aimed at offering medical assistance to persons who cannot realize their desire for descendants, excluding commercialization and possible contracts on surrogate motherhood, although it is undergoing significant changes; for example, in April 2022, the High Administrative Court opened the possibility to adopt also for same-sex couples. This possibility will destroy the legal premise that a child's parents may be only a woman (mother) and a man (father). Changes in the birth registrar are expected to follow this new legal approach by considering the child's origin.

Parental care is understood as a personal and human right, although the parents' responsibility for bringing up their children is particularly emphasized as its component part. There is a demand in the legal system, whenever a conflict of interest arises between the child and its parents, to appoint a special guardian to the child. In such a way, the parents' right to representation is limited. Indeed, the child alone exercises the increasing right to express not only their opinion but also their will in an autonomous way through a special representative and to participate as a party in the proceedings where it is decided on their rights and interests. It is even possible, in particular cases, to have their procedural capacity recognized even before acquiring legal capacity.

Since society is under a great deal of pressure to change social values, it is sometimes difficult for parents to decide how to raise their children. The family-law system is making significant efforts to provide some well-balanced solutions that can more easily be found in the areas of upbringing and education or the media. However, children's protection is a difficult mission for many parents when it comes to the Internet and social networks. This is where technology is developing much faster than the law, and the parents' knowledge is often insufficient to have an impact on the contents to which their children are unselectively exposed, undisturbed, despite the technological progress.

Parental care is also subject to many challenges in interpersonal relations with the other parent who is an equal holder of parental care. Although relatively good legal solutions exist, they are insufficient; what is needed is coherent therapeutic work with families, which is quite often almost inaccessible in smaller cities. The problem of conflicting divorces, parents who are alienated from their children, and

unrealized children's needs (including maintenance) are global phenomena that cannot be easily solved without an awareness that by the termination of marriage, parental care does not vanish. Croatia has enhanced the procedural rights of children by ensuring a special guardian in line with the European trends (still developing institution with many human resource weaknesses). However, it is necessary to allocate significant funds for non-legal support to be offered to families undergoing crises.

A certain number of children remain without any parental care, and the social system steps in to provide it. Any encroaching upon parental care becomes subject to the principle of proportionality and the protection of the right to respect family life, but there are also concerns that the measures for the protection of children's personal interests are not sufficiently intensive. In addition, intensive deinstitutionalization and the insistence on foster families as a desired form of alternative care for children have resulted in a shortage of vacancies in children's homes and in an insufficient number of available foster families (the campaigns organized to increase interest for becoming foster parents have been unsuccessful). As a result, children end up staying with their incompetent parents, although it would be much better for them to be excluded from such families.

The postmodern era we live in is full of challenges for families. It is difficult to come to terms with the parents' rights ensuing from parental care (comprehending parental rights as well as duties) on the one hand and with the rights of children—particularly in education—on the other. It would be a good idea to observe very closely the social changes taking place in society and to enhance parents' rights as long as they are directed toward children's well-being in pluralistic societies. Also, the appropriate support offered to parents must always be ensured because they are torn between their private lives and their business obligations. Various systems have different solutions, and what they all need is effective cooperation between scientists and policymakers to be able to recognize and adopt good practices, high-quality legislations, and supportive non-legal systems for families.

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Chapter III

# Czech Republic: The Content of the Right to Parental Responsibility

Zdeňka Králíčková

## 1. Introduction

This chapter focuses on parental responsibility as a key concept of the Czech family law.[1] First of all, it must be stressed that the term parental responsibility (in Czech "*rodičovská zodpovědnost*") was introduced into the Czech legal order in 1998.[2] It happened within the changes that have taken place after the fall of the previous political regime and its legal sources based on "Soviet model" and communist ideology in 1989.[3] The international human rights conventions signed in the early 90s led to several changes in general. Not only cleansing from ideological sediment, but also a different attitude to the duties and rights of the child's parents and emphasis on the rights of the child should be underlined.[4] Thanks to the case law of both the European Court of Human Rights (ECHR) and the Constitutional Court of the Czech Republic, family law started to be understood, interpreted, and applied in harmony with generally shared European values.[5]

It was significant that the human rights dimension of family law was also taken into consideration when preparing the draft Civil Code after the year 2000,[6] and

1 For a general introduction to the Czech family law, see Králíčková, 2021a, pp. 77 et seq.
2 See Hrušáková, 2002.
3 For a general historical point of view, see Bělovský, 2009.
4 See Haderka, 1996, pp. 181–197.
5 Regarding the human rights dimension of family law, see Králíčková, 2010.
6 See Eliáš and Zuklínová, 2001 and 2005.

Zdeňka Králíčková (2022) Czech Republic: The Content of the Right to Parental Responsibility. In: Paweł Sobczyk (ed.) *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates,* pp. 73–104. Miskolc–Budapest, Central European Academic Publishing.

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later on, within the general discussion prior to the passing the final version of the Civil Code. In addition, the main authors of the Civil Code reflected academic initiatives and their achievements as well, namely the Principles of European Family Law regarding Parental Responsibilities (hereinafter also "Principles regarding Parental Responsibilities")[7] by the Commission on European Family Law (hereinafter also "CEFL")[8] created and published during the time, and the Civil Code was gradually being prepared. That is why the Civil Code in its final version from 2012 not only followed up on its predecessor extensively amended in 1998, but it also took into account many innovations that were relevant and necessary in this matter.[9] Regarding terminology, the experts' team decided after a long discussion for almost the same term, namely "parental responsibility" (however, in Czech with a bit different spelling "*rodičovská odpovědnost*" in comparison with the previous wording "*rodičovská zodpovědnost*"). As a novelty, the Civil Code distinguishes between the "holding" and "exercise" of the duties and rights belonging to parental responsibility. The concept, or the scope of parental responsibility, is much broader than one according to the previous legal regulation, which brings more balance, protection, and security to the family ties. It is highly important that parental responsibility arises from—and belongs (only) to—both the legally established parents of the minor child, without any discrimination based on gender or sexual orientation and so on. The duties and rights of the child's parents are equal regardless of whether they are married, divorced, or separated. The parents must exercise their duties and rights belonging to the parental responsibility jointly and in harmony with the child's best interests and their welfare, well-being, and participations rights. If the child is at risk, for instance, the child's parents cannot exercise their duties and rights properly because of objective reasons (they are minors or do not have full legal capacity or they are in coma) or event subjective ones (they are socially immature or inadaptable, drug addicted, violent, and so on), the Civil Code provides special rules for solving difficult life situations as well. Several provisions are applied by the operation of law (*ex lege*), and many articles give the state administrative authorities and the courts rights—but duties as well—to intervene to the family ties with a wide range of measures and remedies, or sanctions.

The legal provisions regarding parental responsibility anchored to the Civil Code protect not only minor children but their parents as well. Everybody can be in the position of a weaker party, especially a minor, not-fully-capable parents, a single mother, a putative father, a left behind parent in case of international child abduction or intercountry unlawful relocation of the child, and so on. That is why, vulnerability in the broadest sense is reflected by the Civil Code. The general protection of family and family life according to the wishes, choices, preferences, and also special needs of family members is guaranteed in relation to the constitutional law and human rights conventions.

7 Boele-Woelki, 2007.
8 For more, see http://ceflonline.net/ (Accessed April 20, 2022).
9 For more, see Králíčková, 2009, 2014b.

Because of the abovementioned, the following lines are devoted not only to the description of current legal regulation of parental responsibility anchored into the Civil Code, its inspiration sources, terminology, concept and content of parental responsibility, exercise of duties and rights belonging to the parental responsibility, and to solving possible conflicts. The attention is also paid to the jurisprudence and to practice—mainly to the case law of the Constitutional Court of the Czech Republic. It is without a doubt that the constitutional courts are generally deemed to be "drivers" of family law reforms. The Constitutional Court of the Czech Republic has been playing a crucial role in this field.

The picture of the legal regulation of parental responsibility would not be complete without looking at historical legislation, although the protection of all forms of family and family members has not always been a matter. It is interesting to examine the legal development from the concept of the "power of the father" to the "parental power" or "parental "authority" or "parental rights and duties" or "parental care," finally to the "parental responsibility" or "parental responsibilities." Not only the emancipation of woman, but also gradually increasing the importance of the child's autonomy and their participatory rights played a significant role in historical perspective. In addition, the paternalistic and collectivist state little by little lost its significance in favor of a state based on respect for human rights, freedom, and private autonomy in all spheres, including family law and family life.

## 2. Historical context

### *2.1. The General Civil Code and the Constitutional Charter*

It is generally known that after the Second World War, the national legislation in many countries sought to redefine the child's rights. The adoption of several declarations, mainly the Declarations of the Rights of the Child from 1924 and 1959 by the United Nations General Assembly, which defined the child's rights to protection, education, health care, shelter, and good nutrition, "opened the eyes" of lawmakers in many countries and created the conditions for changes in this field of family law or in the whole legal order. Later, the parliaments of many states sought to eliminate discrimination against children born out of wedlock and better equalize the duties and rights of fathers and mothers toward their child and weaken the concept of the "power of the father" in favor of "parental power" or "parental authority."

However, it must be stressed that even before, after establishing the Czechoslovak Republic in 1918, the rights of a child started to be taken more seriously, and the duties and rights of the child's parents were more balanced thanks to the case law and jurisprudence. It is well known that the independent Czechoslovak Republic accepted the legal order of the former Austrian-Hungarian Empire, namely

the General Civil Code from 1811,[10] which became the main source of civil law in the Czech lands.[11] In 1920, the new Constitution Charter of the Czechoslovak Republic was passed.[12] It was stated, at the outset, that laws contrary to the Constitutional Charter were invalid. Furthermore, under the heading "equality," it was stipulated that "*the privileges of sex, ancestry and occupations are not recognized*".

Thanks to the spirit of the Constitution Charter, the General Civil Code started to be interpreted differently, although the statutory law stated that "*the man is the head of a family*" under Art. 91, GCC. The authors of the famous and most appreciable and valuable commentary to the General Civil Code wrote that "*the power of a man over his wife*" must be interpreted in the light of the constitutional order; they even used the words "*responsibility for family in personal and property aspects*" in their commentary.[13] The main aim of the statutory provision was seen to be the protection against the third parties and the provision of a material basis for the family. Regarding the common children of the spouses, the General Civil Code provided, in addition to provisions regulating affiliation under Art. 138, GCC, the rules of "parental power" under Art. 139 and mainly Art. 144, GCC. The authors of the commentary stated that the word "power" means the "right" as well, and introduced the concept of "joined vessels." It was stressed that both the child's parents are vested by such duties and rights toward the children and that the children's upbringing must be done upon the consent of both parents.[14] The upbringing of married children was to consist "*in taking care of their lives and health, decent maintenance; by developing their physical and mental strength and teaching religion and useful knowledge; the parents had a duty to lay the foundations for the future well-being of their children*" under Art. 139, GCC. Special provisions were devoted to religious education. It was stipulated that "*in which religion the child is to be brought up by parents, who are not of the same religion, is determined by political rules*" contained in Art. 140, GCC. A similar reference to special regulation was made to determine the age from which a child can confess to another religion.[15]

In addition to the abovementioned, the General Civil Code provided a special "power of the father" that belonged only to the father as "a head of the family" covered by Art. 147, GCC. This "power" included, especially, the right of the father to decide on the child's profession, to manage their property, represent them, and state who will be a guardian in case of their death under Arts. 149 – 157, GCC. Such rather discriminative provisions were followed by the statement that children born out of wedlock did not have the same rights as children born to the marriage under Art. 155, GCC. This concept was fully abandoned thanks to the following legal changes.

10 The Act No. 946/1811 Sb. z. s., Allgemeines bűrgeliches Gesetzbuch, hereinafter also "GCC."

11 The Act No. 11/1918 Sb. z. a n., on the Establishment of the Independent Czechoslovak State, so-called reception norm.

12 The Act No. 121/1920 Sb., introducing the Constitutional Charter of the Czechoslovak Republic; hereinafter also "Constitutional Charter."

13 For more, see Rouček and Sedláček, p. 463.

14 Ibid, p. 758.

15 The Act No. 96/1925 Sb. z. a n.

### *2.2. The Act on the Family Law and the new Constitution*

The General Civil Code was replaced by the Act on the Family Law in 1949,[16] which was passed beside the Civil Code in 1950.[17] The separation of the Codes was the result of the conception of "artificial atomization of legal order" according to the "Soviet model."[18] The aim of creating a separate Family Law Act was seen in "purifying family law" from characteristics known in the bourgeois society and its law.[19] That is why the Act on the Family Law followed the ideals embedded in the Constitution in 1948.[20] The family based on marriage was pronounced as a state's basis. Because the society run by the Communist Party intended to eliminate the influence of the Church on social life, the form of obligatory civil marriage was stipulated as an exclusive one for many years, and no provisions were devoted to children's religious education. The hate against the clergy escalated into the criminalization of priests.

Both the Constitution and the Act on the Family Law regulated the equality of a man and a woman in marriage and family and some *positives* regarding children. The lawmaker canceled distinguishing between the children born in wedlock and children born out of wedlock. For many reasons, the Act on the Family Law used to be said to be the *"Code of the Rights of the Child."* The "power of the father" was replaced by "parental power" contained in Art. 55 AFL (in Czech "*rodičovská moc*"), which included "*the right to bring up the child, represent him or her and manage his or her property*," and should be exercised jointly by both parents of the child. The protection and management of a child's property was still well regulated under Arts. 58 and 59, AFL.

Regarding the *negatives*, the duty and right to decide on the child's religion and education were missing entirely. Unfortunately, the Act on the Family Law did not regulate, because of political reasons, any family substitute care of children (such as foster care) that used to have a long traditional place in the land. The institutional care of children was favored and—owing to ideological reasons—overused.

However, in general, the passing of the Act on the Family Law in 1949 was highly important for the Czechoslovak Republic in many aspects, bringing many *positives*. The Act on the Family Law finally unified family law of the Czechoslovak Republic based on Austrian law in the Czech lands, Silesia, and Moravia and Hungarian law in Slovakia.[21] Regarding the content, the Act on the Family Law was excellently conceived and processed. It was a result of broad professional cooperation among the experts of the Czechoslovak Republic and the Polish Republic.[22]

16 The Act No. 265/1949 Sb., the Act on the Family Law, as amended; hereinafter also "AFL."
17 The Act No. 141/1950 Sb., the Civil Code, as amended.
18 See Bělovský, 2009, pp. 463 et seq.
19 See Khazova, 2007, pp. 97 et seq.
20 The Act No. 150/1948 Sb., the Constitution of the Czechoslovak Republic.
21 Let us add that the former Compilation Commission on the Re-codification of Civil Code failed to create a new Civil Code that would cover family law matters as well. Draft No. 425 from 1937 was not passed.
22 For more, see Fiedorczyk, 2014.

### *2.3. The Act on the Family and another new Constitution*

Owing to the passing of the other Constitution in 1960,[23] which proclaimed the victory of socialism in the Czechoslovak Republic, all the relevant codes from the previous period were substituted by the new acts, namely the Act on the Family[24] in 1963 and the Civil Code[25] in 1964. The Act on the Family and the Civil Code were said to be more simplified than the older ones, and some experts even spoke about a further vulgarization of legal culture.[26] In general, it can be agreed that the passing of the Act on the Family and the Civil Code in the 60s was a *"disaster"* when it came to the quality of legislative work. Furthermore, owing to political reasons, the ideological sediment was significant.[27]

The politically engaged Preamble of the Act on the Family stressed that "*society strives to make the morality of socialist society the basis of all relationships within the family, marriage and the upbringing of children.*" The Preamble was followed by a list of general principles anchored at the beginning of the Act on the Family, which were intended to be the main rules for the interpretation and applications of the individual provisions. The role of the state and society was stressed to the detriment of the individual interests of the child's parents and the child's well-being. It ought to be mentioned that "*parents are responsible to society for the all-round mental and physical development of their children and especially for their proper upbringing so that the unity of family and society's interests is strengthened*" and that "*the society takes care of the upbringing of children and the satisfaction of their material and cultural needs, cares for them and protects them through the state authorities, social organizations, schools, cultural, educational and medical facilities*".

To follow the effort to build communism, key attention was paid to the upbringing of the child in harmony with political doctrine, and in addition, special provisions were headlined "*Participation of society in the exercise of the rights and duties of parents*". It is generally known that communist lawmakers gave great power to the administrative bodies instead of the courts, and the national committees were allowed to take several actions toward the children, parents, and others. The Act on the Family provided *expressis verbis* that "*if urgently needed, the national committee is obliged to take such measures in advance, which only the court has the right to decide otherwise, to which it will immediately notify it; the court shall decide subsequently*" contained in Art. 46, AF. This provision also "allowed" the national committees to remove the child from the family and place them in institutional care, which used to be overused and abused in practice (sic). Thanks to the negative norm-setting of the Constitutional Court of the Czech Republic, the

23 The Act No. 100/1960 Sb., the Constitution of Czechoslovak Socialist Republic, as amended.
24 The Act No. 94/1963 Sb., the Act on the Family, as amended; hereinafter also "AF."
25 The Act No. 40/1964 Sb., the Civil Code, as amended.
26 Eliáš, 1997, pp. 105 et seq.; for more, see Haderka, 1996, 2000.
27 See Bělovský, 2009, pp. 463 et seq.

relevant article was abolished soon after the fall of the communist regime (Pl. ÚS 20/94, No. 72/1995 Sb.).

From today's point of view, many *negatives* must be added in more detail. "Parental power" was replaced by the rather confusing concept of "rights and duties of the parents," which belonged only to parents with full legal capacity under Arts. 32 and 34, AF. Its scope was limited to "*the right to bring up the child, represent him or her and manage his or her matters*" contained in Art. 36, AF. As the property aspects of family life were neglected in the whole legal order owing to the prevailing ideology, the rules on the protection and management of a child's property were missing.

However, one *positive* aspect must be mentioned in this context: unlike its predecessor (the Act on the Family Law from 1949), the Act on the Family from 1963 re-introduced family substitute care of minor children who could not grow up with their parents. The doctrine of the exclusive placement of children in institutional care was abandoned. It must be added that thanks to the activities of many pediatricians, child psychologists and child psychiatrists, and other professionals, as well as the general public, a special law was passed in 1973[28] that re-established foster care, which had a tradition in the Czechoslovak Republic prior to 1948 or 1949.

### *2.4. International human rights conventions, the new Constitution, and the Charter of Fundamental Rights and Freedoms*

After the fall of communism in 1989, and mainly thanks to the human rights conventions, the legal order in Czechoslovakia—and later in the Czech Republic established in 1992—underwent several changes. When speaking of individual international conventions relevant to the Czech family law and to those the Czech Republic has acceded, it is worth mentioning, especially, the Convention on the Rights of the Child; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the European Convention on the Exercise of Children's Rights; the European Convention on the Legal Status of Children Born out of Wedlock; the European Convention on Adoption of Children; the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption; the Hague Convention on the Civil Aspects of International Child Abduction; the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children; and the European Convention on Contact Concerning Children.

The acceptance of the abovementioned international conventions has led, among other effects, to a new perception of the Czech family law, its more cultural interpretation and application, and, last but not least, to the growing interest by the Constitutional Court of the Czech Republic in the conformity of the Czech family law with the European human rights standards. Its general authority and mainly "new" interpretation and applications of the "old" laws has meant the cancellation of an

28 The Act No. 50/1973 Sb., on Foster care, as amended.

unconstitutional provision of the Act on the Family, which has been already mentioned. Moreover, it is also necessary to underline the gradual wider consideration of the case law of the ECHR, especially in relation to the Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

It must be stressed that the "old" law from the 60s started to be newly interpreted and applied as well thanks to the new Constitution of the Czech Republic[29] and especially owing to the Charter of Fundamental Rights and Freedoms.[30] The Charter is fully in harmony with the wide concept of family life guaranteed by the international instruments and European human rights standards. It can be said that the Charter constitutes the "basic pillar" for the creation, interpretation, and application of individual family law norms. The Charter has a general value by wording "*Parenthood and the family are under the protection of the law. Special protection is guaranteed to children and adolescents*" contained in Art. 32, para. 2, Charter.

The Charter provides many articles devoted to children. It is especially stressed that "*children, whether born in or out of wedlock, enjoy equal rights*" without any discrimination under Art. 32, para. 3, Charter. The provision continues by stating that

> it is the parents' right to care for and bring up their children; children have the right to parental upbringing and care. Parental rights may be limited and minor children may be removed from their parents' custody against the parents' will only by the decision of a court on the basis of the law

contained in Article 32, para. 4, Charter.

It is followed by the statement that "*parents who are raising children have the right to assistance from the state*" covered by Art. 32, para. 5, Charter.

Regarding education, the Charter guarantees that

> everyone has the right to education. School attendance shall be obligatory for the period specified by law … Citizens have the right to free elementary and secondary school education, and, depending on particular citizens' ability and the capability of society, also to university-level education … Private schools may be established and instruction provided there only under conditions set by law

under Art. 33, para. 1-4, Charter.

In this relation, it is necessary to mention a special provision stating that "*the freedom of thought, conscience, and religious conviction is guaranteed. Everyone has the right to change his or her religion or faith or to have no religious conviction*" covered by Art. 15, para. 1, Charter.

29 The Constitutional Act No. 1/1993 Sb., the Constitution of the Czech Republic, as amended.

30 The Constitutional Act No. 23/1991 Coll., the Charter of Fundamental Rights and Freedoms, re-adopted under No. 2/1993 Coll., as amended; hereinafter also "Charter."

As regards healthcare, the Charter provides that "*everyone has the right to the protection of his or her health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law*" under Art. 31, Charter.

The aforementioned constitutional achievements had an important impact on the state's legal development. The Parliament of the Czech Republic initiated many reforms of family law in harmony with human rights dimension and European standards. The Act on the Family was amended mainly in the year of 1992,[31] when religious wedding was again established. However, the *purge* from ideological sediment, principles, and terminology was done rather late after the fall of the Berlin Wall, in 1998.[32]

Finally, the passing of the so-called Children Act[33] in 1999 must be mentioned. Children started to be regarded not as passive objects of their parents' will or of a paternalistic or totalitarian state, but as fully-fledged and active entities.[34] Last but not least, the protection of the families, weak family members, and persons at risk—minor children included—would not be complete without passing the so-called Act Against Domestic Violence.[35]

The changes in substantial law, in this respect, were followed by the passing of amendments to the Civil Procedural Code from 1963[36] and the Act on Mediation in 2012.[37] Later on, in 2013, the Act on Special Civil Proceedings[38] was passed, introducing new family law proceedings.

It must be stressed that the favorable atmosphere of the post-revolution period of the early 90s provided the lawmaker with a great space for the recodification of basic codes, mainly the Act on the Family and the Civil Code from the 60s. Unfortunately, that advantage was missed, and the most important codes were amended many times, but partially and lacking any proper concept.

### *2.5. The Civil Code and its human rights values*

The changes connected with passing of the Civil Code[39] as a fundamental source and "core of private law" were significant. The previous concept of "independent family codes" according to the "Soviet model" was abandoned, and family law was incorporated into "Book Two" of the Civil Code as it used to be a tradition before

31 The Act No. 234/1992 Sb.

32 The Act No. 91/1998 Coll.; for details see Haderka, 2000, pp. 119–130.

33 The Act No. 359/1999 Sb., on the Socio-Legal Protection of Children, the so-called Children Act, as amended; hereinafter "ChildA"; see Krausová and Novotná, 2006.

34 For details see Hrušáková, 2002; Hrušáková and Westphalová, 2011.

35 The Act No. 135/2006 Sb., so-called Act against Domestic Violence, as amended; see Králíčková et al., 2011.

36 The Act No. 99/1963 Sb., Civil Procedure Code, as amended.

37 The Act No. Act No. 202/2012 Sb., on Mediation, as amended.

38 The Act No. 292/2013 Coll., on Special Civil Proceedings, as amended.

39 The Act No. 89/2012 Sb., Civil Code, as amended; hereinafter "CC" or "Civil Code"; the Civil Code came into effect on January 1, 2014.

the year 1949 and as is common in many European countries. Not only the form but also the content of the Civil Code is of the utmost importance. Thanks to its main authors, the Civil Code respects the "traditional" values of the European Christian-Jewish culture and develops "new" ideas anchored into the Charter. The Civil Code also includes some important *novelties* that have been present in other European civil codes for a long time, mainly owing to the human rights conventions, the case law of the ECHR, and various academic activities originated especially in the Commission on European Family Law. It was the Principles regarding Parental Responsibilities that must be mainly emphasized when describing the sources of inspiration for the concept's legal regulation and the content of parental responsibility anchored into the Civil Code,[40] in addition to the abovementioned conventions. As a contribution of the Principles regarding Parental Responsibilities to the discussion of the draft Civil Code should be primarily considered: the concept itself, the broader content of parental responsibility, and the distinction between the "holding" of parental responsibility and the "exercising" of duties and rights belonging to the scope of parental responsibility. It is also worth highlighting that the position of the parents of a child who are incapacitated or minors is strengthened, particularly in relation to personal care or contact with the child. It should also be stressed that the exercise of duties and rights arising from parental responsibility by the child's parents after divorce or in the event of *de facto* separation have been thoroughly regulated and that explicit rules have been established for parents in conflict. Other provisions have been created for a child's parents and prospective adoptive parents and the people involved in the child's substitute family care in general, which will undoubtedly prevent difficulties. With regard to the suspension, limitation, and deprivation of parental responsibility, it is worth mentioning, in particular, the provisions according to which the court must deal with the parent's contact with the child or may, simultaneously, deprive the parents of the right to consent to the adoption. However, these provisions must be seen as "measures" rather than "sanctions."

In addition to the concept of parental responsibility, the Civil Code regulates the establishment of legal parentage, which should be (in principle) in harmony with biological and social parentage under Art. 771 ff, CC. The statutory norms regarding the child's status relevant for kindship are followed by the rules governing the relationship between the parents and the child. The Civil Code provides for many duties and rights, such as status, personal, and property ones contained in Arts. 855 ff, CC. At this point, it should be foreshadowed that some duties and rights concern only newborns; some concern minor, not fully capable children, and others are duties and rights of lifelong importance.

The following lines are devoted to the most relevant aspects of parentage and parental responsibility according to the Civil Code and to critical amendments to this main source of family law that have already been passed.[41]

40 Regarding the impact of other Principles of European Family Law, see Králíčková, 2021b, pp. 85–95.
41 For more, see Králíčková and Hrušáková and Westphalová, 2020, 2022.

## 3. Establishment of legal parentage: a brief description

The Civil Code regulates the establishment of parentage and determines a child's parents by mandatory rules. A child's mother is the woman who gave birth to the child under Art. 775, CC. The child's father is a man whose fatherhood is based on one of the three legal presumptions of paternity contained in Arts. 776 ff, CC. The law also protects the so-called putative parents covered by Art. 783 and Art. 830, CC. Biological (or genetic) parentage and social parenthood (*de facto*) are critical, and it is necessary to respect the balance between all these categories.[42]

Legal parentage (*de jure*) may be established by adoption as well under Arts. 794 ff, CC. Thanks to the international conventions, the Civil Code protects the family of origin of a child well and the child's right to live primarily with the parents or blood relatives. The right to consent to the child's adoption is not included in parental responsibility. However, when depriving the parents of their parental responsibility toward the child, the court can discharge the parents of the right to give consent to the adoption as mentioned above. On the other hand, adoptive parents will become holders of parental responsibility according to the doctrine of full adoption, or *adoption natura imitatur*.[43]

It must be added that legal parentage is most important for the child. The establishment of parentage—or the determinations of kinship—has significance for the whole legal order as it is a base for creating the child's civil status.

## 4. The concept of a minor child

In contrast with the Convention on the Rights of the Child, the Civil Code does not define who the child is, although this can be inferred from the rules on the establishment of kinship. The law provides that it is a relationship based on blood ties or originated by adoption that is constructed as a status change under Art. 771, CC and Art. 794 ff, CC. Then, the child is a descendant in the direct line of the first stage covered by Art. 772 and Art. 773, CC. A minor child is to be understood as a child who has not reached the age of majority under Art. 30, Sub-Section 1, CC; a minor, fully non-capable child is a child who is under 18 years of age and has not yet reached full legal capacity by a court's decision contained in Art. 37, CC or by concluding a marriage under Art. 30, Sub-Section 2, CC; these last two options are only rarely used in practice.

It ought to be stressed that the law provides special protection to a minor, fully non-capable child, especially within the private law concept of parental responsibility.

42 For more, see Králíčková, 2008, pp. 275–282.
43 Králíčková, 2003, pp. 125–142.

## 5. Mutual duties and rights of parents and a child: a general overview

The Civil Code pays significant attention to the mutual duties and rights of parents and the child contained in Arts. 855 ff, CC. The law emphasizes equality and reciprocity, or reciprocity of duties and rights. It stipulates that "*the parents and the child have duties and rights in relation to each other*" under Art. 855, CC. The rights of one always correspond to the duty of the other and *vice versa*. The same provision states that "*these mutual duties and rights cannot be waived; if they do so, it is disregarded.*" Neither the parents nor the children can "get rid" of any of their duties or rights regardless of being personal or property as these are established by law. Above all, the status relationship between the parents and the child cannot be canceled, neither unilaterally nor by an agreement. As it was already mentioned, there are only few legal exceptions: the parents have the right to give their consent to the adoption of the minor child or to "show non-interest" or even leave a newborn child at "baby-boxes" (not regulated at all).

The rules built on equality and reciprocity of duties and rights of parents and the child apply in principle, regardless of the age or the level of legal capacity of both the parents and the child. Many of the duties and rights form an integral part of the parents and the child's entire lives. It must be stressed that some of the mutual duties and rights are permanent—albeit varying in detail with regard to the passage of time; for instance, the amount of the reciprocal maintenance duty between the parents and the child, the duty to respect each other's dignity, or mutual assistance. Several duties and rights of parents in relation to their child concern only a newborn child; for instance, the duty and the right of parents to name their child. However, some duties and rights arise from parental responsibility as a special concept of family law and form the content of the legal relationship between the parents and a minor child who is not fully capable. Similarly, some of the duties and rights of a child in relation to their parents concern only a minor child.

As far as other conceptual issues are concerned, the Civil Code reflects its main inspiration source, the Principles regarding Parental Responsibilities, and in addition to defining the content of parental responsibility, it provides rules for the establishment and holding of parental responsibility and for the joint exercise of duties and rights belonging to parental responsibility in harmony with the best interests of the child and their welfare. It also provides details regarding the most important elements of parental responsibility as personal care for the child and their protection, the child's upbringing and education, their residence and relocation, the parents' personal contact with the child, the child's representation, and the administration of the child's property. The duties and rights belonging to parental responsibility vary in relation to the child's gradual maturation and disappear as the child reaches adulthood or by the child's acquisition of full legal capacity.

## 6. The term parental responsibility

As mentioned in the introduction, the Civil Code uses the term "parental responsibility" (in Czech "*rodičovská odpovědnost*"). However, this term appeared in the Czech legal order for the first time in 1998 owing to the passing of the amendment to the Act on the Family from 1963 (with different spelling "*rodičovská zodpovědnost*").

Regarding the origin of the terms "parental responsibility" or "parental responsibilities," it can be said that they are connected with the international conventions mentioned above and with the European instruments. Several organizations have used the term as singular (the Hague Conference on Private International Law and the European Commission) or plural (the Council of Europe). As foreshadowed in the introduction and within the historical context, all changes in the legal regulation of the relationship between parents and the child were simultaneously accompanied by a change of terminology and indicated the shift from the traditional concept of "parental power" and "parental authority" to "parental rights and duties" as well as "parental care," and ultimately to "parental responsibility" or rather "parental responsibilities."[44]

## 7. The concept of parental responsibility

As stressed above, the concept of parental responsibility anchored into the Civil Code was inspired by the Principles regarding Parental Responsibilities, which is why it must be seen as a broad collection of duties and rights concerned with taking care of the minor child's person and properties.[45]

Under family law, every legal parent of the child is the "holder" of parental responsibility or the "holder" of duties and rights arising from it, unless they were deprived of it by the court under Art. 865, CC. Even the minor parents of a child or the parents limited in their legal capacity, in this respect, by the court because of a mental disease are the "holders" of the duties and rights arising from parental responsibility.[46] However, the Civil Code provides special rules for these parents as follows.

As far as a minor parent is concerned, it is said under Art. 868 para. 1, CC that

> the exercise of parental responsibility of a minor parent who has not previously acquired full legal capacity by having been granted legal capacity or having entered into marriage, is suspended until such time as the minor parent acquires full legal

44 Boele-Woelki, 2007, p. 14.
45 Králíčková, 2021b, pp. 85–98.
46 Šínová and Westphalová and Králíčková, 2016.

> capacity; this does not apply to the exercise of right and duty to care for the child, unless a court, having regard to the personality of the parent, decides that the exercise of this duty and right is also suspended until such time as the parent acquires full legal capacity.

Regarding parent limited in legal capacity owing to a mental illness, it is provided under Art. 868 para. 2, CC that

> the exercise of parental responsibility of a parent, whose legal capacity has been limited in this area, is suspended for the duration of such limitation, unless a court decides that the exercise of the parent's rights and duties relating to the care for the child and personal contact with the child is to be retained with regard to his or her personality.

Such suspension of exercise of duties and rights by the operation of law must be distinguished from suspension by court decision and from other measures (see below).

In connection with the above-described concept of "holders" of parental responsibility, it must be stressed that parental responsibility as a whole cannot be transferred to another person as the law in general provides that parents and children cannot waive their mutual duties and rights. The law does not give such a privilege to a court, either. The holder of the duties and rights arising from the parental responsibility is neither a spouse, the so-called stepparent, or the partner of the child's parent, although the law allows them to "participate" in the child's upbringing covered by Art. 885, CC.

The holder of parental responsibility is not a guardian, although the law stipulates that a guardian has basically all the duties and rights as the child's parent in relation to the child; however, the law regulates that the court exceptionally provide a range of duties and rights otherwise contained in Art. 928, CC.

To sum up, any other third person different from the child's parents cannot be the holder of parental responsibility.

## 8. The content of parental responsibility

As explained above, the main authors of the Civil Code, when writing the final version of the concept of parental responsibility, took into consideration major part of the Principles regarding Parental Responsibilities—not only its terminology, but especially its broadly conceived collection of "rights and duties" aimed at "*promoting and safeguarding the welfare of the child*"; in particular (a) the child's care, protection, and education; (b) the maintenance of their personal relationships; (c)

the determination of their residence; (d) the administration of their property; and (e) legal representation.

However, according to the Civil Code, the content of parental responsibility is rather broader and more complex. The Civil Code provides that parental responsibility includes, in reverse order, the "duties and rights" of parents, which consist in (a) caring for the child, mainly including care for their health, their physical, emotional, intellectual and moral development; (b) protecting the child; (c) maintaining personal contact with the child; (d) ensuring their upbringing and education; (e) determining the place of their residence; (f) representing them; and (g) administering their assets and liabilities, or property contained in Art. 585, CC.

In addition, the Civil Code provides what issues, among the most important ones, require the consent of both parents. The list of a child's significant matters is demonstrative and includes, in particular, (a) non-routine medical and similar interventions, (b) the determination of the child's place of residence, and (c) the child's choice of education and employment under Art. 877 para. 2, CC. It should be added that the duty and right to decide on these matters "extends" the content of parental responsibility.

## 9. The purpose of parental responsibility

As for the purpose of parental responsibility according to the Civil Code, it should be seen primarily as a package of legal and moral rules simultaneously. The essence and meaning of parental responsibility lie in the value of parentage itself, in conjunction with the value of the child's welfare.

The private law concept of parental responsibility is a civil liability aiming to the future in an objective normative significance of an order to provide proper care: here it is a legal order for adequate childcare or for the best parental childcare in accordance with the best interests of the child. To act as a "responsible" parent means to act appropriately with regard to the welfare of the child as best as it can be objectively required from the parents according to their emotional, cognitive, and volitional properties or their best parenting skills. The terms "parentage" and "parental responsibility" have, as a legally recognized value, absolute legal importance with effects *erga omnes*. The purpose of parental responsibility is, on one hand, the implementation of parenting by the child's parents and, on the other, the protection of the rights and legitimate interests of the child, their moral and material benefits, as well as their upbringing and education, personal care, protection (in the broadest sense of the word), determination of place of their residence, administration of their property, and their representation.

## 10. Origin and duration of parental responsibility

It follows from the nature of the case that parental responsibility arises by operation of law (*ex lege*) for each parent at the child's birth and is extinguished upon the child acquiring the age of majority (or full legal capacity). It means that the concept of parental responsibility protects only a minor child who is not fully capable, and it is not relevant whether the child's parents are married or not, whether they live together or not, and so on, although these factors can play a significant role, especially in the case of the exercise of individual duties and rights arising from parental responsibility. The duration and extent of parental responsibility may be changed only by the court (see below for details).

Parental responsibility of one of the parents does not end by placing the child into the individual (sole) custody of the other parent after the dissolution or annulment of marriage nor by *de facto* separation of the parents, or by placing the child into any form of substitute care, such as foster care, institutional care, and so on. This issue must be considered in light of its human rights dimension.[47] The child is an integral part of their family of origin; both parents have the right to exercise duties and rights connected with their parentage and parental responsibility—not only theoretically but also practically, jointly, and in harmony with the best interest of the child and their welfare and well-being and according to the following rules.

## 11. The exercise of duties and rights belonging to parental responsibility

### *11.1. On general rules*

The exercise of duties and rights forming the scope of parental responsibility by both parents of a child, which is a common and desired state of affairs, assumes the parents' agreement that obliges them—albeit subject to changes in circumstances (*clausula rebus sic stantibus*)—for instance, with regard to the scope of personal contact with the child in relation to their age, maturity, and so on. The agreement and cooperation of both parents are the key words of the Civil Code regardless of whether they live together or are *de facto* separated or divorced. Regarding decision-making, special provisions exist for daily matters, important issues, and urgent decisions concerning the child. If the parents cannot come to an agreement on important matters concerning the child—for instance, on the child's residence, representation, property issues, education, health services, or regarding personal care (custody) and maintenance and contacts with the child in case of *de facto* separation

47 See Králíčková, 2010.

in particular—the court decides.[48] Thanks to the Convention on the Rights of the Child, the child is not taken as an object of decision-making but as an active person. Their autonomy, participations rights, and and right to self-representation in legal proceedings concerning themselves are respected.

The following lines are devoted to the child's care, protection, upbringing, health, education, residence or relocation, representation, and property aspects in more details.

### *11.2. The child's care, protection, and upbringing in more detail*

Childcare, in the broadest sense of the word, is a key part of parental responsibility. It includes, in particular, care of a child's health and their physical, emotional, intellectual, and moral development. It should be distinguished from "personal care" or "personal custody" within individual (sole) custody, alternating (serial) or joint custody after divorce or *de facto* separation of the child's parents. By definition, even the parent who is not the so-called primary caregiver has the duty and right to care for their child, their protection and upbringing, education, representation and management of property issues. The same applies even in the case of parentage legally established against the will of one of the parents.

The law provides for a series of partial duties and rights under Art. 880 to Art. 886, CC; in particular, it rules that parents exercise parental responsibility concerning the child in a manner and with respect to the level of the child's development. The parents have the duty and right to have a child by themselves and exercise supervision over the child. If they do not have a child by themselves, they have the duty and right to have personal contact with the child. Furthermore, they have the right to request their child back if another person unlawfully detains them.

Parents have the duty and right to protect their child from the outside world depending on the child's level of development, maturity, age, temperament, and so on. This is the traditional content of parenting or parental responsibility. Protection may be understood as anything that is in the best interests of the child, and it could be, for instance, protection against the negative effects of the Internet, against persons who are prone to committing pedophilia and violent crimes, and so on.

The law stipulates, in particular, that parents play a crucial role in the child's care, protection, and upbringing and that they are supposed to be all-round role models for their children, especially with respect to the way of life and behavior in the family covered by Art. 884, CC.

### *11.3. The child's healthcare, especially in special cases*

When it comes to child's health care, the basic framework is given by constitutional act, the Charter (see above for details). The Civil Code enshrines not routine

48 For more, see Králíčková and Hrušáková and Westphalová, 2020, 2022.

medical and similar interventions in the demonstrative list of important matters in which the consent of both parents of a child is required under Art. 877 para. 1 and 2, CC. It should be emphasized that this concept is relatively broad as it includes interventions affecting the mental and physical integrity of the child as any other person under the Civil Code covered by Arts. 91 ff, CC.

Other provisions of the Civil Code state that parents represent their minor child together in those legal actions for which the child is not eligible under Art. 31, CC; however, each of them may act independently covered by Art. 892 para. 2 and 3, CC. The law protects the good faith of third parties by a rebuttable presumption contained in Art. 876 para. 3, CC. It follows from the above that, in practice, the consent of one of the parents will normally be sufficient for a practicing doctor. However, if the parents have a different opinion, or if the other parent's disagreement is known to the doctor, the consent of one of the parents will not be sufficient. In case of danger of delay in deciding on the child's affairs, in general, one of the parents may decide on their own or grant separate consent, provided that they have an immediate notification obligation toward the other parent under Art. 876 para. 2, CC. When a disagreement between the parents arises in a substantial matter concerning the child's health (i.e., there is a collision in the sphere of non-routine medical and similar interventions), the court will decide.

In principle, the child's participatory rights must be respected in general; however, in this particular context, special rights are guaranteed under Art. 100, CC. It is stipulated that if a child who has reached the age of 14 has not become fully capable and seriously opposes the intervention, even if the legal representatives (the parents) agree to the intervention, the intervention cannot be conducted without the court's consent; if the legal representative does not agree with the interference with the child's integrity, even if the child so wishes, the intervention may be conducted at their request or at the request of a person close to them only with the consent of the court.[49]

The Act on Health Services provides further rules.[50] In the field of healthcare, such as, for example, with regard to the hospitalization of a child without the consent of their parent, it is stipulated that "*a minor patient …. may also be hospitalized without the consent of a legal representative … if abuse or neglect is suspected*" and "*urgent care may be provided to a minor patient … without the consent of the legal representative if the patient is suspected of having been abuse or neglected*". It is followed by the rule that "*a minor patient … may be provided by emergency care without consent*" in case of need of "*urgent or acute care to the child*" or "*health services necessary to save life or prevent serious damage to health*". The right of a minor patient to the continuous presence of their parent during the performance of health care or hospitalization is also explicitly enshrined.

49 For details, see Králíčková, 2016.

50 The Act No. 272/2011 Sb., on Health services, as amended.

Abortion is relatively liberally regulated in the Act on Abortion,[51] and the girl's decisive age limit is 16 years. The law stipulates that "a *woman who has not reached the age of sixteen may have her pregnancy aborted with the consent of the legal representative or the person to whom she has been entrusted*" and "*if a woman between the ages of sixteen and eighteen has aborted her pregnancy, the medical facility will inform her legal representative*". The issue of contraception is also related. It does not follow from the law that a woman under the age of 18 must apply for the consent of her legal representative in the case of means of preventing pregnancy. In the given case, it is necessary to proceed in accordance with the general regulation of partial autonomy of minor girls (see above). If the age limit of 14–15 years is considered to allow generally competent and independent decision-making in the provision of healthcare, if in the case of abortion the relevant age limit is 16 years, it must be concluded that a woman between the age of 16 and 18 does not need to be represented in these matters by her legal representative.

### *11.4. The child's education and parental conflicts connected with the child's residence or relocation*

The right to education is guaranteed on a constitutional level, as outlined above. The Civil Code provides, in harmony with the Charter, that parents have the right to decide on their child's education or career paths within the exercise of parental responsibility. They must always consider the child's opinion in relation to their participatory rights, skills and talents, and so on. The choice of education or employment is an important matter that the child's parents must agree on, or they must go to court in case of disagreement explicitly covered by Art. 877 para. 2, CC. It is not only a matter of choosing a primary or secondary school but also of preschool education. Although special laws often use singular "legal representative" in the regulation of a child's registration for compulsory school attendance by the School Code under Art. 36 para. 4,[52] it must be assumed that the child usually has two parents agree on this matter; otherwise, they will go to court.

In practice, in several cases, the child's parents disagree on their education, school choice, and so on. The case law in these matters is devoted not only to education as such but also to the place of education in relation to *de facto* separation of the child's parents and other connected problems. It often happens that one of the parents leaves the place of the family's usual residence, relocating the child to "the opposite end of the country," and the child enrolls in school or kindergarten there. Judicial decisions in these cases are thus primarily related to the rights of the so-called left behind parent and to the decision-making on the personal care (custody) of the child and contact rights rather than to their education as an essential matter

51 The Act No. 66/1986 Sb., on Abortion, as amended.

52 The Act No. 561/2004, Sb., on Pre-school, primary, secondary, higher vocational, and other education, as amended; hereinafter "School Code."

(see NSS 4 As 281/2015-32). The educational program of a school is in second place in importance and mostly irrelevant.

According to the School Code, the child can attend two primary schools, which can be used with alternating parental care arrangement. However, the question arises as to whether visiting two schools—for instance at weekly intervals—is always in the child's best interests.

### *11.5. Religion and the child*

The child's right to freedom of religion or to not follow a religion is guaranteed in relation to human rights standards (for details see above). Parents may regulate the exercise of their child's rights in a manner appropriate to their developing abilities according to the Act on Freedom of Religion.[53] Details regarding teaching religion in schools are anchored in the School Code.

The Civil Code does not regulate this issue *expressis verbis*, but it can be concluded that this matter belongs to the child's upbringing and care for their emotional, intellectual, and moral development and that it is an essential matter concerning the child on which the parents should agree under Art. 858, 877 para. 2, CC.[54] However, unlike within the General Civil Code's period of validity, no related case law is available.

### *11.6. Legal representation of the child*

Legal representation of the child by their parents is deemed to be a traditional right, but also a duty, of the child's parents. It follows from other provisions that parents have the duty and right to represent the child in legal actions for which the child lacks legal capacity contained in Art. 31, Arts. 892 to 895, CC. If the child is competent, they act alone, and legal representation by their parents does not apply.

Regarding the child who does not have full legal capacity, or who has partial legal capacity and "falls under parental responsibility," the law distinguishes

a) a child who acts independently in relation to their intellectual and voluntary maturity under Arts. 31 and 32, CC and capacity to work under Arts. 34 and 35, CC;
b) a child who is capable of acting independently, but the consequences of their legal acts may be made conditional on the consent of their legal representative, namely the parents covered by Art. 36 para. 2, CC;
c) a child who acts with the consent of their legal representative, namely the parents under Art. 32, CC;

53 The Act No. 3/2002 Sb., on Freedom of religion and the status of churches and religious societies, as amended.

54 Moravčíková, 2013.

d) a child who acts with the consent of the legal representative, the parents, and the court in the case of the operation of a commercial establishment contained in Art. 33, CC;
e) a child for whom the legal representative—the parents—acts exclusively within the exercise of parental responsibility.

When the child has both parents, the parents represent the child jointly as legal representatives; however, either of them may act under Art. 892 para. 2, CC. Thus, it applies that if one parent acts alone in the child's affairs vis-à-vis a third party who is acting in good faith, they shall be deemed to act with the consent of the other parent.

The law emphasizes parental consent; however, it stipulates that if the parents do not agree on which parent will represent the child, the court shall decide, on the parent's motion, which parent will act on behalf of the child and how.

A special provision considers the threat of conflict of interest contained in Art. 892 para. 3, CC. Thus, a parent may not represent a child if there could be a conflict of interest between them and the child or between children of the same parents. In practice, this provision is applied, in particular, in proceedings regulating the relationship of the parents to the child for the period after *de facto* separation or divorce and in proceedings concerning the child's property issues. Guardian *ad litem* must therefore be appointed for the child or for each of the children.

### *11.7. Management of the child's property: on the increasing novelties*

As mentioned above in the part devoted to historical context, the issue of the child's property was completely neglected by the predecessor of the Civil Code. The Act on the Family in its original version from 1963 did not have any article on the management of the child's property that was partially corrected only by an amendment from 1998 in connection with the purification from the ideological sediment.

According to the Civil Code, the protection and administration of the child's property belong to parental responsibility. The law in this matter contains many general and special provisions contained in Arts. 896 to 905, CC, which must always be interpreted and applied in accordance with the principle of the child's best interests and well-being. Child asset management should be rather conservative, and the parents should strive primarily to preserve the child's property rather than *"make a profit at all costs."* The basic principle set out in the regulation of parental responsibility is that parents have the duty and right to take care of the child's property primarily as ordinary managers; they must dispose of funds that are not expected to be needed to cover the expenses related to the child's property. This also applies to the child's savings, whether generated on the basis of the parents' agreement within a functioning relationship or on the basis of a court decision.

When it comes to the relationship between the parents, the law emphasizes their mutual agreement; if the parents do not agree on essential matters in the care of the child's property, the court will decide on the parent's proposal. In addition, the Civil Code contains provisions regulating the need for the approval of parents' legal actions by a court contained in Art. 898, CC. In particular, the law stipulates that the parents need the consent of the court in order to take legal action that concerns the child's existing and future assets or individual components of these assets, unless these are ordinary matters or matters of exceptional but negligible property value. It is further stipulated that the consent of the court is always required for legal proceedings by which the child, for instance, acquires, alienates, or encumbers an immovable property or a share in it; concludes an agreement between the heirs on the amount of inheritance shares or division of the estate; rejects the inheritance or declares that they do not want a reference; and so on. Sanctions for non-compliance with the law are no longer apparent conduct as the law newly stipulates that if a parent acted on behalf of a child without the consent of the court, this legal action can be declared invalid only if it harms the child covered by Art. 898 para. 4, CC.

Other provisions regulate the issue of income or profit (returns of assets) from the child's property under Arts. 899 to 900, CC. The rule is that what the parents gain by using the child's property is acquired by the child. It is further stated that the income from the child's property, which the parents do not use for the proper administration of their property (profit), will first be used for the child's maintenance (even without the court's consent). If necessary, the parents can then use the remaining profit from the child's property as a contribution to the parents' own maintenance and the child's minor siblings if they live in the family household, unless it is necessary to keep them for the child after they reach maturity for important reasons.

A different regime is set for property substance. The law stipulates that the child's parents may, with the consent of the court, use it for the child's own needs and the child's siblings needs only if, without the fault of the persons having maintenance duty toward the child (parents or other direct relatives), a significant disparity arises between the child and parents.

The child's property also includes the alimony paid for them. Regarding the administration of individual amounts of maintenance, the general rules on the management of the child's property apply. The parent in whose hands the maintenance is to be paid has the right to dispose of the maintenance in ordinary or exceptional—but negligible—property values. As the child's property also includes savings that are saved from paid maintenance, both parents have the duty and right to manage the savings.

In legal proceedings concerning an individual part of the child's property, the parents act as their representatives. If the parents violate the obligation to take care of the child's property as a regular steward, they will compensate the child for the damage caused jointly and severally.

Other duties and rights are connected with the parents' obligation to hand over the child's property after completing their full legal capacity contained in Art. 902,

CC. The parents hand over parts of their property to the child or transfer their administration to them, and they submit to the child, at their request, a statement from the administration of property without undue delay but no later than six months from the day that the child became fully capable.

It must be stressed that the Civil Code underwent a significant change in 2021 in an effort to protect *"child debtors"* and *"correct bad practice."* The amendment enshrined several new provisions.[55] In particular, the rule covered by Art. 899a para. 2, CC that regulates the parent's liability for the child's monetary debt should be mentioned. It is stipulated that the parent acting on behalf of the child or giving their consent to the legal action is liable for the child's debt, which arose from the legal action taken before the acquisition of the child's full autonomy. The Civil Code also establishes a new age limit of 13 years within the tort law and establishes special rules for damage compensation for both a child under the age of 13 or over this age and those who were to supervise the child.[56]

## 12. Separation *de facto* and divorce of the child's parents and individual, alternating, and joint custody

### *12.1. On general rules*

As stressed many times above, parental responsibility belongs to each parent of the minor child by operation of law. If the child's parents live in the same household and exercise their duties and rights in accordance with the principle of the child's best interests and well-being, the state has no reason to interfere in their private sphere.

However, if the child's parents are *de facto* separated or they are soon to be divorced, the court will determine how each of the parents will take care of the child and support them in the future, taking into account the best interests of the child contained in Art. 906 ff, CC. The law prefers the parents' agreement, which must be approved by the court, especially in the case of divorce. The court may deviate from the agreement of the parents only if the best interest of the child so requires. The court decides authoritatively but always takes into account not only the child's relationship to each of the parents but also their ties to siblings, grandparents, and other relatives as well as property aspects, the housing situation, and so on.

The law stipulates that the agreement or the court decision must contain

a) always a statement about the personal care of the parents (custody; see below for details);

55 The Act No. 192/2021 Sb.

56 For details, see Psutka, 2021.

b) always a statement on the determination of maintenance duty of the parents toward the child (although maintenance duty does not belong to parental responsibility);[57]
c) a statement on personal contact with a non-caring parent (non-primary caregiver) or grandparents or siblings, but only if no agreement is reached or if the best interests of the child and family circumstances so require; the court can establish rules, intervals, conditions, modifications, and so on; statutory law does not use the terms "standard contact" or "broad contact," although this terminology is used by praxis[58] (see below for details).

### *12.2. The criteria in more details*

The criteria for entrusting a child to personal care (custody) are established by law in very general terms contained in Art. 907, CC. In particular, the court decides in the best interests of the child and takes into account the following:

a) the child's personality, namely their talents and abilities in relation to the developmental opportunities and living conditions of the parents;
b) the emotional orientation and background of the child;
c) the educational abilities of each parent;
d) the current and expected stability of the educational environment in which the child is to live in the future;
e) the emotional ties of the child to their siblings, grandparents, and other relatives and close persons;
f) the fact that one of the parents has so far taken proper care of the child and properly cared for their emotional, intellectual, and moral upbringing;
g) which of the parents has better prospects for the healthy and successful development of the child;
h) the child's right to be cared by both parents and to maintain regular personal contact with them;
i) the right of the other parent, to whom the child will not be entrusted, to regular information about the child;
j) the parent's ability to agree on the child's upbringing with the other parent;
k) good communication between parents is crucial for the child.

It should be added that the criteria mentioned above following from the Civil Code are accompanied by the case law of the Constitutional Court of the Czech

57 As the maintenance duty does not belong to the scope of parental responsibility, only brief information is necessary. The concept or rules of maintenance duty are very general. The child has the right toward their parents for maintenance so far as they are not able to provide for their needs. There are no tables, percentages, or statutory limits, and the child has the right to follow the living standard of the parents, even if they are an adult under Arts. 910 et seq., CC. The related case law is abundant, especially that by the Constitutional Court of the Czech Republic.

58 Kornel, 2008.

Republic, mainly by the statement that "*there are no models for family life*" (II. ÚS 363/03; I. ÚS 420/05). Thus, in each specific case, the court must consider the above-mentioned legal rules, the opinion and wishes of both parents, and especially the opinion and wishes of the child, and it assesses everything so that the post-separation and post-divorce arrangement is in the best interests of the child or in accordance with their well-being (I. ÚS 1506/13). If the attitudes of the child's parents are irreconcilable, "*the state must not give up*" its positive obligation to protect the child. Among other attempts, it must make efforts to improve relations between the child's parents and address the reasons for their negative attitudes (III. ÚS 1206/09; I. ÚS 2482/13). The whole spectrum of means must be used for this—for instance, family mediation, family therapy, meetings of parents and child with an expert in the field of child's psychology, and others.

Every child is different, and this must be taken into account above all; the child also has the right to be cared by both parents—or at least the right for regular personal contact with them—for security, background, and the perspective of successful development and family life in general. According to the case law of the Constitutional Court of the Czech Republic, it is mainly about "*maintaining family ties and minimizing interference in them, as well as the whole spectrum of other aspects*" (I. ÚS 2482/13). Thanks to the case law of the Constitutional Court of the Czech Republic, there has been a gradual deviation from the "model" experienced and used for years such as "one primary caregiver and one weekend parent" in favor of alternating or even joint custody by both the child's parents.

It must always be borne in mind that the child is not the passive object of the agreement or the court's decision, but they must be taken as an active subject with all the rights of a party to the proceedings, who must be represented by guardian *ad litem* (I. ÚS 3304/13). Their views and wishes must be considered.

If the circumstances substantially change (*clausula rebus sic stantibus*), the court may change its decision in the case of a child or approve the parents' agreement even without a proposal under Art. 909, CC. There is no obstacle (*res judicata*), and the best interest of the child is always the overriding principle or value to which other aspects must give way (see also I. ÚS 3216/13, IV. ÚS 106/15).

In harmony with the case law of the Constitutional Court of the Czech Republic and its leading idea that "*there are no models for family life*," the personal care of a minor child (custody) by their parents can take many forms; however, regarding statutory law and terminology, the Civil Code provides as follows.[59]

### *12.3. The individual custody*

The individual personal care (custody) of one of the parents means that the child is entrusted to the custody of the mother or the father and that they should live in a family household with this primary caregiver. The other parent—the one

59 Kornel, 2013.

to whom the child has not been entrusted to individual care (non-primary caregiver)—remains the "holder" of parental responsibility and is allowed to exercise the duties and rights arising from it. However, by the nature of things, this exercise changes. This parent exercises their parental responsibility mainly within the personal contact with the child. Regarding decision-making on important matters related to the child, the agreement with the primary caregiver must be concluded, or the case must be brought before a court. The non-primary caregiver must also fulfill their maintenance duty toward the child at the hands of the caring parent under Art. 910, CC and has the right to have regular contact with the child unless provided otherwise. If the best interests of the child so require, the court may modify the contact—for instance, it may stipulate that contact will take place at certain intervals, on "neutral" ground, or with the participation of a psychologist or other person covered by Art. 888, CC. In exceptional cases, the court may prohibit the contact of the non-primary caregiver with the child under Art. 891 para. 2, CC.

### *12.4. Alternating custody*

In the case of alternating (serial) personal childcare (custody), both the mother and the father care at intervals that may or may not be the same length (for instance weekly or monthly; 2–3 days in case of very young children). Alternating care can take many arrangements.[60] Nothing in the law prevents a child from remaining in the family household and their parents coming to the former common dwelling or taking turns in personal child care. If parents agree on this form of care, they should also agree on their maintenance duty toward the child. The agreement may include agreeing on the child's contact with the other parent during their primary care.

However, this form is not suitable for every child. One can agree with the statement of the Constitutional Court of the Czech Republic that "*alternating care is not always in the best interests of the child*" (II. ÚS 169/16, also IV. ÚS 4037/17). This is not and cannot be considered a universal arrangement because every child is different and has different needs and wishes. Especially for very young children or children with various health problems, some experts prefer stability (the so-called "nest"), namely the care by one primary caregiver.

It should be added that new case law by the Constitutional Court of the Czech Republic states that

> the Constitutional Court acknowledges that there is no consensus among experts about the (dis)usefulness of alternating care, although the results of research from abroad … are in the majority tends to be that, under well-set conditions,

60 For more, Trávníček, 2015.

alternating care for minors after parental separation is the most appropriate arrangement.[61]

It can only be concluded that in a child's parental care, it is the quality—not the quantity—of the time spent together with the child that must play a major role, in addition to the child's best interest.[62]

### *12.5. The joint custody*

The join form of care (custody) of a child means that both parents personally care for the child jointly and together, or evenly when it comes to quality, and not necessarily the real half of the time. The law explicitly states under Art. 907 para. 1 *in fine*, CC that "*if a child is to be entrusted to joint care, the parents must agree to it*". Joint personal care cannot be decided authoritatively, against the will of one of the parents. In practice, this form is not used very often. An example is the arrangement of a 17-year-old child studying and living in college and visiting their parents only on weekends. In the case of joint care, "*nothing would change for the child*." The parents would fulfill the maintenance duty for the child as it was before *de facto* separation or their divorce and meet the child as they used to.

## 13. The court's interventions in parental responsibility

### *13.1. On general rules*

In harmony with the "positive" role of the state, the Civil Code regulates the options, or the duty of the court, to modify parental responsibility authoritatively in the child's best interests. A legitimate aim must always be pursued, and the means must be proportionate as the state must respect that "*la vie privée doit être murée*" and try to balance its roles. The court has the duty to act within the limits of statutory law and respect both the rights of the child and those of their parents. However, all judicial interventions have in common that they must be made in the child's best interests. The individual types of interventions differ in reasons, intensity, and also purpose.[63] Following the court interventions introduced below, it is usually necessary to decide on other matters, in particular to appoint a guardian for the child (if there is no other parent, and so on).[64] They are as follows.

61 I. ÚS 3065/21
62 Kornel, 2013.
63 Králíčková, 2011, pp. 829–840.
64 For more, see Králíčková, 2014a, pp. 71–95.

### *13.2. Suspension of parental responsibility*

This measure is determined in relation to objective obstacles on the part of the child's parent or both parents under Art. 869, CC and Arts. 868 and 825, CC. The law stipulates that if a parent is prevented from exercising their parental responsibility by a serious circumstance (for instance, coma), and if it is assumed that the measure is necessary in accordance with the child's best interests, the court may decide to suspend the parent's parental responsibility. The suspension concerns the exercise of all duties and rights arising from parental responsibility. However, the parent remains the holder of parental responsibility.

### *13.3. Limitation of parental responsibility or its exercise*

Limitation of parental responsibility or its exercise is a milder measure linked to subjective problems on the part of the child's parent or both parents covered by Art. 870, CC. It follows from the nature of the case that the limitation may relate to individual duties and rights. It is thus stipulated that if the parent does not exercise their parental responsibility properly, and if the best interests of the child so require, the court will limit their parental responsibility or the exercise of that parental responsibility. It is therefore necessary for the decision to be specific and to restrict the parents only in detail (as opposed to the suspension or deprivation of parental responsibility, which is always *an bloc* decision). Whether the court restricts the parent in any duty or right as such—for instance regarding the administration of the child's property—the parent must not exercise such duty and right; this right will be performed by the other parent or by a guardian. Other duties and rights remain unaffected.

### *13.4. Deprivation of parental responsibility*

This exceptional measure to a child's situation is applied when their parent abuses parental responsibility or its exercise or seriously neglects parental responsibility or its exercise under Art. 871 para. 1, CC. If the parent committed an intentional criminal offense against their child not only directly but also indirectly; if the parent used their child, who is not criminally liable, to commit a criminal offense; or if the parent has committed a criminal offense as an accomplice, guide, assistant, or organizer of a criminal offense committed by their child, the court shall assess whether there are grounds for depriving the parent of their parental responsibility under Art. 871 para. 2, CC (see NS 30 Cdo 1376/2012, I. ÚS 2643/13).

## 14. Extinction of parental responsibility

As already mentioned, parental responsibility and all the duties and rights belonging to the content of parental responsibility expire as a whole on the day when the child reaches the age of majority (or full autonomy). They also cease to exist when the child dies or is adopted. As of the effective date of the adoption decision, parental responsibility arises for the adopters of the child, as the adoption of a minor who is not fully capable is always a "full adoption" respecting the doctrine *adoption natura imitatur* covered by Art. 794, CC.

## 15. Conclusion

A long evolution in this specific field of family law described above shows that several changes in favor of a minor child were implemented by lawmakers, courts, international and European organizations and bodies. This entailed many issues, including a change in terminology or the abandonment of some obsolete terms such as "illegitimate child" and a shift from the concept of "power of the father," "parental power," or "parental rights and duties" to the concept of "parental responsibility," which had already been established in the 90s in the Czech Republic in connection with the abovementioned international conventions and essentially adopted by the Civil Code in 2012.[65]

The private law concept of parental responsibility should be seen as two sides of the same coin. First, it is through the concept of parental responsibility that parents realize their parentage, ideas, wishes, and so on. On the other hand, thanks to a broad content of parental responsibility, the parents protect their child. It is the parents of the minor child who take care of the child, direct their actions, manage their affairs (including property matters), decide on their education, religious, upbringing, future profession, medical treatments. There is more private autonomy anchored in the Civil Code and "*there are no models for family life*" in a court's decision-making. The growth of shared parenting appears more in cases of alternating and joint personal custody of a minor child, well-elaborated family agreements, and widely respected voluntary arrangements and amicable solutions. The concept of paternalistic state was abandoned in favor of a state based on respect for human rights, freedom, and private autonomy in all spheres, including family law and family life. The state, lawmaker, and courts note that the parents usually know very well what is in the best interest for their child.[66] Moreover, the respect for the child's right to express their

65 For more, see Radvanová, 2015.
66 Hrušáková, 1993.

opinion is growing.[67] The "negative" role of the state finds its application in relation to the saying "*la vie privée doit être murée*."

Nevertheless, in special cases, the state must not resign itself to its "positive" role. The state authorities must protect the minor child because of their immaturity, sometimes even against their parents or the child's own decisions. In addition to the private law concept of parental responsibility, public law to protect the child also exists. If the situation is serious and the child is at risk, the child's health and life is in danger, the courts may—and, actually, must—modify the scope of the parents' parental responsibility and their contacts with the child. In extreme cases, the courts shall deprive the parents of parental responsibility or remove the child from the family of origin and place them into substitute care. The courts sometimes may—or even must—apply criminal law sanctions; however, the measure and means must always be proportionate and pursue a legitimate aim, the best interest of the child, and their well-being and welfare. Last but not least, a long-awaited, pending draft at the Parliament of the Czech Republic on the Public Defender of Children's Rights ("ombudsman for children") is therefore to be welcomed in this context.[68]

67 Šínová and Westphalová and Králíčková, 2016.

68 Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 894.

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Chapter IV

# Hungary: The Content of the Right to Parental Responsibility

Tímea Barzó

## 1. Introduction

The content of parental responsibility in the traditional sense has not changed significantly in the recent decades. However, the issues and legal disputes about the exercise of parental responsibility have multiplied and become more diverse. This trend has led to serious changes and the emergence of a new approach at the international level as well.

The initial "paternal power" and "parental power" developed to "parental custody" in the former Family Law Act, while international documents use paternal "responsibility" instead of "custody" for the summary of parents' rights and duties in relation to their children. In Hungary, during the codification process, it was suggested that other phrases, such as parental care, parental liability, and parent–child relationship, would be desirable instead of the term "parental responsibility"; however, according to the legislator, none of them express what the parents' tasks in this matter are better than "parental responsibility."[1]

1 Kőrös, 2006a, p. 1.

Tímea Barzó (2022) Hungary: The Content of the Right to Parental Responsibility. In: Paweł Sobczyk (ed.) *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates,* pp. 105–146. Miskolc–Budapest, Central European Academic Publishing.

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## 2. Axiological and constitutional foundations for the protection of parental responsibility

According to the Fundamental Law, Hungary shall protect the institution of marriage, namely the conjugal union of one man and one woman based on their voluntary and mutual consent; Hungary shall also protect the institution of the family, which is the foundation for the survival of the nation. The basis for family relationship is marriage as well as the relationship between parent and child. The mother is a woman, and the father is a man. The creator of the Constitution wanted to clearly enshrine the creation of the mother as a woman, the father as a man, and to establish the basic guarantees intended to protect children and the rights of future generations. In line with this, the Fundamental Law declares that Hungary protects the right of children to be identified by their sex assigned to them at birth and provides for their education in accordance with the values based on Hungary's constitutional identity and Christian culture. These foundations, which serve the most important interests of children and future generations, provide a stable basis for Hungary to remain a strong, secure community in the future. Hungary promotes the commitment to have and raise children on the level of Fundamental Law. The protection of families shall be regulated by implementing an act.

Parents shall have the right to choose their form and method of child-rearing. They shall also provide care for their minor children, which includes their education. Children of adult age shall provide care for their parents if they are in need.[2]

## 3. Protection of parental authority in the system of legal sources

The Family Protection Act[3] places great emphasis on families as "the most important national resource of Hungary" and "the guarantee of the survival of the nation."

In addition to emphasizing the importance of upbringing in a family, marriage is seen as the foundation of family, which fulfills its role when the long-lasting and solid relationship between mother and father bears the responsibility for the children. Without the birth of children and growth of families, there is no sustainable development and economic growth under the law; further, there is no well-functioning society without harmonious families. The Family Protection Act also states that intergenerational relationships, including between grandparents and grandchildren, are of paramount importance in the lives of families.

2 Fundamental Law Art. XVI. (1)-(4)

3 Act 2011 of CCXI on the Protection of Families [FPA. – Family Protection Act] Preamble.

According to the law, the protection of the institution of family and marriage—especially the parent–child relationship that forms the basis of the family relationship—in which the mother is a woman and the father is a man is the duty of the state. The protection of orderly family relationships and the exercise of children's right to self-identity according to their gender are of particular importance for the protection of their physical and mental health. The state supports the desire to have children in accordance with the provisions of special laws to ensure the survival of the nation and help the realization of the parents' intentions to have children. The state supports adoption so that all children can be raised in a family and seeks to establish an adoption procedure that is in the best interests of the child within a reasonable timeframe.[4]

The law stipulates as a principle that, to protect children, media service providers are obliged to provide their services with respect to the institution of marriage and the value of family and child-rearing. The state encourages the presentation of programs and media contents that disseminate the value of the family and the upbringing of children. It was also declared, as a principle for the protection of children, that anyone under the age of 18 years cannot be made available for any pornographic content or content that depicts self-centered sexuality or that promotes deviation from the gender identity assigned at birth, gender reassignment, and homosexuality.[5]

According to the Family Protection Act, a parent is not only obliged but is also entitled to take care of their minor child in the family and to provide the child with the conditions necessary for the physical, mental, spiritual, and moral development and access to education and healthcare.[6] The FPA sets out, in a separate chapter, the parental obligations and rights in respect of which the mother and father are equal.

The parent of the minor child is obliged to

- respect the human dignity of the child;
- cooperate with the child;
- inform the child about the issues concerning to the child, in accordance with their age and development and take the child's views into account;
- provide guidance, advice, and assistance for the exercise of the rights of the child;
- take the necessary measures to enforce the rights of the child;
- cooperate with persons, bodies, and authorities involved in the care of the child;
- take care of the child in accordance with the provisions of a separate law when the child is in a public place or nightclub at night.

The parent is obliged to spend the support received with regard to the child in the care and upbringing of the child and is obliged to support the minor child even by restricting their own necessary maintenance.[7]

4 FPA. Art. 1(1)-(4).
5 FPA. Art. 5 and Art. 5/A.
6 FPA. Art. 9(2).
7 FPA. Art. 9..

A parent raising a minor child is entitled to the benefits in accordance with the provisions of a separate law as well as benefits ensuring the coordination of the parental role and work.[8]

It is also necessary to mention the Child Protection Act,[9] which details the rights and obligations of children[10] and parents in a separate chapter. The latter are in line with the content of the Family Protection Act. An important legislation on the subject is the Government Decree 149/1997 (IX. 10.) on guardianship authorities and child protection and guardianship proceedings (Gyer.). This Decree contains rules on matters relating to the exercise of parental responsibility in cases where the guardianship authorities have jurisdiction over disputes between parents living together and living apart from each other as well.

The Criminal Code stipulates the punishment of crimes against the interests of children and against the family in several criminal offenses.[11]

## 4. The concept of a parent and a child

According to the Civil Code, and in line with the UN Convention on the Rights of the Child, persons who have not yet reached the age of 18 years shall be deemed minors. Nevertheless, married minors are considered to be of legal age. In cases provided for by law, the guardian authority may authorize the marriage of a minor of limited legal capacity over the age of 16 years.[12]

If the marriage is annulled by court order owing to the lack of capacity or in the absence of the guardian authority's consent where it is required due to minority,

8 A pregnant mother or a parent raising a minor child, as a parent raising at least three children, a single parent, or a parent with a chronically ill or severely disabled child are entitled to various benefits to take account of these circumstances. FPA. Art. 15-18. For instance, until the child reaches the age of three, the worker shall be entitled to unpaid leave for the purpose of caring for the child, to be granted at the time requested by the worker. According to the Art. 128 (1) of the Act 2012 of I on the Labour Code (LC), employees shall be entitled to unpaid leave for the purpose of taking care of their child until the child reaches the age of three, and such leave shall be allocated at the times requested by the employee, or if in the case of women, while receiving treatment related to a human reproduction procedure [LC. Art. 65(3)].

9 The Act 1997 of XXXI on the Protection of Children and about the Guardianship Administration (Children Protection Act – CPA.).

10 CPA Art. 6-10.

11 The Chapter XX of the Act 2012 of C on the Criminal Code (Criminal Code) regulates the criminal offences of "Abuse of a Minor" (Art. 208), "Child Labor" (Art. 209), "Preventing the Exercise of Visitation Rights" (Art. 210), "Changing of the Custody of a Minor" (Art. 211), "Nonsupport" (Art. 212), "Domestic Violence" (Art. 212/A), "Violation of Family Status" (Art. 213), and of "Plural Marriage" (Art. 214). These regulations are often filled with content of family law provisions.

12 CC. Art. 4:9(2).

adulthood acquired by marriage shall no longer apply. The dissolution of this marriage shall not affect adulthood acquired by marriage.[13]

Minor children are under parental responsibility or guardianship.[14] It follows that a child who has neither a parent having parental responsibility nor a guardian cannot be legally interpreted. In the case of a child born in wedlock, parental responsibility and both paternal and maternal status are established by birth, *ipso jure*, by law. With the exception of the special rules on adoption, parental responsibility may not be waived, and parental responsibility over a minor child can be terminated only by court in cases specified by law. If, for any reason, the child does not have a single parent exercising parental responsibility, immediate action must be taken with the involvement of the guardianship authority regarding the child's further fate and, if necessary, placing them under guardianship. For each child, there must be a person (parent or guardian) who is "responsible" for the child for the entire duration of the minority.

## 5. Principles of parental responsibility

The Book of Family Law of the CC sets out the principles governing the exercise of parental responsibility, which are important for the parent–child relationship, in line with the best interests of the minor.

### *5.1. Cooperation obligations of parents*

The cooperation obligation of parents is an essential requirement, which means that parental custody shall be exercised by the parents in collaboration with one another in the interest of the child's physical, intellectual, and moral development, regardless of whether the parents live together or separately. It is necessary to deal with the child by pushing personal differences and possibly the parents' offenses against each other into the background and to discuss and make decisions related to the common minor child. If the parental responsibility of the minor is exercised jointly by the parents together or separately, this is accompanied by a joint decision-making right.

However, the obligation to cooperation does not always and in all respects constitute a right of consent or joint decision if, after the separation of the parents, only one of the parents exercises parental custody of the joint minor child(ren). In such a case, the separated parent has the right to the joint decision only on major issues relating to the child's well-being.[15] Otherwise, the parent raising the child is only

13 CC. Art. 2:10(1)-(3).
14 CC. Art. 4:146(1).
15 CC. Art. 4:175.

obliged to inform the separated parent about the child's development, state of health, and studies.[16]

It shall be emphasized that in addition to the general cooperation obligation of parents, the Book of Family Law emphasizes the duty of cooperation between the parent exercising parental responsibility and the separated parent to respect each other's family life and peace.[17]

### *5.2. Principle of equality of spouses*

The principle of equality of spouses is one of the general principles of family law, which includes, *inter alia*, that on family life, and in family affairs, spouses shall be considered equals; they shall have equal rights and obligations.[18]

However, the legislator also considered it important to place a special emphasis on the requirement of equality for parents. Another important basic premise is that the rights and obligations of parents are equal in the joint exercise of parental responsibility; thus, no discrimination can be made between parents in this area. In other words, neither parent has more "power" in issues and matters affecting the child than the other, who also exercises parental custody.[19]

### *5.3. Involving children in the decision-making process*

According to Article 12 of the UN Convention on the Rights of the Child, the child who can form their own views has the right to express those views freely in all matters affecting them, and their views are given due weight in accordance with the child's age and maturity.

The child's opinion shall be taken into account according to their age and degree of maturity. To exercise this right, the child shall be given the opportunity to be heard in any judicial or administrative proceedings directly or through a representative or appropriate body in which they have an interest, in accordance with the procedural rules of domestic law.

According to the Family Protection Act, parents shall inform the child concerning the decisions that pertain to them as well, and they shall take the child's opinion into account, giving it due weight consistent with the child's age and degree of maturity.[20]

The Child Protection Act also states, as a basic principle, that the child has the right to freedom of expression and to be informed about their rights, the possibilities of enforcing these rights, and to be heard directly or otherwise on all matters

16 CC. Art. 4:174.
17 CC. Art. 4:173.
18 CC. Art. 4:3.
19 However, parental equality is expressed not only in the Book of Family Law but also in the Family Protection Act.
20 FPA. Art. 9(3) c).

affecting their person and property, and their opinion shall be taken into account in view of their level of development.[21]

Art. 4:148 of the Book of Family Law describes the parent's obligation to inform their child concerning the decisions that pertain to the child as well, and they shall permit the child of sound mind to express their views before the decision is made and to partake in making the decision itself.[22] Article 4:171(4) prescribes to courts that in justified cases—or if requested by the child themselves—the court shall hear the child as well, either personally or through an expert. If the child is over the age of 14 years, the decision relating to custody and their placement can be made upon the child's agreement, except when the child's choice is considered to jeopardize their development.

An example is when a child chooses a parent who is less suitable for upbringing solely because they provide better financial conditions or tolerate the child's free life. It shall be regarded that a child over the age of 16 years shall be allowed to leave the parents' home or any other place of residence designated by the parents, with the guardian authority's authorization and without the parents' consent, if that is not contrary to their interest.[23]

The law stipulates the different levels of a "partnership" between a parent and a child.

On the one hand, it prescribes an obligation to provide information on all decisions affecting children. On the other hand, in some cases, the parents and the child jointly decide on the latter's career path by considering their abilities.[24]

In certain matters, the Civil Code grants an independent decision-making right to a child who has reached the age of 14. This means, for example, that they can make legal statements of a personal nature for which they are authorized by legislation (e.g., statement concerning the acknowledgment of paternity, adoption, or marriage), can conclude contracts of minor importance aimed at satisfying their everyday needs, can dispose of the earnings they acquire by gainful employment, or can give away gifts within reasonable limits.[25] In the field of healthcare, a minor who has reached the age of 16 is entitled to name the person who exercises the right to refuse informed consent or to refuse healthcare instead.[26]

In addition to the principles of exercising parental supervision, the Civil Code provides regulation stating that the opinion of a minor of sound mind shall be taken into account:

21 CPA Art. 8(1) and Art. 12(4) b).

22 E.g., the court classified the contract signed by the parents against the will of the 17-year-old, which obligated the minor to perform the contract in person even after reaching the age of majority, as a void contract concluded by circumvention of the law (EBH2004. 1019.).

23 CC. Art. 4:152(4).

24 CC. Art. 4:153(1)-(2).

25 CC. Art. 2:12(2).

26 Health Care Act Art. 16(6).

- any statement made by the legal representative that effects the person or property of the minor;[27]
- as to their adoption, a minor of sound mind under the age of 14 shall be heard, and their opinion shall be taken into consideration where deemed appropriate;[28]
- the court or the guardian authority shall adopt a decision relating to visitation rights taking into account the child's age, health, and living conditions; the parents' personal circumstances; and the opinion of the child of sound mind;[29]
- in the process of appointment of a guardian, the opinion of a minor child of sound mind shall be taken into account and given due weight consistent with the child's age and degree of maturity.[30]

The adjudication of whether a child is of sound mind is an extremely complex issue. According to the Child Protection Act, the child of sound mind is a minor who, in line with their age, intellectual, and emotional development, can understand the essential content and facts of the decisions affecting them during the hearing.[31] In the context of the settlement of parental custody, a minor child who is stable in terms of their way of thinking and personality is able to express a concrete opinion independently and without negative influence and thus make their well-founded request in the best interests of the court informed.[32] A judge with sufficient experience is already able to make a decision with great certainty as to how well the child has judgment when over the age of 10–12.[33] However, under this age, it can be necessary to involve an expert.[34]

The success of the child's personal hearing depends on the court and on the judge's ability to perceive the child's specific psychological situation and to establish a real dialogue with the child.[35] The advantage of judicial hearings is the principle of "directness," while the advantage of a psychologist expert's hearing is that it is less burdensome or shocking, since it involves no direct questions and children do not see the purpose of indirect questions.[36] The "child-friendly procedure" in the Civil Procedural Code (CPC)[37] is not traumatic for the child, but it takes into account their rights and needs.[38] During the analysis of concrete court and guardianship cases, it

27 CC. Art. 2:14(3).
28 CC. Art. 4:120(2).
29 CC. Art. 4:181(1)-(2).
30 CC. Art. 4:228.
31 Gyer. Art. 2 a).
32 According to psychology, a court hearing is permissible from the school-age group of second grade (6–8-year-old children) since then the minor's logical abilities and perception of reality are developing and are thus suitable for forming an opinion that cannot be ignored. Ádámkó, 2015, pp. 10–11.
33 Szeibert, 2020b, pp. 10–11.
34 Visontai-Szabó, 2015, pp. 31–32.
35 Kozák, 2011, p. 25.
36 Ádámkó, 2015, p. 12.
37 The Act of 2016 on CXXX on the Civil Procedural Code (CPC).
38 The National Office for the Judiciary has set up child hearing rooms in several courts across the country under the "Child Friendly Justice" program, where children under 14 are heard in a special environment designed to meet their needs. Fazekas, 2016, p. 2.

can be mentioned that, in almost all cases, the court hears a child over the age of 14 with binding force and, in all other cases, entrusts this task to a specialist—a psychologist.[39] It is obvious, even without psychological knowledge, that the minor can express a meaningful opinion on some issues before reaching the age of 14 (e.g., even at the age of six or seven), and there are other issues in which the minor cannot be considered competent later on.[40]

### *5.4. Limiting parental supervision in exceptional cases*

Limiting parental supervision for the protection of the child(ren) should only be done in exceptional cases and should always be proportionate to the seriousness of the danger or the harm. With regard to this, the Act stipulates that the court or other competent authority may restrict or withdraw the parent's rights of custody in exceptional and justified cases specified by law where this is deemed necessary for the protection of the child's best interest (see, in detail, chapters 6.5.4. and 6.6.3.) Eventually, the CC allows the termination of parental responsibility by the court if the parent has engaged in any wrongful conduct causing serious injury to, or endangering the interest of, their child, including the child's physical integrity and mental or moral development, or if the parent was sentenced to imprisonment by court verdict for an intentional criminal offense committed against either of their children.[41]

## 6. The rights and obligations of parents and children resulting from parental responsibility

### *6.1. Rights and obligations arising from parental responsibility in general*

The Act lists the rights and obligations arising from parental responsibility, which are the following: to select the minor child's name, to provide care, to determine the child's place of residence, to handle their financial affairs—including the right and obligation of representing the child in legal forums—and the right to exclude guardianship and other forms of social care.[42]

In addition to parental responsibility, the Family Protection Act defines the rights and obligations of a parent as follows. In the family, the mother and father have the

39 Bucsi, 2011, p. 20.

40 According to Fehérné Gaál Tünde, children under 10 years of age are more open to the expert, and the various tests and methods used by the expert are more effective in revealing the child's family relationships. These children do not yet have the capacity to judge, but what they say will be assessed in the context of the other facts of the case. Fehérné Gaál, 2016, p. 9.

41 CC. Art. 4:191(1)-(2).

42 CC. Art. 4:146(2).

same rights and obligations under parental responsibility, with the exception detailed in a separate act. A parent is obliged and is also entitled to take care of their minor child in the family, to nurture them responsibly, and to provide them with the conditions necessary for the physical, mental, and moral development and access to education and healthcare.

The duties of the parent of a minor child, in particular, are the following:

- respect the human dignity of the child,
- cooperate with the child,
- inform the child about the issues concerning to them according to their age and development,
- provide guidance, advice, and assistance in the exercise of the child's rights,
- take the necessary measures to enforce the child's rights,
- cooperate with the persons, entities, and authorities involved in the child's care,
- take care of the supervision of the child, in accordance with the provisions of a separate law, when the child is in a public place or nightclub at night.

The parent is obliged to spend the support received for the child in their care and upbringing. The parent is obliged to maintain the child in the manner and with the exceptions specified by law, including in the case of a minor child, by restricting the own necessary maintenance.[43]

### *6.2. Naming the child*

Determining the name of a child is a right that falls within the scope of parental responsibility, which, as an important issue affecting the child's fate, belongs to both parents, even if the parental responsibility rights are no longer exercised jointly. If the parents cannot agree, the guardianship authority decides.[44]

The child shall be given—by the parents' agreement—the birth name or the married surname of their mother or father. The child's surname may consist of two segments at most.

If no person is considered the child's father, the child shall use the mother's surname accrued by birth or through marriage. The mother may request the guardian authority to enter an imagined person in the registry of births as the father of her minor child; however, this is only possible if there is no proceedings pending for paternity or for the child's adoption.[45] However, it is recommended that this procedure be performed as soon as possible in the child's life as changing the name may be detrimental to an older child.[46] At any time after the child has reached the age of ma-

43 FPA. Art. 9-10.
44 CC. Art. 4:175.
45 Gyer. Art. 60(1).
46 Makai, 2013, p. 240.

jority, the child may apply to the guardianship authority for a person to be identified as the father, provided that no person is already regarded as the father. The child can also request, at any time, that the name and data of the previously registered imagined father shall be deleted and can make a statement whether they wish to continue to bear the imagined father's surname.[47]

### *6.3. Taking care of the child*

The most important element of parental responsibility is that the parents shall ensure the child's livelihood, care, and upbringing, so that when their child becomes an adult, they are able not only to live independently but also to integrate into society. That is why the responsibility and obligation of the parent goes beyond the child's maintenance and education. Within the scope of the parent's educational obligation, the minor child shall pass on the general moral norms and shape their character, values, and habits in accordance with the moral requirements accepted by society. The absolute respect of life and human dignity is the central element of moral education and the core of a minor child's socialization and emotional intelligence.[48]

In this regard, it is critical to decide when and under what conditions a minor child can appear on social platforms. In Hungary, the age limit of digital self-determination is 16 years. The processing of personal data of a child under this age is only lawful if consent was given by the parent exercising parental responsibility over the child. The data controller shall make reasonable efforts to verify that the consent has been given by the parent. The problem is that children can understand digital technology better than parents.[49]

#### *6.3.1. The child's residence and leaving the parental home*

The place of care and upbringing of the child is primarily the parental home, the common home. The Act also stipulates that parent shall provide a home for their child in their own household, and the child's place of residence shall be the parents' home even if the child temporarily resides elsewhere (e.g., in college, boarding school, and so on). The child can use the parents' home in their own right; it is prescribed by the Book of Family Law that "*Minor children of the spouses shall be given the right of tenancy in the common home of the spouses*."[50]

A child over the age of 16 years shall be allowed to leave the parents' home or any other place of residence designated by the parents with the guardian authority's authorization and without the parents' consent. In this regard, the guardianship

47 Gyer. Art. 60(2)-(3).

48 The most important aspects of good moral and family upbringing are compromised when the guardian of the minor fails to do their utmost to impart these values to the minor, thereby failing to best shape their emotional stability and mental health (BDT2010. 2364.).

49 Gál, 2020, pp. 23–24.

50 CC. Art. 4:76(2)-(3).

authority shall examine whether leaving the parental home is "not against the best interests of the child."[51]

It is important to note that this kind of permission of the guardianship authority does not imply the placement of the child or its alteration, nor does it affect parental supervision. However, it may be necessary to change the court decision related to the payment and enforcement of child support in some cases.[52]

### *6.3.2. The extradition of the child*

The parent or guardianship authority may demand the extradition of the child from anyone who is wrongfully holding them.

An action for the extradition of a child may be brought by the parent who exercises parental responsibility provided that the person against whom the action is sought is unlawfully retaining the child. The conduct of a person is unlawful is they take a child against the parents' consent or court order. However, the subject of the evidence in preparation for the decision should not be to examine which parent is better to exercise parental responsibility. The provisions on the procedure for the extradition of a child are in line with the Brussels II Regulation as well as the Hague Convention.

### *6.3.3. Taking the child abroad and staying abroad*

Different rules have been developed for the child's travel abroad.

The consent of a separate parent who does not exercise parental custody is not required for the minor child to travel abroad for occasional holidays, sightseeing, or family visits for a few days or weeks, when the child travels with the other parent who exercises parental custody. The separate parent is also entitled, within the framework of visitation rights, to maintain personal contact with the child; removing the child from their home or place of residence on a regular basis even to go abroad, for a prearranged period of time; spending longer time with the child at specific times, such as school breaks and lengthy holidays; as well as maintaining contact by ways other than personally. The right of visitation applies also to traveling with the child to foreign destinations, unless otherwise provided for by the court or the guardian authority in the child's interest.[53]

However, if it becomes necessary for the child to stay abroad for a longer period or possibly permanently—whether the child or the parent is studying abroad or for the parent's employment or other similar purpose—the other parent's consent must be obtained, and a statement that the child is staying abroad alone or with the

51 There can be many reasons for a child's intention: the minor's further education, training, or employment; a possible civil partnership; or emotional distance from the parent(s).

52 Makai, 2007, pp. 694–695.

53 CC. Art. 4:180(1)-(2).

parent must be made. The longer period depends on the purpose of the stay abroad, which can be a few months or possibly several years (for example, in the case of employment). Thus, a child can travel abroad for a longer period of time on their own or with one of their parents only with the consent of both parents. If they cannot reach an agreement, their guardianship authority will also have to settle their dispute.[54]

Based on the abovementioned rules, it is obvious in which cases is legal and in which is illegal to take a child out of Hungary. The purpose of the departure—and not the duration—is the criterion from which the illegality or lack thereof can be established. Thus, taking a child abroad for a long period of time, not for the purpose of vacation or visiting relatives but for the purpose of changing the usual place of residence or for establishment, is considered illegal on the basis of a unilateral decision of the parent.[55]

### *6.4. Rearing of children and career guidance*

According to Fundamental Law, parents shall have the right to choose the form and method of rearing their children. Rearing contains many legally unregulated elements, such as worldview, religion, morality, and behavior.[56]

Issues of the freedom of conscience and religion connected to a child's upbringing may affect sensitive and personal areas in which a third person or authority cannot intervene, even if the parents have not reached an agreement. Thus, if, in the case of joint custody, the parents fail to agree on issues connected to the right of freedom of conscience and religion, the guardian authority does not have decision-making power.[57]

Considering the child's abilities, the parents and child decide together about the latter's preferred career; however, the child's physical and intellectual abilities, interests, development, and endurance shall be taken into account. The parents can decide whether to send their child to a public, parochial, or other private school. An important aspect in the designation of the school is that it teaches the mother tongue of the separated parent to a high standard, for a significant number of hours, and introduces the child to the culture and traditions of the parent's country of origin.[58] As the choice of the child's school and career is an important issue affecting their well-being, the separated parent also has the right to consent.[59] If the parent caring for the child decides to choose (change) the child's school without the consent of the separated parent, as a result of which the amount of child support would increase by

54 CC. Art. 4:175.
55 Kőrös, 2013, p. 5.
56 Fundamental Law Art. XVI(2).
57 CC. Art. 4:166 and BH2001.479.
58 BH2013. 246.
59 When choosing a school for the child, it is important that it teaches the mother tongue of the separated parent to a high standard, with a significant number of lessons, and that it introduces the child to the culture and traditions of the parent's country of origin (BH2013. 246.).

tens of thousands of forints, the separated parent is not obliged to pay it if income conditions would otherwise allow this.[60] The parent's right to the free choice of school may be restricted to ensure the child's special interests, fundamental rights, and equal opportunities.[61]

The Book of Family Law appoints the guardianship authority to decide the dispute.[62]

The Act puts great emphasis on the "direct contact with the child"; therefore, the CC allows the stepparent and foster parent to be involved in exercising certain rights and obligations relating to caring for and raising the child with the agreement of the parent.[63] For example, to take part in a parent's meeting at the child's school, to take the child to kindergarten or school, and to take them to various school events, special classes, sporting events.

### *6.5. Management of the child's assets*

One of the most important sub-rights of parental responsibility is the management of the assets of the minor child. In recent decades, the responsibilities of parents in this area have become even more important.

#### *6.5.1. Subject of the asset management*

The parents' asset management rights and their obligations extend to all the properties of the child that are not excluded from the custody in accordance with the Book of Family Law. The following are not covered by parental responsibility:

a) The earnings acquired by the child's gainful employment. It can be wage, salary compensation, reward, or royalty. Moreover, a child over 14 years of age can undertake commitments up to the extent of their earnings.[64] For example, they can give away gifts, shop, or be a guarantor. If the child is raised in the parent's home and has an income, the parent shall be entitled to ask for appropriate contribution to household expenses.[65]

b) Property that a child has received with the demand that it cannot be managed by the parents. In this case, the guardianship authority shall appoint a trustee to manage the property. The condition of it is that the other parent is also not entitled to the administration of the property or that the administration of the property is contrary to the child's best interests.[66]

60 BH2016. 64.
61 BDT2017. 3761.
62 CC. Art. 4:153.
63 CC. Art. 4:154.
64 CC. Art. 2:12(2) c).
65 CC. Art. 4:157(3).
66 The detailed rules of the procedure can be found in the Art. 26/A of the Gyer.

### *6.5.2. Appropriation of the child's asset and income*

In this manner, asset does not mean the earnings of the minor child but the pure income of the asset (e.g., property rental, interest of cash).

The parents shall use the child's assets remaining after covering the incremental costs applicable to them for financing the child's justified needs. Unfortunately, in some cases, the child cannot be maintained even in this way. The parents shall be allowed to allocate the child's assets for covering the costs of maintenance with the authorization of the guardianship authority. However, whether parents can take care of the child without compromising their own support is an important condition.[67]

### *6.5.3. The parents entitled to manage the assets and their liability*

a) The range of parents entitled to manage the child's property. In the case of parents exercising parental custody jointly, the rights and obligations of the management are exercised jointly by the parents; otherwise, the parent exercising parental custody acts exclusively in the child's property matters. However, the Book of Family Law provides that the court may delegate management rights upon the parent living separate from them[68]; in particular, such a decision may be justified where the management of the child's property requires special expertise.

b) Parents' responsibility for the management of the child's assets. The parents shall administer their child's property without having to provide security and without the obligation to give account. In managing their child's property, the parents shall follow the same rules of prudential management as applicable to their own affairs. In the event of any breach of this obligation committed intentionally or through serious negligence, the parents shall provide compensation for damages on the grounds of non-contractual liability.[69]

In the event of any breach of obligation of parents having rights of custody in managing their child's assets, thus causing serious injury to the child's interest, the guardian authority may impose restrictions on or withdraw the right of management from the parents in justified cases.[70]

### *6.5.4. Limitation of the parent's right to manage the child's assets*

a) Limitation of the parent's right to manage the child's assets by the guardianship authority. In the event of any breach of the obligation of parents having rights of custody in managing their child's assets, thus causing serious injury to the

67 CC. Art. 4:215(2).
68 CC. Art. 4:168(2).
69 CC. Art. 6:519.
70 CC. Art. 4:159.

child's interest, the guardianship authority can impose such consequence(s) that can ensure the protection of the child's asset:

- order that the child's money and other valuables be transferred to the guardian authority if such assets are not immediately required for ongoing expenses according to the principle of prudential management.[71]
- order the parents to provide collateral security,
- place the management of assets under its supervision,
- order the parents to give account of management practices as a trustee,
- impose restrictions on or withdraw the right of management from the parents or their right of representation in certain financial matters or specific groups of matters.

The guardianship authority can apply more than one consequence simultaneously.

b) Limitation of the parent's right to manage the child's assets by the law. While the guardianship authority can restrict the parent's right to manage the child's assets only in the case of a serious breach of obligations, the provisions of the Civil Code impose restrictions to protect the child's property in the event of the exercise of the parent's general asset management right.

The parent, as a legal representative, can act independently on behalf of a minor of limited legal capacity, but restrictions apply. In some cases, the law requires the minor's personal statement (e.g., a notarial will), or the legal representative parent cannot make legal statements concerning the minor's income from work.

In addition, the Civil Code mentions several cases where the approval of the guardianship authority is required for the validity of the statement of the parent as a legal representative in the case of both a minor of limited legal capacity and with legal incompetency:[72]

1) The waiver of maintenance of a minor. For example, the parent can agree that the parent living separate and apart from the child can meet the maintenance obligation by providing assets of kind value (real estate ownership share or money).[73]
2) The rights or obligations that, by virtue of inheritance, are conferred upon a minor, and the refusals to inherit any property that can be individually refused; for example, an inheritance contract concluded by a minor of limited legal capacity as heir. However, a minor of limited legal capacity can make a notarial will on their own, without any consent or permission.
3) The acquisition of any real estate property by a minor, if such property is not free, or the transfer or encumbrance of a minor's real estate property. This

71 Gyer. Art. 26/B(2).
72 CC. Art. 2:15.
73 CC. Art. 4:217(2).

may be, for example, the lien on the property, the grant of the right to use it, or the establishment of an easement right.[74]

4) The disposal of property exceeding the amount[75] specified by law for a minor. For example, legal transactions concerning the child's movable and cash assets or property rights exceeding the abovementioned value limit (for example, securities, shares, stocks, and so on).
5) The guardianship authority shall, upon request, decide whether to approve the parent's abovementioned legal declarations. The condition for this is that it is in the best interests of the child to make a declaration of the child's property.[76]

Finally, it shall be mentioned that some statements will not be valid with the approval of the guardianship authority either:

1) Gifting is an exception as the child can give away gifts within reasonable limits.
2) Liability for a foreign obligation without adequate consideration is an exception when a minor of limited legal capacity undertakes commitments up to the extent of their earnings.
3) Waiving on rights without compensation: if the waiver was made for a fee, it depends on the content of the legal declaration—whether the guardianship authority's approval is required for the validity of the legal representative's legal declaration or not.

### *6.6. Legal representation of the child*

Minor children are under parental custody or guardianship, which means that parents having rights of custody can and shall represent their child in matters of a personal and financial nature.[77]

Marriage, which has an age-related effect, is an exception to this.[78]

#### *6.6.1. The legal representation of a minor of legal incompetency*

As a general rule, an incapacitated minor who has not reached the age of 14 cannot act on their own behalf or independently; instead, the parent or guardian exercising parental custody can act and make a valid legal declaration. As an

74 The need for the approval of the guardianship authority for all legal transactions involving the property of a minor with limited capacity or incapacity is independent of the value of the property (share of the property). (BH2007. 153.).

75 If the value of the assets involved in the parental provision exceeds seven times the current minimum amount of the old-age pension.

76 See, in details, Art. 26/B of the Gyer.

77 CC. Art. 4:146.

78 CC. Art. 4:9 and the Art. 36 of the Government Decree No. 149/1997. (IX. 10.)

exception, the contracts of minor with legal incompetency can be concluded if they are generally concluded in large numbers and do not require special consideration or assurance that have been concluded and performed directly (e.g., bus tickets or skating rink entrance purchase).[79]

### *6.6.2. The legal representation of a minor of limited legal incompetency*

The consent of the legal representative is required for the validity of a legal declaration made by a minor of limited legal capacity who has reached the age of 14. In most cases, the legal representative of the minor (parent or guardian) of limited legal capacity makes the legal declaration independently; however, an important guarantee rule is that if a parent makes a legal declaration on behalf of a minor of limited legal capacity, they must take the child's views into account.

A minor who has reached the age of 14 can make some legal statements on their own; for example, they can conclude contracts aimed at satisfying their everyday needs. This is the so-called "pocket-money rule," which allows a minor over the age of 14 to validly make small purchases and simpler transactions. The minor can conclude contracts that only offer advantages, and they can give away gifts within reasonable limits. Finally, they can dispose of the earnings they acquire by gainful employment and undertake commitments up to the extent of their earnings.

Finally, some legal statements require the approval of the guardianship authority in addition to the consent of the legal representative or will not be valid with the approval of the guardianship authority either.[80] These statements were analyzed in the chapter about management assets.

### *6.6.3. Exclusion of legal representation by parents*

If the child has received property with the stipulation that it cannot be managed by the parent, the parent may not act as a legal representative in matters related to the administration of property.

A parent may not be able to act as the child's legal representative because these matters require the minor's personal statement (e.g., last will,[81] marriage[82]). A minor of limited legal capacity can prohibit the removal of organs or tissues from the body for transplantation after death.[83]

The parent's legal representation may be excluded owing to a conflict of interest. A parent may not represent the child in a matter in which they—or the spouse, cohabitant partner, or other person under their legal representation—are an adversary

79 CC. Art. 2:14.
80 Barzó, 2014, pp. 180–194.
81 CC. Art. 7:14(4).
82 CC. Art. 4:5(1).
83 Healthcare Act Art. 211(1).

to the child. This would be the case if the parent were to gain a pecuniary or other advantage at the expense of the minor in the matter in which their child was represented. In this case, the guardianship authority assigns an ad-hoc guardian for the child; this is appointed by the law (e.g., in action for establishing paternity[84]) or at the request of the court if there is a conflict of interest between the minor witness and the legal representative.[85]

The ad-hoc guardian can officially be appointed upon request of the interested party or by the authority, and they shall have the same authority in the matter as the guardian; however, the ad-hoc guardian is also obliged to know the opinion of the child in their judgment and to take it—as well as the child's age and maturity—into account in the performance of their activities.[86]

## 7. Exercising of parental responsibility

The basic common affair and responsibility of the spouses is the care and upbringing of a common minor child; thus, parental responsibility is exercised jointly by the parents. This applies to cohabiting parents even if it is clear that the exercise of custody in everyday life is actually shared between them. Joint parental responsibility does not mean that both parents participate in the life, care, and upbringing of the child with equal emphasis and role. Unless otherwise provided for in an agreement between the parents or by the guardian authority or the court, parental custody shall be exercised by the parents jointly, even if they are separated.

### *7.1. Agreement between parents on the exercise of parental custody*

#### *7.1.1. Joint exercise of parental responsibility*

Parents shall establish such a system and lifestyle for their child as they see fit as regards the exercise of custody, whether by express agreement or by implication. However, the law sets two critical limits to parental agreement:

- on the one hand, if the parents are separated, they shall ensure that the child's life is well balanced when exercising joint parental supervision;
- on the other hand, in matters where immediate attention is required, in the case of joint custody, either parent shall have the right to decide on their own in the child's interest, of which the other parent must be notified immediately.

84 CC. Art. 4:106(2).
85 CPC. Art. 167/A(4).
86 The detailed regulations can be found in Art. 130/A of the Gyer.

### *7.1.2. The agreement of parents on the exercise of parental responsibility*

In addition to the joint exercise of parental responsibility, an agreement between separate parents may have several contents.

The parents may agree on the joint exercise of parental responsibility in general, meaning that even though they no longer live together, they are still making decisions about the child together. Therefore, if the parents can agree on joint parental responsibility, it is not necessary (but not prohibited) to settle the minimum extent and manner of contact. In the case of the application of the rules of joint parental custody, it is also necessary to indicate the child's place of residence, and it is also necessary to settle the child's maintenance in the agreement.[87] Undoubtedly, the best solution for a child is if the parents can remain responsible, caring parents who respect each other's parental quality even after their separation.

Parents may share the rights and obligations related to parental responsibility in any division. It can be settled that one of the parents is more actively involved in the care of the child, while the other is only involved in legal representation, administration, and property management. However, the division of duties may also involve the division of work that falls within the scope of the exercise of a specific right, such as care and education. For example, one parent studies with the child and goes to the educational institution, while the other parent promotes the child's out-of-school sports activities and takes them to competitions.

The parents may also agree that parental responsibility is exercised by only one of them. This means that the parents continue to decide jointly on major issues relating to the child's well-being; however, in other issues, only one of them has rights and obligations under parental responsibility.

Nevertheless, in practice, the parents themselves shape the situation in such a way that, after their separation (for example, when one of the spouses moves out of a joint family home), the minor children remain in the household, care, and upbringing of the other parent, to which the other separately moving parent also contributes—only financially or financially and actively—as a parent. If the practice developed in this way is not opposed by the other parent, but they accept and acknowledge it, then this behavior is of paramount importance for the future as well. The CC stipulates that this situation should be considered as an agreement between the parents; thus, the parent disputing this shall prove that, as a result of a substantial change in circumstances, the demanded change in the exercise of parental responsibility is in the child's best interests.[88]

87 CC. Art. 4:21(4)-(6).
88 CC. Art. 4:170(1) Kőrös, 2006b, p. 2.

### *7.1.3. The court's decision about joint parental responsibility*

In a lawsuit for the settlement of parental responsibility, the parents' agreement on joint parental custody or the sharing of it may be approved by the court taking into account the child's best interests, but it can also be decided with a judgment upon the joint request of either party or parties.

Since January 1, 2022 it is possible that in the absence of an agreement between the parents living separate and apart, at the request of either parent, the court may rule to order joint parental custody if considered to be in the best interest of the minor child.[89]

However, under the regulations in force until December 31, 2021, if the parents were not able to agree on the exercise of the child's custody following the deterioration of their marriage or cohabitation, the court had to decide which parent exercised parental custody. According to the previous regulation, the court did not have the possibility to order the exercise of joint parental supervision, even if both parents were suitable for the upbringing and care of the child and even if this was in the child's best interests. In practice, the courts have tried to "solve" this legal obstacle by authorizing the separated parent to have contact with the child for the same period as the parent exercising parental custody. However, according to the Curia, such an arrangement meant the replacement of joint parental supervision with the legal institution of contact, and joint parental supervision disguised in its content.[90]

However, since January 1, 2022, the abovementioned amendment created the possibility for the court to decide on the joint exercise of parental custody at the request of one parent if it is in the best interest of the minor child (i.e., if the child's physical, mental, and moral development can be provided in the most favorable way).

Consequently, in the case of an application for the exercise of joint parental responsibility, the given parent must show in detail how the joint parental supervision and the possible alternate placement and care of the child(ren) will work in the concrete case. The court is entitled to order evidence in this regard and may even hear the child(ren) in person. The court must examine whether it is convenient for the parents to exercise parental responsibility jointly and whether compliance with such a judgment constitutes a real commitment in life. It is also an important aspect to what extent the establishment of joint parental responsibility ensures the child's balanced future life—especially if joint parental responsibility is manifested in the child's possible "alternate placement and care."

The child's place of residence is the home of one parent, even in the case of a joint parental supervision. This can be a problem when parents choose the form of "alternate placement or care" in which the child alternately spends equal time with both parents.

89 This amendment was enacted into Art. 4:167 (1) of the CC with Act CXXII of 2021.
90 BH2020. 11.

In this case, the parents must state in their agreement—or the court shall state in the judgment—about the child's place of residence because, in such a case, the child can only have one registered place of residence.[91]

### *7.1.4. The form of exercising parental responsibility – the so-called alternate care*

The alternating care that was applied by former judicial practice without concrete legal regulation was added to the CC with the amendment coming into force on January 1, 2022. The amending Act (Act CXXII. of 2021) supplemented the Art. 4:164(1) of the CC with the following:

> "*Joint parental custody may be exercised by way of the parents taking turns, where they each shall have custody of the child for the same length of time entailing the entitlement and duty of raising and caring for the child.*"

This means that both parents can alternately spend the same amount of time physically with the child[92]; if there is a discrepancy in this (for example, 9 days with the mother and 5 days with the father), it is no longer considered alternate care.

In the case of joint parental supervision, the parties and court shall decide on the extent of the parent's independent care, including the period of breaks and holidays and on how and when to take over the child. The child's age may also play a key role in determining the duration.

The establishment of so-called alternate care[93] does not exclude the possibility that the court can establish an obligation to pay maintenance from one of the parents, taking into account the different property and income conditions and the parents' living conditions. This is called additional child support.

It is important to list in the judgment (settlement) exactly which expenses the parents are obliged to undertake separately, which mostly include the fees for meals, clothing, medical expenses, and special lessons. If travel costs are incurred with alternate care, it is necessary to decide who shall bear it; of course, household expenses are always borne by the parent with whom the child is currently staying.

The order of joint parental custody on a unilateral application can be applied in the court proceedings initiated on or after January 1, 2022; however, this solution is not applicable in pending cases.

In the case of alternate care, therefore, both parents spend virtually the same amount of time with and take full care of the child while they are with them. It is not uncommon in some European countries to hand over custody in 3 or 4 days, or

91 Grád, 2019, pp. 1–7. and the Opinions of the Advisory Board of the New Civil Code. http://www.kuria-birosag.hu/hu/ptk?&body_value=&page=1 (Accessed May 6, 2022).

92 Szeibert, 2022, pp. 10–16.

93 Szeibert, 2017a, p. 38.

having a child spend 1 week with one parent and then the same time with the other; however, doing so every 2 weeks has become more common in other countries.[94]

The primary condition of alternate placement is that both parents are not only suitable for raising their children but are willing to spend the same or even more time and energy on their children in the future than before.

The child's suitability is also a significant factor. Some professionals believe that frequent placement alternation can lead to imbalance for young children in the long run. Most psychologists and psychiatrists are strongly opposed to using this option in infancy, and many professionals would prohibit it until the age of 6 years. In the specific case, it is decided whether the equal paternal and maternal presence is necessary for the child or whether the child's emotional lability would no longer be able to endure the constant change in the environment associated with the relocation.[95] A significant difference exists between the different professional viewpoints.[96] A critical connecting issue is to determine the opinion of the common minor children because the decision can have a decisive significance and impact on the child's further life.[97] Therefore, it is advisable for the parents and child to make a decision on the issue of alternate care together, or at least taking into account the opinion, aspects, and request of the child.[98]

The proximity of the parents' place of residence is also a critical requirement as the child must feel at home in both places. They must often travel between the parents' homes, and in the case of a school-age child, they must go to the institution.

It is also a common viewpoint that if parents are unable to communicate properly with each other, alternate care cannot be approved because it requires a good relationship between the parents; nevertheless, it is also supposed that the lack of good communication between parents alone should not be an obstacle of alternate care.[99] However, another study reports no tangible evidence that the "switched model" would reduce the number of conflicts between parents. Moreover, if the parents had heated debates, the remnant of this dynamic survives, exposing the child to even greater tension.[100]

### *7.2. The court's decision on the sole exercise of parental responsibility*

If the separated parents cannot agree on the exercise of parental responsibility, or the conditions for the joint parental custody are not met, the court will decide on the settlement of parental responsibility. A Civil Procedure Code states that in case

94 Szeibert, 2012, pp. 2–7.
95 Gyengéné Nagy, 2006, pp. 34–35.
96 Szeibert, 2017a, p. 43.
97 Fehérné Gaál, 2016, p. 13.
98 Pál, 2014b, p. 12, pp. 16–18.
99 In fact, in some cases, it is the poor relationship between the parents that may require alternate care. Szeibert, 2017a, p. 42.
100 Szeibert, 2017b, p. 58.

of annulment of marriage or divorce, the court must also decide on the maintenance of a joint minor child, the exercise of parental responsibility, or the placement of the child with a third party, even in the absence of a claim to that effect.[101]

The law prescribes a significant right, allowing one parent to "fully exercise" parental responsibility with the consequence that the other parent cannot do so but has the right to decide jointly on material matters affecting the child's fate.

During its decision, the court will consider how the child's best physical, mental, and moral development can be ensured; however, if the exercise of parental responsibility by the parents endangers the child's best interests, the court may place the child with a third party, provided that this person also requests the placement with them.

Therefore, the court must conduct an extensive evidentiary procedure to decide on the issue. The principles and criteria set out in Directive No. 17 of the Supreme Court (Curia), amended by Directive No. 24 (hereinafter referred to as: Directive), are often applied by courts when they decide which of the separated parents can ensure the full and best development of the child.[102] Therefore, the court must make its decision by exploring and considering all the circumstances affecting the child's life.[103] Which are these circumstances?

It must be examined whether the parents are capable to ensure the child's upbringing based on their individuality, lifestyle, and moral qualities. The court must take into account the honesty of their attachment to the child, the child's emotions toward the parent and attachment to them, and the parent's ability to provide education and schooling opportunities.[104]

It is also necessary to examine the development of the financial and housing situation of the parties as the environment in which the child's maintenance, care, and health care is better ensured. The opinion of the environmental study, the nursery school, the kindergarten, and the school can provide valuable data for the decision.[105]

Psychological expertise can help make the right decision in the child's best interests. In these lawsuits, the court asks the questions to the psychologist expert, whose test methods used to define the questions asked are determined entirely independently using the methodological guide,[106] which includes the following:

1) Emotional attachment: the impairment of an emotional relationship with one parent, if it is not the result of external influence, justifies the placement of the child with another person in the case of the parent's incapacity to raise the child.

101 CPC. Art. 459(1).
102 Szeibert, 2020a, p. 15.
103 Grád and Jánoskúti and Kőrös, 2007, pp. 17–20.
104 The worldview of the parents, the doctrines, and beliefs of the religion they practice are not a matter for judicial discretion in the adjudication of the dispute (BH2001. 479. II.).
105 Visontai-Szabó, 2015, p. 35.
106 Methodological letter No. 5/2020.

2) Gender and age: the case law of recent decades has only attached importance to a child's age and gender when it is in the best interests of the child to take this into account. However, it should also be emphasized that the decision on parental responsibility and placement of a child over the age of 14 can only be taken with their consent.[107]
3) Permanence of "placement" and care: the healthy development of the personality of the child is facilitated by being able to live in their usual environment, in the care of those who love them. It is the duty of the parent to explain to the child that the home of the other parent will be their home, and it is the duty of the host parent to help the child get used to their new home.[108] Permanence cannot be taken into account in favor of a parent who creates it through arbitrary, violent behavior with the intention of excluding the other parent from the child's life.[109]
4) The raising of siblings together: when deciding on the exercise of parental responsibility, the court must seek that the same parent exercises parental responsibility over the children after their separation. However, children's mutual attachment is not equally strong in all families—for example, when there is a significant age difference between them or their abilities, interests, and needs differ significantly. It is not unlawful to place siblings separately with the two parents if it is in accordance with a situation that has developed for several years as well as the wishes and best interests of the children.[110]
5) Responsibility for marriage: behavior that violates marital fidelity[111] can be assessed in the context of a child's placement if it expresses irresponsibility, selfishness, and indifference toward the family. The court should seek to ascertain which antecedents have led to the severance of cohabitation.[112]

### *7.3. Entitlement of a separated parent to exercise certain parental custody rights*

In practice, when both parents are suitable for the upbringing and care of the child but the objective circumstances do not allow for the exercise of joint parental supervision or the so-called application of alternating care, it is not uncommon for the judge to decide, but this decision should not exclude a parent who also loves the

107 CC. Art. 4:171(4).
108 Parental behavior that, by influencing the child, has prevented or made impossible contact with the other parent for years endangers the long-term interests and balanced development of the minor and justifies the placement of the child with a parent who is better able to raise the child (BH2017. 123.).
109 It is not in the child's best interests if the parent who has not been granted parental rights tries to use various means (e.g., repeatedly bringing new lawsuits) to prevent or delay the child's placement in the other parent's home in the hope that they will eventually be entitled to exercise parental rights over the child (BH1998. 180.).
110 BH2000. 451.
111 CC. Art. 4:24(1).
112 Pál, 2015, p. 24.

child in the same way. To achieve the most ideal solution, the legislator allows a parent who does not generally exercise parental responsibility over the child to take an active part in the day-to-day tasks of caring for the child. For example, this parent can take the child to the educational institution on certain days, or they may be responsible for preparing, practicing, and attending a sports activity or music lesson chosen by the child on a weekly basis.[113]

The court may confer on a parent with special expertise the right to legal representation in relation to the management of the child's property in general or only in relation to a specific case. However, in the cases indicated above, the obligation to provide information and co-operation also applies to the parent against the one who exercises parental responsibility, cares for, and raises the child in general.[114]

### *7.4. The third-party placement of a child*

As it was already mentioned, the law only uses the term "placement of a child" if the child is not placed with one of the parents but with a third party. However, the law stipulates placement with a third party—typically a close relative—with the following two cumulative conditions: (1) the exercise of parental responsibility by either parent endangers the best interests of the child; as the mere fact that neither parent is capable of raising a child without the existence of a "threat" is not sufficient, the judge's officiality cannot go so far as to make such a decision merely because a "better" placement in a third party can be accepted; (2) the third party themselves requests that the child be placed with them.

In the event of such placement, the parents' parental custody is suspended, and the person with whom the court has placed the child shall be appointed as the guardian. In this case, the much-mentioned rule that the child's opinion should be given due weight—especially in the case of a child over the age of 14—should apply.

If neither parent is suitable for the care of the child, and there is no third person with whom the child can be placed and child protection care seems to be justified in the interests of the minor, the court shall immediately contact the guardianship authority to take the necessary measures.

### *7.5. Changes in exercising the rights of parental custody*

A change in the exercise of parental responsibility means a change in the exercise of parental responsibility based on either the parents' consent or a court judgment. The final judgment of a lawsuit concerning the exercise of parental responsibility or a child's placement cannot prevent a lawsuit from being instituted against a change in the exercise of parental responsibility or the placement of a child.

113 Ibid. p. 23.
114 CC. Art. 4:176.

This can be requested in the event of considerable changes taking place subsequently in the circumstances underlying the parents' agreement or the court's decision, and in consequence, these changes are in the child's best interest.

It should be emphasized that a change in circumstances (such as a new marriage of the spouse, establishment of a new cohabitation, and so on) alone is not sufficient to review the previous decision as it is also necessary to prove that the changed circumstances justify a change in the previous decision for the child's interest.

### *7.6. Mediation in connection with the exercise of rights of custody*

The Book of Family Law stipulates that the parents can initiate a mediation to settle their relationship before or during the dissolution proceedings and to settle disputes related to the divorce by mutual agreement. The agreement resulting from the mediation procedure may even be included in a legal settlement. However, mediation proceedings can only be offered to the parties as an option in this matter, and a mandatory order is not possible. Nevertheless, the Act creates a substantive legal basis, as in justified cases, and the court may order the parents to submit to a mandatory mediation in the interest of properly exercising parental supervision and to ensure their cooperation to that end, including the right to maintain direct contact between the parent living apart and the child.[115] The mandatory mediation procedure ideally ends with an agreement, but the obligation no longer covers it. After the first meeting, each party is free to decide that they no longer wish to take part in the proceedings; however, during the mediation, each party of the dispute is obliged to cooperate more acutely with the mediator (communication by telephone or e-mail or personal appearance at the first informative mediation meeting for information).

## 8. Rights and obligations of a parent living separately from the child

### *8.1. Obligation of the parent living together with the child to provide information*

The most important right and obligation of the separate parent, namely the right of visitation, is regulated in a separate section of the Book of Family Law.[116] In connection with this, however, the separate parent has the right to be regularly informed about the studies, state of health, and development of the child in general.

115 CC. Art. 4:172.
116 CC. Art. 4:178-185.

It is a statutory obligation of the parent raising and caring for the child to regularly inform, which has to be given without any special request, in the interest of the separate parent. However, it is important that the interest of the separate parent does not constitute harassment and does not focus on the ongoing "monitoring" of the parent caring the child.

### *8.2. Significant issues affecting the fate of the child*

The Book of Family Law defines, in the absence of joint parental supervision, the rights and obligations of the parent who lives separated from their child in a specific section. In this context, the separate parent decides, together with the parent caring for the child, on the significant issues concerning the child's fate, which is also their obligation:

a) Defining and changing a child's name (see, in detail, Section 6.2).

b) Designation of a place of residence outside the same place of residence as the parent. A joint decision on the determination of the child's place of residence may be made if the parent exercising parental responsibility wishes to place the child permanently outside their permanent home, in another person, institution (e.g., in a dormitory), or abroad for a long period of time.[117] In case of a dispute between parents, either parent may request a decision from the guardianship authority (see, in detail, Section 6.3.1).

c) The child's stay abroad. Depending on the duration of the child's travel abroad, different situations and rules have been developed. In case of a dispute between parents, either parent may request a decision from the guardianship authority (see, in detail, Section 6.3.3).

d) Changing the child's citizenship. It is possible that the parent exercising parental responsibility is a foreign citizen, has settled abroad with their child, or intends to work abroad for a longer period of time, and thus, it is necessary to change the child's citizenship. However, this also requires the consent of the separate parent. In case of a dispute between parents regarding this topic, either parent may request a decision from the guardianship authority.[118]

e) Deciding the child's school and career. According to the Book of Family Law, the parents and child jointly decide on the child's career by considering their abilities. The Book of Family Law designates the guardianship authority to decide in disputes between parents exercising parental responsibility and between a parent and a child regarding the choice of career, the child's education, and the choice of school[119] (see, in detail, Section 6.4).

117 However, the joint decision does not cover cases where the parent exercising parental responsibility over the child moves with the child to a new place of residence, perhaps to a town geographically distant from the child's previous place of residence, or stays with the child for a longer period of time outside the place of residence (BH2003. 504.).

118 Gyer. Art. 25.

119 CC. Art. 4:153.

It must be concluded that the legislation on parental responsibility satisfies the societal expectation that the parents caring for a child with due care are independent in their responsible parenting activities and that the state can intervene in the life of families only in situations where it is absolutely necessary to question the parental competence in child's interest.[120]

## 9. Decisions regarding the minor's healthcare

Within the framework of the exercise of the right of self-determination, any medical intervention shall be subject to the patient's informed consent, which is free from deception, threats, and coercion.[121] One might think that in the case of a minor, these rights can be exercised fully by the parent acting as the legal representative, but this is not always the case. Under the provisions of the current Healthcare Act, the parent (legal representative) has a much narrower decision on the treatment of a minor than on their own, and the exercise of the right of consent is limited to two areas.[122]

On the one hand, the consent of the parent (legal representative) is only required before an invasive procedure; therefore, the consent of the legal representative is required for any surgery or invasive diagnostic procedure, but the examination and medication of the child can be performed without the parent's approval.[123]

On the other hand, even in case of invasive procedures, the parent's declaration (legal representative) must not adversely affect the health of the sick child and, in particular, must not lead to serious or permanent damage to health.[124] The parent (legal representative) can only decide in the child's best interests based on the opinion of the child's doctor; however, this requires decision-making based on sufficiently detailed information.

Nevertheless, if the child's parent is not available prior to the invasive procedure, the consent can be given primarily by the competent sibling living in the same household as the child and, secondly, by the grandparent(s). In the absence of these relatives, the legally competent parent, sibling, or grandparent who is not living in a household with the sick child may declare in this order. In the event of contrary statements by those entitled to make a statement, the decision that is most favorable to affect the patient's state of health shall be considered.

120 Mentuszné Terék, 2019, p. 22.
121 Healthcare Act Art. 15(2)-(3).
122 Dósa, 2003, p. 17.
123 *Invasive procedure:* a physical intervention that penetrates the patient's body through the skin, mucous membranes, or orifices, excluding procedures that pose a negligible risk to the patient from a technical point of view (Healthcare Act Art. 33. m) point).
124 Healthcare Act Art. 16(4).

Therefore, if only one parent exercises exclusive parental responsibility, only their consent is required for an invasive intervention on a minor child.[125] The separate parent has the right to decide only on significant issues affecting the child's fate, but this does not include the right to consent to an invasive medical intervention. The law only prescribes the obligation of the parent exercising parental responsibility to inform the separate parent about the development, state of health, or studies of the common minor child.[126] This can lead to an interesting situation when a minor child who stays with the separate parent has an accident and the parent exercising parental responsibility is unavailable or their personal appearance is disproportionately delayed. Although the law allows the right of declaration to a legally competent sibling and grandparent living in a household—respecting this order—and it also accepts the legal capacity of the separate parent to make legal declarations in the absence of such persons,[127] this rule is completely unrealistic and seriously violates the right of a separate parent entitled to contact but not exercising parental responsibility.

The opinion of an incompetent or limitedly competent sick child shall be taken into account as far as professionally possible in decisions concerning healthcare, even if the right of consent or refusal is exercised by one of the persons indicated above.[128]

The Healthcare Act—albeit to a very limited extent—provides a wider right of self-determination for minors over the age of 16, in accordance with the following[129]:

1) On the one hand, a minor who has reached the age of 16 may waive their right to information, unless they need to know the nature of their illness not to endanger the health of others. If the intervention is initiated by the patient and is not for therapeutic purposes, the waiver of information shall be valid only in writing.[130]
2) On the other hand, the law allowed a minor who has reached the age of 16 to designate—in an authentic document, in a private document of full probative force, or in a declaration signed by two witnesses—a person with legal capacity who is entitled to exercise the right to information, consent, and refusal in their place. It means that a teenage girl or boy can name their adult boyfriend or girlfriend, or even a separate parent or grandparent, to give the consent required to perform a particular—even invasive—health intervention.[131] Thus, a girl who has reached the age of 16 can visit a gynecologist together with an adult person designated and authorized by her to use the method of contraception that is most effective and least burdensome for her; under the age of 16, however, this is not possible.

125 Lantai, 2014, pp. 303–309.
126 CC. Art. 4:174.
127 Healthcare Act Art. 16(5).
128 Healthcare Act Art. 16(5).
129 Barzó, 2015, pp. 12–14.
130 Healthcare Act Art. 14.
131 Healthcare Act Art. 16(6).

An important rule is that this right does not apply to abortion because Section 8 of Act LXXIX of 1992 on the Protection of Fetal Life provides that the declaration by the legal representative of the person with limited legal competence acknowledging the application for abortion is required for the validity of the declaration by the latter, and the application for abortion of the incapacitated person must be submitted on their behalf by the legal representative.

From the point of view of data protection, the notion of a "mature minor" also exists because the processing of (special) personal data from the age of 16 does not require the prior consent or subsequent approval of the legal representative. Therefore, the consent to the processing of health data from the age of 16, which is typically implicit, does not require the simultaneous presence of a parent in a doctor's office.[132]

## 10. Children's rights to contact or visit a parent

### *10.1. Visitation between the parent and the child*

a) Visitation between the parent and the child in general: under the UN Convention on the Rights of the Child, a child living separately from both parents or one of them has the right to maintain personal and direct contact with both parents, and this right can only be restricted for their "best interests."[133] Article 8 of the European Convention on Human Rights states that both fathers and mothers have the right to contact with their children.

According to the Book of Family Law, divorce does not remove the joint parental responsibility for the child's fate, but the child shall have the right to maintain a personal relationship and direct contact with their parent living separate and apart on a regular basis. The parent or other person raising the child shall ensure that the right to maintain personal relationship can be exercised undisturbed.[134] A parent who unreasonably keeps the child from having contact with the other parent or turns the child against the other parent shall act in a manner that is seriously prejudicial to the child's best interests. The separate parent should not use their contact with the child to create sentiment against the parent caring for the child or against a relative living with the child (e.g., a new spouse) to nurture hopes in the child that they themselves would be in a better position to care for and raise them. Only the mutual and cooperative behavior of the parents is in the child's best interests.

b) Exceptional cases of visitation between the parent and the child. A parent has the right to maintain contact with their child even when parental responsibility is

132 Hanti, 2013, p. 298.
133 UN Convention on the Rights of the Child Art. 9. point 3.
134 CC. Art. 4:178(1).

suspended. Even if a parent is a minor at the age of 14 or they are temporarily unable to take care of their child (for example, because of a serious illness), and the child will therefore be admitted to the family, it does not mean that the parent should be completely separated from their child. Therefore, in some cases, parental responsibility is suspended where the closest and most intimate relationship with the child is directly suggested and supported.[135]

In exceptional cases—in the interests of the child—a parent whose parental responsibility has been terminated by a court may also be authorized to have contact with the child—for example, if the child's emotional development would be jeopardized by the complete separation from the parent, or if the child's fate cannot be resolved through adoption.[136]

A new rule among the provisions on visitation is that it is also provided for a parent who consents to the adoption of their child and, therefore, no longer has parental responsibility. Sometimes a child is raised in the common household by the mother's new spouse from an early age, and the separate parent is not involved in the child's life at all. In this case, the stepfather often wants to adopt the child from his wife's previous relationship, but the father does not consent. By continuing to allow a parent who no longer has parental responsibility after consent to the child's adoption the right to visitation, the new provision of the Book of Family Law facilitates the chances of such an adoption.[137]

Rarely and exceptionally, the right of visitation between the adopted child and the blood parents may be guaranteed as well. The child has the right to know their family of origin and, with the consent of the original family, to have the right to visitation, even if the parent's parental responsibility ceases to exist.[138]

As a surviving right, the Book of Family Law also ensures that a presumed father who has raised the child as their own in their family for a long period of time may also be entitled to have contact with the child in justified cases. If the intimate relationship between the child and man whom they love as a father is broken from one day to another, it can seriously damage the child's mental development and emotional security.[139] However, in the latter three exceptional cases, the right to visitation must be expressly decided by the guardianship authority or the court.[140]

In addition to the parent, the grandparent and sibling are primarily entitled to have contact with the child.

From 2014, the Book of Family Law extended the scope of the right to visitation to the stepparent (spouse of the parent), the foster parent (cohabitant of the parent), the former guardian, and the parent whose paternity presumption for the

135 Somfai, 2005, pp. 16–21.; Somfai, 2007, pp. 8–17.
136 Gyer. Art. 29(3).
137 This is also prescribed in the CC. Art. 4:133(4).
138 CPA Art. 7(4). Somfai, 2008, pp. 83–85.
139 CC. Art. 4:113(1) b).
140 Gyer. Art. 29(4).

child has been overturned by the court, provided that the child has been raised in their household for a longer period of time.[141] With this new provision, the law prevents a lawsuit to overturn the presumption of paternity, where the main objective of one parent is to completely "exclude" the other from the child's life in the event of dissolution of marriage or cohabitation.[142]

### *10.2. Types of right to visitation*

In decisions related to the right to visitation, *inter alia*, the frequency and duration (continuous or periodical) of the visitation must be specified.[143]

#### *10.2.1. Continuous visitation*

The visitation is continuous when contact is repeated at regular intervals. Several forms are named in the law[144]:

- Personal meeting with the child at the child's usual place of residence (visitation);
- Removal of the child from their habitual residence on a regular basis, for a specified period, with the obligation to return. Neither the Civil Code nor the Gyer. limit its duration, and the bearing of expenses related to the child's removal (for example, the cost of petrol, the price of tickets, and expenses related to the child's stay with the parent, such as food) is, as a general rule, an obligation of the person entitled to visitation,[145] although the court or guardianship authority may deviate from this in its decision governing the visitation. However, the expenses incurred by the parent raising the child through the attributable conduct—obstruction or even thwart of the visitation—are to be borne or reimbursed by this parent.[146] The right of visitation also extends to the child being taken abroad for a specified period, even though the situation is different if the child's travel abroad with the separate parent is considered contrary to the child's best interests by the guardianship authority or the court (for example, because the separated parent has already illegally taken the child abroad);[147]

141 CC. Art. 4:113(1) b).
142 Kőrös, 2006b, p. 7.
143 CC. Art. 4:181(3).
144 Gyer. Art. 27(3).
145 CC. Art. 4:180(3) However, in the literature, it has already been suggested that the additional costs justifiably incurred as a result of moving to another municipality should be borne jointly by the moving parent and the contact parent. Grád, 2021, p. 28.
146 CC. Art. 4:183(2).
147 The contact between a child placed with a parent living in Hungary and a parent living abroad cannot be limited to the country's territory (BH2007. 412.).

Regular contact with the child without personal contact, in particular by correspondence, telephone, or IT means (e.g., skype, social networking sites), gifts, and parcels.

The duration of continuous visitation is not limited by law. According to the current judicial practice, visitation can occur every 2 weeks, lasting from Friday afternoon or Saturday morning to Sunday afternoon. However, the 2-week visitation is also increasingly supplemented with an intermediate contact. Of course, the latter is only possible if both parents live in the same city or town, or at least the geographical distance does not prevent this.[148]

### *10.2.2. Periodical visitation*

Periodic visitation includes long-term contact with the child during school breaks and multi-day holidays, with the possibility of going abroad or excluding it for the benefit of the child.[149] The duration of periodic visitation is, in practice, usually about 1 month per calendar year, which can be provided to the separate parent in addition to continuous visitation. The time and extent of the periodical visitation must be determined in the school holidays—summer, spring, winter holidays—and multi-day holidays in accordance with the holidays of the parent caring for the child.

The regulation of periodic visitation may also cover the celebration of birthdays and name days or the "sharing" of special holidays, such as birthdays, in one year with the family of the beneficiary and in the other year with the family of the parent caring for the child.

The duration of periodic visitation should be determined in accordance with the child's age and maturity. In case of a child subject to compulsory schooling, the date and duration of the school breaks are governed by the decree of the minister responsible for education.[150]

### *10.2.3. The supervised visitation*

Supervised visitation is appropriate if no family relationship exists between the child and the parent entitled to visitation or if this has deteriorated. By ordering supervised visitation, the guardianship authority seeks to facilitate the establishment or restoration of a family relationship with the person entitled to visitation under safe conditions for the child. In case of supervised visitation, the meeting between the child and the person entitled to visitation takes place at the contact point of the child welfare service or child welfare center, in the presence and with the advice of the visitation supervisor. Later, as a result of supervised visitation, a meeting between the child and the person entitled to visitation may take place without the presence of a supervisor, and later, the visitation may be exercised in the form of takeaway or visit.

148 Somfai, 2008.
149 Gyer. Art. 27(4).
150 Gyer. Art. 29/A(4).

### *10.3. The settlement of visitation*

In the case of joint parental responsibility, parents do not have to agree on visitation. However, if the right of parental responsibility toward the child is exercised by only one of the parents, the relationship with the separate parent shall be settled on the basis of an agreement, in the absence of which the court or the guardianship authority shall decide.

The agreement of the parties regarding the form and extent of visitation with the child is not restricted by law; the reason for this is that the separate parent should have the widest possible contact with their child. The settlement is approved by a court order, and after the approval, the guardianship authority concludes the agreement in a decision if it is in the best interests and opinion of the child, as well as the purpose of the contact.[151] An agreement cannot be approved if it is expressly objected to by a child in their judgment.

The guardianship authority acts when there is no pending marriage procedure or litigation relating to parental responsibility settlement and the parents or the entitled persons cannot agree on the visitation. The guardianship authority also decides if the visitation was originally decided by the court and one of the parents or another person entitled to visitation requests the change of visitation 2 years after the final decision.

However, in a dispute concerning the exercise of matrimonial or parental responsibility, the court shall decide on visitation in the absence of an agreement, provided that one of the parties so requests.[152] If the right to visitation was originally decided by the court, the change of visitation can only be requested from the court within 2 years of the decision.[153]

The Book of Family Law provides for the possibility of mediation, which can mandatorily be ordered in the child's best interests, both in the proceedings of the guardianship authority[154] and the court[155.]

### *10.4. Obligation of the parties to cooperate*

#### *10.4.1. The failed visitation*

The visitation may be hindered on both sides by unforeseen, sudden circumstances; for example, the child becomes ill at the beginning of the visitation, or they must attend a school or kindergarten event, and in the same way, an extraordinary

151 Gyer. Art. 29/A(1)-(3).
152 The former Civil Procedural Code Art. 3(1) and the current CPC. Art. 1(2).
153 CC. Art. 4:21(3).
154 CC. Art. 4:177.
155 CC. Art. 4:172.

plan or activity may take place in the life of the parent who is entitled and obliged to visitation.

However, the common obligation of the parties concerned is to inform each other in writing, or in any other verifiable manner and without delay, as far as possible, in such a way that the change does not cause disproportionate costs and harm to the other party.[156]

If the visitation fails for reasons not attributable to the entitled party, they must be rectified at the nearest appropriate date but no later than 6 months.

### *10.4.2. The responsibility of the parent toward preventing visitation*

The parent caring for the child is liable under civil law for any damage caused by the unlawful prevention of visitation. The condition of liability is the attributable conduct of the parent (person) entitled to visitation or obliged to ensure visitation, in consequence of which the visitation ultimately failed and in connection with which pecuniary damage was caused. In this context, however, only the civil court has jurisdiction. The scope of damage covers actual costs incurred in connection with the infringement (such as overpaid travel expenses, pre-planned and paid foreign holidays, purchased theater tickets or concert tickets) and expenses, as well as other pecuniary and personal damages.

The Metropolitan Court of Appeal stated in a specific case that "the mere fact that legal protection against the unlawful obstruction of the relationship between the child and the parent is provided primarily by the family law institutions does not preclude the possibility of claiming protection of personal rights"[157] or the possibility of the application of compensation.[158]

At the request of the person entitled to visitation or the person obliged to visitation, the guardianship authority may also order the party who obstructs the visitation without due cause and who violates the rules of contact to bear the costs incurred. Reimbursement of certified expenses incurred owing to obstruction of visitation and violation of its rules may, of course, also be claimed during the enforcement proceedings.[159]

Parental behavior that has prevented visitation with the other parent for many years through the intention of expropriation, influences the child, endangers the long-term interests and balanced development of the minor, and justifies their placement with a separate parent with better parenting skills.[160]

156 Gyer. Art. 30(1).
157 7.Pf.21.696/2011/8.
158 Pál, 2014a, pp. 11–17.
159 Gyer. Art. 30(2)-(3).
160 BH2017. 123.

### *10.5. Restriction, termination, or change of visitation*

In view of serious abuse of the child or the parent raising them, the right of visitation already established may be restricted or revoked.

a) Suspension of the right of visitation: the right of visitation of the parent shall be suspended in the event of serious assault of the child by the parent[161] or serious abuse of rights by the entitled person to the detriment of the child or the person raising the child. The maximum period of suspension is 6 months, or 1 year in the case of serious abuse.[162]

b) The restriction of visitation: the guardianship authority or the court in a marriage or parental responsibility lawsuit can restrict the already established right of visitation in the best interests of the child, upon request, if the right holder abuses their right to the detriment of the child or the person raising the child. It is considered abusive, attributable conduct if the entitled person does not exercise their right of visitation in accordance with the decision of the court or the guardianship authority, or if they do not exercise their right of visitation at all for more than 6 months. During the restriction of the right of visitation, the guardianship authority may decide to change the already established form, frequency, or duration of visitation and order supervised visitation.

c) Termination of visitation: the guardianship authority shall revoke the right of visitation established in its decision upon request if the entitled person seriously abuses their right to the detriment of the child or the person raising the child, and the child's upbringing and development is seriously endangered by this attributable conduct.[163] In practice, fortunately, this rarely happens.

d) In the event of a change of visitation, the guardianship authority may decide to change the form, frequency, duration, and location of the previously established contact individually or jointly. Upon request, the guardianship authority may, in the interests of the child, lift the restriction on visitation or restore the right of visitation if the circumstances on which the decision was previously based no longer exist.[164]

### *10.6. The implementation of visitation*

From 2020, in case of a breach of the decision on visitation, the district court may be ordered to enforce this decision,[165,166] and an appeal against that order has no suspensory effect.

161 Gyer. Art. 30/E(2).
162 Gyer. Art. 31(4).
163 Gyer. Art. 31(5).
164 CC. Art. 4:181(4).
165 A particular difficulty for the courts has been to resolve disputes arising from the enforcement of contacts that have failed owing to the COVID-19 pandemic. Pungor, 2021, pp. 23–30.
166 Hámori, 2020, pp. 26–31.

According to the Civil Code, the implementation of the decision may be requested by the person entitled or obliged to visitation within 30 days of the breach of the decision or of the time that the applicant became aware of it. The provisions of the decision of visitation shall be deemed to have violated if the person concerned, for reasons attributable to them,

- does not comply with their obligation of visitation within the time limit,
- does not supply the missing visitation within the time limit set in the decision,
- obstructs the visitation without due cause, or
- otherwise thwarts uninterrupted visitation with the child.

The district court shall, if necessary, hold a hearing or request evidence to order enforcement. The court will act out of turn while examining the application. If the court finds that the applicant has breached the decision to maintain visitation, it will order enforcement. In the enforcement order, the court calls on the applicant to

- comply with the due visitation at the time and in the manner specified in the decision,
- supplement the visitation canceled by a non-attributable conduct of the entitled person at the earliest appropriate time, but no later than 6 months, and set a deadline for the replacement, or
- if there were other obstacles to visitation that cannot be attributed to the person entitled to visitation, ensure uninterrupted contact with the child after the obstacle has been removed.

Upon request, the court shall order the applicant to pay the proven costs incurred as a result of this breach of the contact decision.[167]

If the conditions for ordering enforcement are not met, the court will reject the application, and the applicant has the right to appeal against the order. The court must be notified of the fulfillment or non-fulfillment within 30 days of the expiry of the time limit set for voluntary performance. In case of non-performance by own fault, the court

- may contact the guardianship authority to promote the applicant's performance by involving the family and the child welfare institution system;
- may impose a fine pursuant to Point c) of Section 174 of the Act LIII of 1994 on judicial enforcement (Vht.);
- may order the transfer of the child with the assistance of the police in the event of a regular and repeated breach of the rules of visitation[168];
- may apply to the guardianship authority for the purpose of settling parental responsibility or the placement of the child in a third party, provided that it is in the best interests of the minor and that the parent or a third party so requests; or

167 Harmat and Völcsey, 2020, p. 29.
168 Vht. Art. 180/B.

– makes a charge for the abuse of the minor or prevents the exercise of visitation rights.

The court may order the application of more than one measure simultaneously, and the fine may be imposed repeatedly. An appeal against the order has no suspensory effect.

In case of an order for the transfer of the child with the assistance of the police, the court shall immediately send the order electronically to the official body of the Hungarian Judicial Enforcement Body.

The proceedings shall be suspended until the end of the mediation procedure, but no later than 2 months after the beginning of the mediation procedure or until the end of the procedure for changing or withdrawing visitation.[169]

## 11. Summary

The Hungarian legal system regulates the parent–child relationship on several levels: on the one hand, Fundamental Law contains important statements declaring that the family relationship is based on the marriage of a man and a woman and on the parent–child relationship, where the mother is a woman and the father is a man. In line with this, it emphasizes the child's right to the self-identity appropriate to their sex at birth and the right to be educated in accordance with values based on Hungary's constitutional identity and Christian culture. The Family Protection Act sets out the same principles, but in addition to this, it also contains a summary of the parents' obligations. The Child Protection Act and its implementing decree summarize the rights and obligations of children and their parents, and the detailed rules relating thereto. Moreover, the Book of Family Law of the Civil Code sets out detailed rules on the content, exercise, and settlement of parental custody. The issue of the exercise and settlement of parental rights is crucial in both everyday life and in litigation; acknowledging this, the Book of Family Law sets out, in addition to the general principles of civil law and the specific principles of family law, several principles that are of particular importance both in the relationship between parents and between parents and children. Defining and highlighting the principles governing the exercise of parental responsibility is an excellent solution in domestic legislation as it can be used by the courts in cases where the specific legal rules governing the dispute cannot be clearly defined. The principle of the child's best interest and the right of the child to the self-determination should be given greater emphasis by the legislator, even if it is elevated to the level of a general principle of the Civil Code.

169 The Art. 22/A–22/E. of the Act CXVIII of 2017 on the rules applicable to civil extrajudicial procedures and to certain extrajudicial procedures.

As a general rule, the parent or the child's guardian is the child's legal representation. In practice, in some cases, a parent cannot represent the child for some statutory reason (e.g., conflict of interest); an ad-hoc guardian who is typically an advocate is then appointed by the guardianship authority. The law does not require any specialization in family law or child protection law, which should be an important requirement in this case. A similar problem exists in courts where family law cases are heard by general civil law judges, even though family law cases differ both in number and nature from traditional civil litigation. Additionally, the establishment of child-friendly hearing rooms in the courts does not change this tendency as judges cannot take advantage of the room without special training.

With the amendment of the Civil Code as of January 1, 2022, the institution of alternate care has been regulated, and the court may order it even at the request of only one parent. However, the suitability of the child is one of the most important factors in determining this issue. A related and very important aspect is to obtain the opinion of the minor children in common, as the decision may have a decisive impact and influence on the child's future life. For this reason, the decision on the issue of alternate care should always be taken by the parents or the court by taking into account the child's views, points of view, requests, and—if the child does not yet have the capacity to judge—a psychological evaluation (not only in justified cases) if requested or if they have reached the age of 14.

The Book of Family Law sets out, in a separate section, the rights and obligations of a parent who is separated from the child in the absence of joint parental custody. In this manner, the separated parent decides, together with the parent exercising parental responsibility for the child, on important issues concerning the child's fate, which is also the parent's obligation. The law lists these cases in an exclusive list; however, this does not include the exercise of the right of self-determination in relation to the child's healthcare, including the right to consent to invasive medical procedures. The law only requires the parent exercising parental responsibility to inform the other parent about the development, health, and education of the minor child, which does not even allow the parent to obtain information directly from the teacher or doctor about the child's school progress, health, and possible illnesses. This legislation unnecessarily and disproportionately restricts the rights of the separated parent who does not exercise parental responsibility.

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Chapter V

# Poland: Parental Authority

Marek Andrzejewski

## 1. The historical context of a modern legal parent-child relationship

Without referring to history older than the end of World War II, it can be said that in terms of the legal structure of the parent-child–state relationship, from then until now, there have been two radically different periods with regard to the position of the state's legal status in relation to raising children.

In the first period, which lasted until 1989, Poland belonged to the so-called "people's democracies," in which the authorities sought to implement the idea of a socialist state to eventually introduce a communist system. However, pursuing this goal did not entail the permeation of the Family and Guardianship Code enforced on January 1, 1965 (hereinafter referred to as FGC)[1] with ideological threads. Although the Code was adopted during the period of strong expansion of communism, the statements formulated there were ideologically neutral.[2] As a result, after the fall of the communist system in 1989, it was not necessary to repeal this legal act. On the other hand, several amendments have been added since then, especially in marriage law (marriage contract, matrimonial property regimes, divorce, separation) and in the provision concerning the parent-child relationship (filiation, parental authority, foster care, adoption, maintenance obligations).[3]

1 Ct. Journal of Laws of 2020, Item 1359.
2 Fiedorczyk, 2014, pp. 697–742; Nazar, 2005, pp. 81–110; Holewińska-Łapińska, 2009, pp. 1023–1025.
3 Ignatowicz, Nazar, 2016, pp. 45–62.

Marek Andrzejewski (2022) Poland: Parental Authority. In: Paweł Sobczyk (ed.) *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates,* pp. 147–185. Miskolc–Budapest, Central European Academic Publishing.

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Family law regulations, owingto the presence of many ambiguous phrases (which is not an allegation but a natural feature of this branch of civil law), including general clauses, should be read in the context of the state's political system and the then-valid constitution. Therefore, the phrases contained in the FGC take on a different meaning depending on the context assigned to them in the currently binding Constitution (until and since 1989, especially since the adoption of the Constitution of the Republic of Poland of April 2, 1997[4], henceforth referred as the Constitution RP).[5] The flexibility of the FGC regulations gave judges (and still does) the opportunity to focus their attention only on substantive issues, which prevented the courts from interpreting them oppressively toward parents whose impact on their children's upbringing was questionable from the point of view of the assumptions of the official communist doctrine. No historical reports suggest that the courts interfered with the sphere of parental authority to persecute parents for their involvement in opposition activities that were illegal at that time or, for example, for raising children in a religious spirit. This also applies to the period of martial law (1981–1983), when the repressions against those contesting communism were massive and drastic (internment camps, imprisonment, dismissal, beatings, and murders by the so-called unknown perpetrators).

Unfortunately, examples of an ideological approach to family law in the scientific literature were abundant but not dominant, and their number decreased each year.

The parent-child relationship is also regulated outside of the FGC. Of particular importance here is educational law as it creates a framework for educational activities in relation to children.

Unlike the ideologically neutral FGC regulations, the education law in force in Poland until the political breakthrough of 1989 was extremely ideologized in the communist spirit,[6] and its content was meticulously implemented in the practice of schools and educational welfare institutions, such as children's homes. In many families, children obtained knowledge about the history of Poland from their parents and other relatives in a version diametrically different from that taught at schools, where curricula were imposed.[7]Simultaneously, compliant luminaries of legal science and pedagogy preached about the primacy of the communist party in raising children,[8] which was manifested in the politicization of scouting, bans on youth organizations if they did not declare support for communism, and—above all—in the curricula, especially of such subjects as the Polish language and literature, history, and social sciences. Since the communist party constituted the state authorities and usurped power to determine the direction of children's education and upbringing, it is possible to define the state system as authoritarian and, in some aspects, even totalitarian.

4 Journal of Laws of 1997, no 78 Item 483 as amended.

5 Andrzejewski, 2021a, pp. 7–10.

6 Journal of Laws of 15 July 1961 on the development of the system of education, Journal of Laws of 1961 no. 32 Item 160 as amended.

7 Cywiński, 1978.

8 Kozakiewicz, 1976, pp. 74–84.

After the political breakthrough of 1989, the ideological legal solutions were dismissed, and the main function of the school was education, which, with time, also embraced support for the family in its upbringing endeavor.[9] The Art. 47 of the Constitution RP provided that the family is an autonomous unit, and parents have primacy over public institutions in raising their children.[10] The state is assigned a supporting role in relation to parents, and it orders to support them in performing their parental tasks (see Section 6). Such a direction is also indicated in the United Nations Convention on the Rights of the Child[11] (preamble, Art. 5 and 18; hereinafter referred to as the UNCRC), the provisions of which are a kind of directive addressed to the states as parties, so that they focus their efforts on supporting parents—especially in performing the care-educational and economic functions of the family—to protect the rights of the child.[12]

## 2. Current issues justifying research on the parent-child relationship

### *2.1. Parents and the state*

The debate on the role of parents, including their special position and tasks in relation to the child, is being held in the context of the relationship between state and family. The debate has been perennial and universal in character because it has taken place in all political systems except during the communist period, during which it was not held owingto preventive censorship. In Poland and other countries of Central Europe, the institution that opposed the oppressive attitude of the state toward families was the Catholic Church.[13] Within its Polish structures, it offered educational and welfare programs for a significant percentage of children and adolescents. These programs were an important educational and upbringing alternative to the one provided by the state. Religion was taught in parishes (i.e., outside the control of the state) and in the cities; the Light-Life Movement (also referred to as the Oasis Movement) enjoyed popularity among young people.[14]

Today, in Poland, a dispute has once again erupted over the position of parents and the role of the state in relation to children. The parents' position is threatened by the spread of the *gender* ideology and the philosophical trend known as neo-Marxism.

9 Act of 7 September of 1991 on the educational system, Journal of Laws No.95, Item 425 as amended; Act of 16 December of 2016 on Educational Law, ct. Journal of Laws of 2021, Item 1082 as amended.
10 Art. 48, Art. 53(3), Art. 70(3).
11 Journal of Laws of 1991, No. 120, Item 526.
12 Smyczyński, 1999, pp. 149–166; 2012, pp. 14–16; Andrzejewski, 2012, pp. 41–46.
13 Cywiński, 1993.
14 Terlikowski, 2021.

Many Western countrieshave adopted legal acts and resolutions of various bodies (especially political but also scientific) that openly undermine the so far generally unquestionable positive role of the family, especially as a model environment for children to grow up in. In their view, the family is a source of oppression rather than of harmonious growth.[15]

In the debate on state interference in family life, the subject of the dispute is not whether the state can interfere (whether it has substantive and formally legally defined competencies to do so), but instead, it concerns the scope of such interference. The admissibility—and sometimes the necessity—of state intervention in the life of families is determined by Articles 18 and 71 of the Constitution RP, which oblige the state to support the family as well as the married couple, maternity, and parenthood, with the reservation that the courts may restrict or deprive parents of their parental rights if the prerequisites for such restrictions set out in the FGC are met.[16] The core of the problem is how to strike a balance between the state's overprotective attitude toward families (i.e., patriarchalism violates the autonomy of the family and destroys its resourcefulness) and an excessively lenient attitude toward the highly reprehensible behavior of parents, or a hasty or excessively firm one if persuasive measures have not been used beforehand.

### *2.2. Contemporary problems with upbringing*

The list of contemporary parenting challenges should begin with the role of multimedia, which generate, for children and young people, a superficial way to communicate that is often inaccessible to the adult generation. A great impediment to upbringing is the fact that parents do not know enough about the content to which their children are exposed on the Internet and are therefore unable to discuss it, let alone correct or counteract its impact.

Upbringing is also hindered by the universal process of change in the social roles performed by women and men. In times of intensive change, stability—so conducive to parenting—has become a scarce commodity. It has been replaced by the reality of permanent change. Women and men's difficulties in fulfilling their roles as mothers and fathers raising children in a new way, as well as difficulties in mutual understanding (parental alignment), create an unstable ground for the growth of their children.[17]

The destabilizing force of the above factors is strengthened by the influence of the media. Many media productions, so attractive in terms of plot, color, and artistic elements, have an intentionally destructive effect on upbringing and family relations.

Moreover, easy access to pornography is found demoralizing as it fosters the attitudes of objectification of oneself and others.

15 Roszkowski, 2019, pp. 485–554.

16 Borysiak, 2016, pp. 1182–1211; cf. Art. 48(2) of the Constitution RP.

17 Kujawska and Huber, 2010; Augustyn, 2009; Melosik, 2006; Kocik, 2006, pp. 336–352.

Central Europe has no areas of acute poverty, but serious parenting problems are caused by the incompetent use of wealth as a result of parents' involvement (including professional one) outside the home, which usually happens at the expense of building bonds with their children. As a result, parents share their parenting and educational functions with a variety of institutions (in addition to schools, also nurseries, kindergartens, and social, sports, cultural, and religious organizations). One of the consequences of this sharing is a discrepancy in the messages conveyed to children between those from within the family and those from outside. Of course, the situation in which the parents "absolve" themselves of the responsibility of raising their children, claiming that this is the task of the school and other institutions, is not rare.

Of special note is the proliferation (especially in Western Europe) of laws giving children excessive freedom to decide for themselves (with the knowledge and support of public institutions), which, simultaneously, marginalizes the role of parents. Pro-family standards of human rights protection are ignored also by the UNCRC, which emphasizes the high importance of parents and family. The misinterpretation of the UNCRC's provisions by some activists, politicians, as well as educators and lawyers generates opposition (tension) between children and the adult world (especially parents). It is enough to point to the simplified—and therefore harmful—sex education[18] or the abortion law that enables underage women (with the help of public institutions) to terminate a pregnancy without the parents' knowledge. Worthy of mention is also the use of the educational system to indoctrinate children in matters of worldview that are contrary to the official educational programs adopted by schools and accepted by parents.

As in every important issue, semantics plays an important role in the reflection on the parent–child relationship. The terminological confusion[19] that is being created nowadays leads to the questioning of important concepts in this field. A case in point is the official gender terminology adopted in some countries (e.g., "parent 1" and "parent 2" to replace "mother" and "father," just as "two people getting married" replaces "man" and "woman"). A displacement of the term "parental authority" by the term "parental responsibility" is also questionable, as will be discussed in Section 5.

## 3. The protection of parental authority in the system of sources of law

The catalog of sources of law concerning—directly or indirectly—the protection of the relationship between parents and children is extensive. The following provisions of the Constitution RP are worth quoting:

18 Kuby, 2013
19 Keyes, 2018.

Article 18. Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.
Art. 33. Men and women shall have equal rights in family, political, social, and economic life in the Republic of Poland.
Art. 38. The Republic of Poland shall ensure the legal protection of the life of every human being.
Art. 47. Everyone shall have the right to legal protection of their private and family life, of their honor and good reputation, and to make decisions about their persona.
Art. 48. 1. Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as their freedom of conscience and belief and also their convictions. 2. The limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.
Art. 53 (3). Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate.
Art. 70 (3). Parents shall have the right to choose schools other than public for their children. Citizens and institutions shall have the right to establish primary and secondary schools and institutions of higher education and educational development institutions. The conditions for establishing and operating non-public schools, the participation of public authorities in their financing, as well as the principles of educational supervision of such schools and educational development institutions shall be specified by statute.
Art. 71 (1). The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances—particularly those with many children or a single parent—shall have the right to special assistance from public authorities. (2) A mother, before and after birth, shall have the right to special assistance from public authorities to the extent specified by statute.
Art. 72 (1) The Republic of Poland shall ensure protection of the rights of the child. […] (2) A child deprived of parental care shall have the right to care and assistance provided by public authorities. (3) Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child. […]

In this field, international standards are set especially by the following:

- UNCRC and several other universal and regional conventions,[20] including, in particular, Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[21]
- The Council of Europe's resolutions and recommendations,[22]

20 Smyczyński and Andrzejewski, 2020, pp. 23–24, 211–213, 260–262.
21 Nowicki, 2010, pp. 508–566; Jasudowicz, 1999a.
22 Safjan, 1993; Jasudowicz, 1999; Jaros, 2012.

– EU Regulations (in particular Council Regulation [EC] No. 2201/2003 of November 27, 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation [EC] No. 1347/2000, the so-called Brussels II bis).[23]

Among national regulations, the most important are the FGC provisions,[24] which will be repeatedly mentioned, as well as the laws mentioned in Sections 3, 6, and 10.2. of this report and the list of legal acts.

The legal doctrine has highlighted the usefulness of separating a set of norms defined as "law concerning the family," which are scattered over numerous legal acts from various branches of law and which all share the function of protecting the family.[25] The consequence of this view is the directive that the legislative and executive acts on family protection should form an axiologically, formally, and pragmatically coherent whole together with the family-related regulations of the Constitution RP and the FGC. In relation to legal acts that have already been adopted, a postulate is formulated that their provisions should be applied in a manner consistent with the provisions of the FGC and the Constitution RP. The implementation of these seemingly obvious postulates is difficult to achieve in practice.

## 4. The concept of parental authority

Parental authority consists of the powers, duties, and competencies of parents with regard to their care of the child and custody over the child's property. It is also manifested in their representation of the child within the framework of statutory representation. The concept covers all the behaviors (including decisions) of parents in relation to the child as well as their behavior in relation to other parties with respect to the child. The concept of parental authority includes only those behaviors and decisions that serve the spiritual (mental) and physical development of the child, namely those that are in the child's best interests (see Section 6). The behaviors that are contrary to the child's best interests are referred to as abusive.

Parental authority consists of three legal relationships of parents[26]:

a) with the child (family law relationship),
b) with the state (administrative law relationship),
c) with third parties (civil law relationship).

23 Journal of Laws of European Union, L 338 of December 23, 2003.
24 Articles 87–127 FGC.
25 Ziembiński, 1983, p. 126; Telusiewicz, 2013; Andrzejewski, 2003 pp. 51–63.
26 Sokołowski, 1987, pp. 41–57.

The essence of the first is in the parents' powers, duties, and competencies in relation to their child (custody of the person, of the property, and statutory representation). The second concerns the administrative obligations imposed on parents (registration of the child in the registry office, compulsory medical examinations and vaccinations, compulsory school attendance) and the state's interference in the form of judicial intervention in the parent–child relationship. The third offers the possibility for parents to request that the state take their child away from unauthorized persons.

Since the exercise of parental authority includes actions undertaken in the interest of the child (for their well-being), the use of violence or demoralizing behavior that takes advantage of the position of the more powerful party toward the child is treated as an abuse of parental authority, and as such, it deserves a negative reaction by the law in the form of termination of such parental authority.[27] If the parents' behavior does not meet the conditions for the termination of parental authority but threatens the child's well-being, then the court will restrict parental authority to correct their behavior.[28]

On the primacy of parents in raising their children, see Section 6, and on legal custody (surrogate parental authority), see Sections 12 and 14.

## 5. Parental "authority" or parental "responsibility": the (not only) terminological dispute

In Poland, there is an ongoing dispute between the supporters of the term "parental authority" used in Polish legal acts[29] and the proponents of abandoning it and replacing it with the term "parental responsibility." As already mentioned, what is at stake here is not only the accurate reflection of the designator's essence but also the parents' position in relation to the child and the state.

Supporters of the change have argued that the term "authority," when used to describe the parent–child relationship, contradicts the idea of the child's subjectivity and the need for respect for the child; in its name, it refers to the paternal authority known in Roman law, which was restrictive toward the child. They posit that the term "parental responsibility" captures the essence of this relationship and reflects the desired attitude of the parents toward the child as persons responsibly performing tasks in relation to their children. It has been pointed out that this very term is used in the documents of the Council of Europe as well as, for example, in the documents of the academic body, the Commission on European Family Law.[30]

27 Art. 111 § 1 FGC
28 Art. 109 §1 of FGC; see Section 10.
29 Articles 93-113[8] FGC
30 Wysocka-Bar, 2018, pp. 701–722; Sokołowski, 2021, pp. 227–248.

In Poland, this view was most strongly articulated in the content of the draft of the Family Code submitted in 2018 by the then Ombudsman for Children and in its justification.[31] No constitutionally entitled institution took the opportunity to bring it to the Sejm, the Polish Parliament, and it was strongly criticized in the doctrine.[32]

The legal definition of "parental responsibility" found in Art. 2(7) and (8) of the Council Regulation (European Community) No. 2201/2003 of November 27, 2003 reads as follows:

> /…/7. the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child, which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;
> 8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;/…/

Conceived in this way, "parental responsibility" as a category is situated in public law, which makes a significant difference when compared to the civil law construction of legal rights on which the concept of "parental authority" is founded.[33]

The concept of "parental responsibility" used in the draft of the Family Code presented by the Children's Ombudsman[34] defines it "as a task, but also as an attitude to and relationship of the parents with the child," which makes a dogmatic analysis difficult, especially since the cited provision of the draft also states that parental responsibility entails bearing responsibility.[35]

In the justification of the proposal, it was pointed out that the word "responsibility" was used in the sense developed in the personalistic philosophy and ideologically affiliated pedagogy. In the statements made therein, it is easy to notice that they refer to the "responsibility" of the subject "for someone," "for something," "to someone for something," and "to oneself for something." It is understood as the life attitude of someone who will not fail, will be supportive, will not yield to the temptation of egoism but will be patient, merciful, and the like. Thus understood, "responsibility" has an affirmative value, and a responsible person is the one who can be set as an example for others.[36]

Despite the frequently raised proposal to change it, the term "parental authority" has been retained in the FGC because

31 https://brpd.gov.pl/aktualnosci/rpd-prezentuje-nowy-oczekiwany-spolecznie-kodeks-rodzinny (Accessed: August 26, 2021).
32 Nazar, 2019, pp. 7–25; Andrzejewski, 2019, pp. 9–42; Sokołowski, 2020, pp. 205–236; Bugajski, 2021, pp. 105–130.
33 Sokołowski, 2020, p. 215.
34 Art. 21(10).
35 Sokołowski, 2020, p. 215.
36 Wojtyła, 2001; Molesztak, 2007, p. 417–431; Rynio, 2021; Stadniczeńko and Zamelski, 2016, pp. 96–110; Budajczak, 2012, pp. 107–116.

- it has democratic origins: it was introduced at the beginning of the twentieth century to put the position of the mother on an equal footing with that of the father[37];
- it is incorrect to equate parental authority with paternal authority;
- it is widely understood in society;
- the word "authority" is not used to condone aggression toward the child[38];
- there is a danger that the replacement of "parental authority" with "parental responsibility" will lower the parents' legal position in the minds of society; to promote this notion is to support (intentionally or unintentionally) the process aimed at weakening the institution of the family and the family relationship between parents and children[39];
- and above all because
- the character of a legal relationship is determined by its content rather than its name.[40]

Moreover, it should be emphasized that in light of the provisions of the FGC, the desired attitude of parents toward their child amounts precisely to what is referred to in pedagogy and philosophy as responsibility for the child.[41] Their legal position does not imply the parents exercise an authority understood as the right to rule over the child by making arbitrary decisions. Rather, the law obliges parents to behave in a way that is marked by concern for the child. This implies an attitude of service and devotion to the child and a focus on the best interest of the child.[42] A change in terminology would not change the legal position of parents and their children (see Sections 6 and 9.1).

It has also been pointed out that, in the legal language used by lawyers and in the legal language used to formulate legal acts, "responsibility" has—more or less—but always negative connotations. Someone is responsible for causing damage, committing a crime, failing to fulfill an obligation or a misdemeanor; for these reasons, the person will bear responsibility, that is, they will suffer the deserved negative legal consequences (sanctions). A case in point is Article 427 of the Civil Code (henceforth CC) on parents being liable for damage caused by a child (fault in supervision). Opponents of the change argue that the linguistic tradition of using the word "responsibility"—contrary to the intention of the proponents of its introduction—would give a negative normative context to the legal position of the parents toward the child.

At the end, a word of remark may be added, namely that the word "authority" does not evoke enthusiasm among supporters of the existing terminology. However, the strengths of the term "parental authority" can easily be demonstrated against the

37 Sokołowski, 2021, p. 230.
38 Nazar, 2013, pp. 112–113.
39 Sokołowski, 2021, p. 230.
40 Strzebińczyk, 2011, pp. 237–243.
41 Andrzejewski, 2018, pp. 225–242.
42 Andrzejewski,2018, pp. 225–242.

background of the weaknesses of "parental responsibility" and the concerns raised by the anticipated effects that its possible introduction may bring forth. It was worrying to observe that the term was promoted in Poland by circles treating children's rights in a way that antagonizes the world of children with the world of adults. In this context, a proposal was made to introduce the term "parental custody"[43] into the FGC, which captures the essence of the psychological and pedagogical relationship between parents and children better than the term "authority" and, simultaneously, does not evoke the reservations formulated in relation to the concept of "responsibility."

The debate continues.

## 6. Axiological and constitutional grounds for the protection of parental authority

Of particular importance for the protection of the family are those legal norms that are defined as "principles of law." This notion has been developed by the legal doctrine. The "principles of law" should be understood as norms expressing directives of great importance and wide application, which are aimed at the protection of certain values (their validity is strongly axiologically justified) and the realization of important goals. They are sometimes expressed in specific provisions, but more often, the basis for their identification can be found in several different provisions and sometimes also in norms interpreted from these provisions.[44]

The protection of the family and such aspects of family life as maternity, paternity, parenthood, fulfillment of economic and educational needs, a sense of security, and other needs have their foundation in the provisions of the Constitution RP. The normative status of these family "regulations" corresponds to their solid and consistent axiological justification. This is worth emphasizing in view of the evolution of law in many European countries in the direction to erode the family institution, involving, *inter alia*, the position of parents.

All constitutional principles of law concerning the family and relations within this social group mostly reflect ideas previously expressed in international documents setting out the standards for the protection of human rights. Among them, one should point out, in particular, the following principles in the Constitution RP:

1) the principle of the primacy of parents in the child upbringing,[45]
2) the principle of the privacy of family life,[46]

43 Strzebińczyk, 2011, p. 243.
44 Wronkowska, Zieliński, and Ziembiński, 1974; Kordela, 2012.
45 Art. 48.
46 Art. 47.

3) the principle of the good of the child,[47]
4) the principle of the protection of the family,[48]
5) the principle of equal legal status of men and women in family life,[49]
6) the principle of subsidiarity (preamble) in the approach of public institutions to families,
7) the judicial protection of children in their relationship with their parents.[50]

Re. (1), the primacy of parents in raising a child is taken over in the Polish law from documents cataloging human rights, among which the most important is the United Nations Convention on the Rights of the Child (UNCRC), the preamble of which affirms the family. As regards the norms, the rank of parents and their paramount importance for the development of a child are expressed in Art. 5 and Art. 18 as well as, in a certain sense, in Art.8 and Art. 9 (see Sections1, 2.1., 4).

Parents exercising parental authority, an element of which is the child upbringing and guidance, may do so in accordance with their own convictions. In this respect, they have primacy, that is, precedence over the organs of the state that are obliged to support the parents.[51] This primacy of parents is also reflected in Articles 53(3) and 70(3) of the Constitution RP on the prerogative of parents in the religious upbringing of the child and in the choice of education (school). Abusing this primacy by parents to engage in behavior contrary to the good of the child constitutes the basis for the termination of parental authority.[52]

Re. (2), the principle of protection of the privacy of family life[53] safeguards the autonomy of the family vis-à-vis the state and third parties. In an autonomous family, parents pursue their own idea of life, which involves also their child formation. If the parents are supported in their upbringing by various institutions, including public ones (nurseries, kindergartens, schools, day-care centers, organizations such as scouting, and so on), this support is given at the will of the parents who, within the framework of primacy in upbringing and autonomy, have chosen this path. Autonomy, like primacy, does not prevent the state from intervening in the life of the family if, within the family group, the weak are abused, neglected, or not protected.

Re. (3), the principle of the good of the child is the most important principle of family law.[54] The "good of the child" is understood as the optimal configuration of circumstances relating to the child. The configuration of circumstances spans over a long period of time and is conducted with the view of a long-term perspective, which

47 Art. 72.
48 Arts 18, 71.
49 Art. 33(1).
50 Art. 48(2).
51 Borysiak, 2016, pp. 1198–1207; Art. 48(1) of the Constitution RP
52 Długoszewska, 2012, pp. 228–282; Borysiak, 2016, pp. 1207–1211; and Art. 111 § 1a FGC.
53 Wild 2016, pp. 1161–1118.
54 Radwański, 1981, pp. 3–26; Stojanowska, 1979; Ignatowicz and Nazar, 2016, p. 75; Sokołowski, 2020, pp. 209–212; Smyczyński and Andrzejewski, 2020, pp. 26–27.

is rooted in the awareness of creating the child's future (i.e., shaping the child as a person who will soon become a grown-up).[55] This principle requires searching for this optimal configuration of the circumstances concerning the child in every case in which courts and administrative authorities solve legal problems that directly or indirectly concern the child. Its meaning is identical to the concept of "the best interests of the child" used in Article 3 of the UNCRC.

Re. (4),in light of the Constitution RP, a family that is under state protection consists of a married couple, married parents and their children, a single-parent family (parent with a child or with children), as well as a cohabiting couple, provided that it raises children.[56] Forms of cohabitation other than marriage do not offer children the same protection as that afforded to children of married parents. In particular, only a child born to a married woman is presumed to have descended from the mother's husband. If a child is born to an unmarried woman, the father is identified through an acknowledgment of paternity or court filiation proceedings (see Section 7.2.).

The principle of family protection is mainly understood from the point of view of the economic—and also social—impact of the state within the framework of the implementation of social policy goals. By its very nature, social policy[57] is focused on areas requiring intervention; hence, Art. 71 of the Constitution RP mentions support for impoverished, single-parent, and multi-child families. Among numerous laws supporting families in fulfilling their economic needs, the following should be pointed out: Act of November 28, 2002 on family benefits[58]; Act of February 11, 2016 on state aid in the upbringing of children (the so-child support benefit called 500+ Act[59]); Act of December 17, 1998 on pensions from the Social Insurance Fund[60] (especially provisions on survivors' pension); and Act of March 12, 2004 on social assistance and others.[61]

In recent years, the good of the family has been seen particularly through the prism of health protection, including mental health, as well as compulsory vaccinations.

It should be stressed that the social support of the family or its individual members cannot overtake family-legal maintenance obligations as this would be contrary to the constitutional principle of subsidiarity. The state's role is to ensure that these obligations are fulfilled, especially if the ones obliged to meet them are the parents.[62] The relevant regulations are contained in the FGC;[63] the Code of Civil

55 Radwański, 1981, pp. 3–26; Sokołowski, 1987, pp. 54–57; 2013, p. 13; 2020, pp. 207–215; Andrzejewski, 2021b, pp. 29–51; Stojanowska, 1979, 1993, pp. 217–233; Strzebińczyk, 2011, pp. 313–323; Mostowik, 2014, pp. 54–74; Jaros, 2015, pp. 102–116.

56 Ignatowicz and Nazar, 2016, pp. 29-34; Borysiak, 2016, pp. 487–490.

57 Kosek, 2009, pp.1073–1085.

58 Ct. Journal of Laws of 2022, Item 615.

59 Ct. Journal of Laws of 2019, Item 2407 as amended.

60 Ct. Journal of Laws of 2022, Item 504.

61 Ct. Journal of Laws of 2021, Item 2268 as amended.

62 Andrzejewski, 2003, pp. 131–162; Nitecki, 2008, pp. 58–87, 95–102.

63 Art. 27, Art. 60, Arts128–144[1]

Procedure[64] (provisions on enforcement proceedings; hereinafter, the CCP); the Act of September 7, 2007 on assistance to persons entitled to alimony[65]; and Art. 209 of the Criminal Code.[66]

Re. (5), in the context of the subject of the study, the principle of the equal legal status of women and men[67] implies the equality of both parents in relation to their child.[68] The origin of the principle dates back to the adoption of the concept of parental authority as an institution created to equalize the legal status of the father and mother in their role as parents. The Art. 97 § 2of the FGC provides that the parents decide jointly on important matters concerning the child and, in the event of a dispute, a court may be called upon to decide on the matter. What is meant by the term "important matters" is the shaping of the children's outlook, their education, medical treatment, membership in social organizations, participation in competitive sports, place of residence, and others.

If one parent has limited or no parental authority, the other parent has full parental authority.

Re. (6), the principle of subsidiarity[69] is applied in many contexts, one of which is the parent–child relationship. It has a strong influence on the way the principle of family protection is implemented. The supportive state is not overprotective, nor is it liberal in the classical sense; it supports the family in the fulfillment of its functions—in particular in childcare and economic functions—and it cannot replace (relieve) parents in the execution of their tasks. Simultaneously, it is not indifferent to family dysfunctions (life incompetence but also culpable behavior resulting from, e.g., addictions and mismanagement) and difficult crisis situations. Its role is to support the family in overcoming its difficulties to become independent. The principle of subsidiarity is reflected in the slogan "help to self-help"—in other words, leading to the self-reliance of the beneficiary. With reference to the subject of this report, it can be expressed as an order to support the family in fulfilling its childcare, educational, and economic functions, so that it performs these tasks independently in the future.

Re. (7), the principle of the court's protection of the child in relation to their parents and guardians manifests itself, *inter alia*, in

- the prerogative of the courts to rule on cases of limitation and termination of parental rights;[70]
- the obligation to focus on the child in cases of divorce and separation (so that no decision is made against the best interests of the child[71] and so that the

64 Ct. Journal of Laws of 2021, Item 1805 as amended
65 Ct. Journal of Laws of 2021, Item 887 as amended
66 Ct. journal of Laws of 2021, Item 2345 as amended
67 Sobczyk, 2009, pp. 1277–1291; Borysiak, 2016, pp.843–867.
68 Mostowik, 2014, pp. 27–28.
69 Millon-Delsol, 1995; Dylus, 1995, pp. 52–61.
70 Art 48(2) of the Constitution RP.
71 Art. 56 § 2 FGC.

good of the child is a criterion for the decision on parental authority, contact, and maintenance);
- referring divorcing spouses to mediation;
- exercising judicial control over the implementation of child property management and decisions on the limitation of parental authority;[72]
- monitoring the exercise of the child's legal custody;[73]
- competence to support parents in the exercise of parental authority at their request.[74]

Among the numerous issues concerning the functioning of courts dealing with family cases, it should be pointed out, in particular, that the child's effective protection requires the cooperation of the judges with institutions and organizations active in the environment, which, on the one hand, signal disturbing situations threatening the child and, on the other hand, execute court decisions. This issue is underestimated by judges and neglected during judicial training.

## 7. Parents

### *7.1. The mother*

The mother is the woman who has given birth to the child.[75] This regulation was adopted in 2008 to end the disputes over the operation of surrogacy services.[76] Sometimes, after the child was born, the surrogates did not intend to deliver the child to the persons who had ordered the service of carrying the baby and giving birth. Until 2008, surrogacy agreements were invalid on the grounds that they were contrary to the principles of social co-existence.[77] Statutory surrogacy agreements were banned under penalty of the law in 2015.[78] It was considered reprehensible to treat a child as an object of a contract and to objectify a surrogate, who is required by contract not to establish an emotional bond with the child, as this is not indifferent to her psyche and is also harmful to the psyche of the child to be born. Apart from the maternity of a child born by surrogacy, the question of determining the mother is not controversial. Actions for the determination of maternity may be taken if a birth certificate

72 Arts. 101–105 FGC; Art. 109 § 2 and 3 FGC.
73 Arts 165–168 FGC.
74 Art. 100 FGC.
75 Art. $61^9$ FGC.
76 Mostowik, 2019.
77 Nesterowicz, 2007, pp. 257–263.
78 Article 28 (1) and (2) of June 25, 2015 Act on infertility treatment. Ct. Journal of Laws of 2020, Item 442.

has been drafted for a child born of parents who are unknown or if the maternity of a woman entered in the child's birth certificate as their mother has been denied.[79] If, on the other hand, a woman who did not give birth to the child is entered in the child's birth certificate as their mother, then the denial of the motherhood of that woman may be requested.[80]

A woman who has adopted a child is also a mother; upon adoption, the woman who previously enjoyed the status ceases to be a mother (in the formal sense).

### *7.2. Father*

The father of a child is identified through the woman who gave birth to the child. In the still typical situation where a married woman gives birth to a child, the child's father is presumed to be her husband.[81] This presumption does not apply when a child is born by a married woman who has been separated from her husband for 300 days, and it may be rebutted in a lawsuit for the denial of paternity by "proving that the mother's husband is not the child's father".[82] The mother's husband cannot bring an action for the denial of paternity if the child was born as a result of a medically induced procreation procedure to which he consented.[83]

An action for the denial of paternity of the mother's husband may be brought by that husband, the child's mother, the child, and the public prosecutor. The child may do so after reaching the age of majority within one year from the day on which they learned that they did not descend from their mother's husband. After the child's death, the denial of paternity is not admissible, but the descendants may request it if the child dies after the action has been taken.[84]

If the child was born to an unmarried woman, then the determination of the paternity may be conducted based on an acknowledgment of paternity (when the child's parents agree on the father's person and want the child's legal situation to reflect the biological reality) or on a court's determination of paternity.

Acknowledgment of paternity is made when the man from whom the child descends declares, before the head of the registry office, that he is the child's father, and the child's mother confirms it.[85] The declaration will not be accepted if the acknowledgment is inadmissible (e.g., because the child was born to a married woman) or if doubts arise concerning the truthfulness of the declarations (e.g., owing to the different skin color of the man and the child).[86]

79 Art. $61^{10}$ § 1 FGC.
80 Art. $61^{12}$ § 1 FGC.
81 Art. 62 FGC.
82 Art. 67 FGC.
83 Art. 67 FGC.
84 Art. $70^{1}$ FGC.
85 Art. 73 FGC.
86 Sylwestrzak, 2020, pp. 19–28.

According to Art. 75 of the FGC paternity of a child conceived but not born may be acknowledged; however, paternity may not be acknowledged after the child has reached the age of majority.[87]

Acknowledgment of paternity may be declared invalid by the man who has acknowledged paternity, the child's mother, the child, and the public prosecutor. The court shall declare an acknowledgment of paternity invalid if the man who has acknowledged paternity is not the father; after the child's death, the determination of the ineffectiveness of such acknowledgment of paternity is admissible if the child dies after the proceedings have been initiated (Art. 83 FGC).

The acknowledgment of paternity of a child born through medically assisted procreation takes place from the day of their birth, when a man declares that he will be the father of a child conceived in that way and born within two years from the submission of that declaration. If the child is born after the mother's marriage to a man other than the one who has acknowledged paternity, the presumption of paternity of the mother's husband shall not apply.

Determination of paternity by a court may be requested by the child, the child's mother, the child's alleged father, and the public prosecutor. The plaintiff must prove that the mother and the alleged father had intercourse during the conception period.

In the case of establishing the child's filiation, the court may decide to suspend, limit, or terminate the parental authority of one or both parents.

## 8. The child under parental authority

### *8.1. General remarks*

When a question about the legal definition of a person in relation to a child is asked, the thought usually turns to the end of childhood (i.e., the age of majority). This is an important threshold, but the legal significance of being a child is not limited to it being under parental authority. In the context of inheritance law, a deceased person's descendants inherit from them, in the first place, their children, who, sometimes, have already grown up. In addition, some adult children who have passed the age of majority are still economically dependent on their parents and seek their maintenance.

A child is a first-degree relative to their parents. A child's origin is defined by their birth certificate.[88] An important role in the civil status of a child is played by court decisions concerning, for example, the determination (denial) of paternity,

87 Art. 75 §2 FGC.

88 Articles 52–62 of the Act of November 28, 2014, Law on civil status certificates, i.e., Journal of Laws of 2021, Item 709.

adoption (dissolution of adoption), as well as acknowledgment of paternity and the decision declaring the acknowledgment invalid. The court decision may have the effect of changing the child's civil status by changing the person who is formally their parent. A person has a single, indivisible civil status.[89]

### *8.2. The competence of the parents in relation to the conceived child*

The question of the beginning of childhood is connected with that about the legal status of the conceived child (*nasciturus*). According to numerous legal regulations, a child in this phase of life is a human being (the preamble to the UNCRC, Art. 2 of the Act on the Ombudsman for Children[90]; the jurisprudence of the Constitutional Tribunal of the Republic of Poland concerning Art. 38 of the Constitution RP ensuring the legal protection of life to every human being[91]). The preamble to the UNCRC states that it was enacted to protect the child "both before and after birth." The word "child" was used—in other words, a human being and not, for example, a fetus or pregnancy, which could be interpreted in any way. Article 6 of the UNCRC also consistently obliges states to protect the child's life.

Under Art. 8 of the CC a child conceived and unborn has legal capacity on the condition that they are born alive.[92] The property interests of the unborn child are protected, among others, on the grounds of inheritance law[93] and contract law.[94] Property and personal interests are protected, in particular, under family law[95] (e.g., Articles 141 and 142 FGC on the obligation of maintenance toward the mother during pregnancy as a consequence of the acknowledgment of the child or of the substantiation of the father) but also under administrative and criminal law.

The bone of contention in the doctrine is the legal nature of the parents' actions undertaken as a consequence of waiting for the child to be born: is it an exercise of parental authority? During a child's fetal life, their parents (especially if married or cohabiting) make several decisions directly affecting the child. They make various purchases, sometimes adapt the home to accommodate the needs of that child after birth, and—when necessary—they decide on medical procedures to be performed on the unborn child.[96]

The opponents of classifying these actions as the exercise of parental authority point to Art. 182 of the FGC concerning the appointment of a guardian for the

89 Kasprzyk, 2018, pp. 131–134, 136–140.
90 Ct. Journal of Laws of 2020, Item 141.
91 Judgment of the Constitutional Tribunal of October22, 2020, sig. 1/20, OTK ZU A/2021, Item 4; Judgment of the Constitutional Tribunal, sig. 26/96, OTK 1997, Item 19.
92 Bierć, 2018, pp. 379–384; Smyczyński, 2011, pp. 213–229.
93 Art. 927 § 2 CC.
94 Art. $446^1$ CC.
95 Mazurkiewicz, 1985.
96 Haberko, 2010, pp. 111–182.

conceived child to represent the child's interests in court proceedings to ascertain the acquisition of inheritance. They argue that if the parents exercised parental authority over the unborn child, then the appointment of a *curator ventris* would be unnecessary because, as legal representatives, they could conduct these actions.[97] In response, supporters of describing these actions as the exercise of parental authority argue that, in many other cases where parents exercise parental authority, it is also necessary to appoint a guardian for their children,[98] and this does not undermine parental authority.

Another argument to quote in this context is that it is up to the parents—and especially the mother—to request termination of pregnancy, in other words, to end the child's life. In specific situations, this is a legal action, though the exercise of parental authority includes only those actions that are in the interest (for the good) of the child, and the deprivation of their life is not such an action. In Poland, abortion is possible if conception was a consequence of a criminal act or if the pregnancy poses a serious threat to the woman's health and life.[99] However, the rule accepted in Polish law is that punishment is inflicted upon those who perform the procedure (to a doctor, an assistant, or an instigator) but not upon the woman. The above actions in which abortion is legal are exempted from the prohibition.

*De lege lata,* the dispute is unresolvable. A change in the regulations should be proposed to strengthen the protection of the family, parents, and child.

### *8.3. Coming of age*

When a child reaches the age of majority, parental authority over that child ends. The status of adult is also acquired by a woman who, after reaching the age of 16, has entered into marriage with the authorization of the guardianship court.[100] This regulation raises doubts as it is a form of pressure on a minor to get married, and it is the only way for a woman to exercise parental authority after the birth of a child until she reaches the age of majority. As such, this solution raises doubts from the point of view of the principle of freedom to marry (Art. 16 of the Universal Declaration of Human Rights).[101] It has been suggested that a court should be able to grant a pregnant minor the status of an adult based on a psychological and pedagogical opinion confirming that she is mentally and socially mature.[102]

97 Smyczyński, 2018, pp. 390–391.

98 Arts. 98–99 FGC.

99 Act 4a of January 7,1993 Act on family planning, protection of the human fetus, and the admissibility of abortion. Ct. Journal of Laws of 1993, Item 78 as amended.

100 Art. 10 § 1 FGC.

101 Cf. also Article 1, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage opened for signatures in New York on December10, 1962. Journal of Laws of 1965, No.9, Item 53.

102 Andrzejewski, 2014, pp. 377–380.

### *8.4. Legal guardianship of a grown-up child*

When a child reaches the age of majority, parental authority terminates. If—owing to a mental disability—an adult child cannot function independently, they may become totally or partially incapacitated. In this case, the person is placed under guardianship or wardship, and a guardian or probation officer is appointed. As a rule, the parents are designated for this function, but the final decision rests with the guardianship court.

### *8.5. The age of the child and the extent of their participation in the legal sphere*

The scope of a child's autonomy, participation in the legal sphere, and legal accountability for their behavior increases with age. Upon reaching the age of 13, a child attains their limited capacity to perform acts in law, and upon reaching the age of 18, they are granted full capacity to perform acts in law and the status of adult, which results in the termination of their parents' parental authority. The age of 13 marks the beginning of the child's legal liability on the grounds of the Act on Juvenile Delinquency Proceedings[103] dated October 26, 1982 for every act characterized by features of a punishable act, and not only for manifestations of demoralization.[104]

At the age of 15, a minor may not only enter into an employment contract but may also incur criminal liability for the most serious crimes as an adult, if this is supported by a negative assessment of their personality.[105] After reaching the age of 17, a minor is treated by criminal law as an adult being fully liable for committing a crime.

Under Art. 10 § 1 of the FGC, when a woman reaches the age of 16, she can marry.

A minor, upon reaching the age of 16, grants their consent to the use of medical procedures on them (in addition to the consent of the parents, arguable cases are resolved by the guardianship court).[106]

103 Ct. Journal of Laws of 2018, Item 696.

104 As of July 2022, when the article was finished, an Act on Support and Resocialization of Juveniles was passed by the Polish Parliament, but it has not yet been enforced and has not appeared in the Journal of Laws.

105 Art. 10 § 2 Criminal Code.

106 Haberko, 2020, pp. 22–39.

# 9. Rights and obligations of parents in the exercise of parental authority and in the exercise of the duty and right of contact

## *9.1. Child custody*

According to Art. 87 of the FGC parents and children have a duty to respect and support each other, which excludes the use of violence. Therefore, under Art. 96[1] of the FGC parents and persons having care or custody of a child are prohibited from using corporal punishment.[107] The obligation to show respect, furthermore, presupposes the upbringing of the child in dialogue with them, but this is a pedagogical issue that is impossible to regulate by law (nor is it necessary to do so). The desirable pedagogical vector of the parents' behavior foregrounds a dialogue and listening to the child's opinion before making decisions on major issues concerning their person and property. This, obviously, applies to situations where it is possible owing to the child's mental development, health, and degree of maturity. Decisions should—as far as possible—consider the child's reasonable wishes (Art. 95 §4 FGC; compare Art. 72 of the Constitution RP Art. 12 UNCRC). On the other hand, in matters in which the child can make decisions and declarations of will independently, they should listen to the opinions and recommendations of the parents formulated for the child's good (Art. 95 § 2 FGC).[108]

Nowadays, the custody of the child—including all decisions related to guidance and upbringing—also involves previously unknown situations, such as the child's access to the tools of cyberspace (social networks, e-mail, computer games, and so on), which is crucial from the point of view of upbringing. These issues are intertwined with the child's right to privacy.[109] When raising a child, parents may not infringe upon the child's rights and well-being, but they cannot be denied the possibility of restricting their access to Internet portals, social media, and so on; this is not only an educational measure but sometimes a necessary form of countering addiction.

The scope of custody of a child includes the parents' right to set the direction of their child's education. Parents can choose a school with a particular educational or curricular profile.[110] As members of the school community, they can influence the school's educational profile (through their involvement in school boards or parent councils), but they have no influence on the content of the curriculum. Failure of a child to comply with educational obligations may result in the imposition of

107 Helios and Jedlecka, 2019.
108 Zajączkowska-Burtowy, 2021, pp. 942–946; Gajda, 2020, pp. 787–791.
109 Art. 15 UNCRC.
110 Królikowski and Szczucki, 2016, pp. 1588–1591.

administrative sanctions on parents. Sometimes, in practice, this becomes the basis for restricting parental authority.

The obligation imposed on children to obey their parents[111] should be read in the context of the directive "dialogue and persuasion rather than order." This obligation refers to parental orders, which are an exercise of parental authority rather than its abuse.[112] Parental authority may only be exercised through behavior aimed at protecting the child's good.[113] This behavior should be characterized by a concern to respect the child's dignity and rights[114] and, therefore, should be an expression of concern for the child's physical and spiritual development. Its aim is to adequately prepare the child for adulthood.[115]

In the exercise of their authority, parents have autonomy, which does not preclude court interference to ensure the child's protection.[116]

The provisions of the FGC (as well as the provisions of the UNCRC) do not place the child above other members of the family but within it—the child is a member of the family group, whose feature is supposed to be mutual support (solidarity of the family group). This educationally correct approach is reflected in the child's obligation to not only show respect and obedience to their parents but also, if receiving an income from their own work while living with their parents, to contribute to the family's maintenance[117] and use the net income from their property for their maintenance and upbringing as well as for the legitimate needs of their siblings or the family.[118] Moreover, a child who is dependent on their parents and lives with them is obliged to help them in the common household (Art. 91 FGC). This regulation is sometimes treated in practice as justification for an excessive burden of work put on children in poor rural households.

When parents do not have full legal capacity and, therefore, do not exercise parental authority because they have not reached the age of majority or because they are legally incapacitated, they have the right to manage the day-to-day supervision and upbringing of the child. The aim here is to give them a chance to build a relationship with the child and—especially in the case of minors—to prepare them for the moment when they will have parental responsibility. In the latter situation, the court may, however, decide otherwise if the child's good requires a restriction or prohibition of the influence of the child's parents (Art. 96 § 2 FGC) —for example, in the case of aggressiveness of the incapacitated parent caused by a serious mental illness or immaturity of the child's minor parents.[119]

111 Art. 95 §2 FGC.
112 Art. 111 §1 FGC.
113 Art. 95 § 3FGC.
114 Art. 95 § 1 FGC.
115 Art. 95 § 2 FGC.
116 Art. 109 §1 and Art. 111 §1 and 1a FGC.
117 Art. 91 FGC.
118 Art. 103 FGC.
119 Urbańska-Łukaszewicz, 2021, pp. 177–196.

### *9.2. Custody of children's property*

The issue of the protection of property interests of minors is becoming increasingly important owing to an increasing number of children with property. The management of the child's property is the prerogative of parents exercising parental authority, who are obliged to exercise it with due diligence.[120] Its only limitation is the necessity to obtain the court's consent to a legal transaction exceeding the scope of ordinary property management. Under Art. 101 §3 FGC Parents may not themselves consent to the performance of such an act by a child, and a legal action performed without the required court consent is invalid.[121]

Furthermore, the donor or testator may stipulate that the items transferred to the child will not be administered by the parents. If they do not appoint an administrator, the management of these objects is conducted by a guardian appointed by the guardianship court.[122]

Before parents make a decision in relation to the child's property, they should consult the idea with the child if they can understand the issue.[123] The obligation to protect the child's interests against imprudent actions by the parents in relation to the child's assets lies with the court, which may do as follows:

- order the parents to draw up an inventory of the property and to notify the court about major changes;
- determine the value of the disposition regarding the movable property, money, and securities, which the child or the parents may make each year without the permission of the guardianship court;[124]
- limit the parental authority of the parents with respect to the management of the child's property and appoint a guardian to perform these management duties.[125]

After the management ceases, "the parents are obliged to submit to the child or to his or her legal representative the property of the child which has been managed by them." In addition, if the child or their legal representative so requests within one year of the termination of the management, "the parents are obliged to submit the account from the management of the property. However, this request shall not relate to income from property received during the exercise of the parental authority".[126]

120 Art.101 §1 FGC.
121 Ignatowicz and Nazar, 2016, pp. 521–523.
122 Art.102 FGC.
123 Art. 95 FGC.
124 Art. 104 FGC.
125 Art. 109 §3 FGC.
126 Art. 105 FGC.

### *9.3. Statutory representation*

Apart from exceptional situations indicated in the regulations, a child cannot, for natural reasons, function independently in legal transactions. The duty to act for and on behalf of the child is performed by the parents who are their statutory representatives under their parental authority.[127] If neither parent exercises parental authority, then the statutory representative of the child is the guardian. In the typical situation where both parents exercise parental authority, "each of them may act independently as the child's legal representative." There are exceptions to this rule: a parent may not represent the child in legal transactions between children under parental authority as well as in legal transactions between the child and the other parent or the other parent's spouse (with the exception of acceptance of a donation and proceedings for alimony.[128] If the parents are unable to represent the child, the court appoints a curator (Art. 99 §1 FGC).[129]

The role of a curator who represents the child may be vested with an attorney at law or a legal adviser if the person has special knowledge of child-related issues or has completed training in child representation, children's rights, or children's needs.[130] In less complex cases, the child may also be represented in the capacity of a curator by another person with higher legal education, provided that the person has knowledge of their needs. Exceptionally, except in criminal proceedings, a person without higher legal education may be appointed as the curator.

### *9.4. Contacts with children*

A consequence of the exercise of parental authority is that parents stay with their children (i.e., they have unrestricted daily contact with them). The issue of parental contact with children is sometimes treated as separate from the exercise of parental authority. For example, it is argued that parents have a right to contact their children although they do not exercise parental authority in the case of minors or parents who have been deprived of their parental authority. On the other hand, it is impossible not to take into account at least the functional links between the exercise of parental authority and the right to contact, since the neglect of contact with the child, as well as the exercise of contact in a manner that is demoralizing (with features of violence, etc.) or threatening for the child (and their harmonious emotional development) may lead to the restriction of parental authority or even its withdrawal.[131] Similarly, obstruction of contact with the child by the other parent is ground for the restriction of parental authority.[132] It may also result in a change of the child's place of residence if the child lives with the parent who obstructs contact. Interference in the sphere of

127 Art. 98 § 1 FGC.
128 Art. 98 §2 FGC.
129 Wicherek, 2021, pp. 981–994.
130 Art. 99[1] FGC.
131 Mostowik, 2013, pp. 35–45; 2015, pp. 257–270; Zajączkowska-Burtowy, 2020, pp. 173–276.
132 Art. 109 § 1 FGC.

parental authority may also be a result of preventing contact—with the child—of the child's siblings, grandparents, relatives in a direct line (stepfather/mother) as well as other persons, if they have had custody of the child for a long time.[133]

Therefore, when discussing the issue of parental authority, one cannot ignore the issue of contact between parents and their child as both a right and a duty of the parents as well as a right and a duty of the child.[134] This regulation is a consequence of the injunction to show respect to each other. Contact includes staying with the child (visits, meetings, and taking the child away from their place of permanent residence); direct communication; and correspondence, including by electronic means.

The issue of contact becomes more important when a conflict arises between separated parents (following divorce or separation, or breakdown of cohabitation) or when the foster family makes contact with the child difficult.

If the child lives with one of the parents, it is desirable for the parents to reach an agreement on how the other parent will maintain contact with the child or, if necessary, on the modification of previous arrangements. The involvement of the court in solving such problems demonstrates a difficult emotional and educational situation for the child. Maintaining contact is a high priority; if contact is not properly maintained or not maintained at all, the guardianship court may, in particular, refer the parents to institutions or professionals providing family therapy, counseling, or other appropriate assistance to the family and indicate how the implementation of such orders should be monitored.[135] In an extreme situation, the guardianship court may completely forbid the parents to have contact with the child.[136]

As in many other family law situations, the guardianship court—in compliance with the principle of the child's good—may also change its earlier decision on contact with the child.[137]

## 10. Court interference in the exercise of parental authority

### *10.1. Introductory remarks*

The legal framework of parental authority also consists of provisions on court interference in the exercise of the authority. As mentioned above, the family is autonomous in relation to the state, and parents have primacy in the upbringing of their children; however, the state may and sometimes does have an obligation to interfere

133 Art. 113[6] FGC.
134 Art. 113 FGC; cf. Art. 9(3) UNCRC.
135 Art. 113[4] FGC; cf. Art. 109 §2 point 2 FGC.
136 Arts. 113[2] and 113[3] FGC.
137 Art. 113[5] FGC.

in the family's functioning. The courts have the exclusive competence to rule on these two issues.[138] There are two forms of such interference, namely the limitation of parental authority and its withdrawal.

### *10.2. Limitation of parental authority*

Parental authority can be restricted if the child's good is at risk. This applies both to situations in which the child's good has been violated and to situations in which this has not yet happened but is highly likely to happen and should be prevented. In such situations, it is the duty of the guardianship court to issue an appropriate order. The aim of the limitation of parental authority is to correct a family situation that is threatening for the child. It is up to the court to choose how to react.[139] This requires the judge to have the fullest possible knowledge of the case, including its non-legal aspects (psychological, pedagogical, social, medical, and other). What this implies is that the judge must not rely solely on their intuition concerning these areas of knowledge.

Remedies are listed in Art. 109 §2, 3, and 4 FGC. The catalog of remedies indicated in Art. 109 §2 FGC is not exhaustive, but it begins with the mildest, persuasive measures, such as obliging parents and the minor to work with a family assistant, directing the child to a day-care center, directing the parents to an institution or a specialist providing family therapy, counseling, or other appropriate help, or indicating the way of controlling the execution of orders. The catalog goes on to list more decisive measures (restricting parents in their role to that of guardians or establishing the supervision of the court superintendent over the exercise of parental authority). Finally, the harshest restriction of parental authority involves placing a minor in foster care (foster family, family home, or care and educational center). When placing a child in foster custody, the court appoints a particular foster family or the institution where the child is to stay[140] and notifies the organizational unit for family support and the foster care system. The latter is to provide support to the child's family and inform the court about the situation in that family. The court analyzes the situation at least once every six months and may restore parental authority to the parents, change the form of restriction, terminate it, or leave the legal *status quo* while waiting for further effects of the actions supporting the parents.

The corrective mechanism adopted in Art. 109 of the FGC can be seen as a kind of preventive measure to avoid abuse and negligence, which could lead to the termination of parental authority.

138 Art. 48(2) of the Constitution.

139 Smyczyński and Andrzejewski, 2020, p. 285; Ignatowicz and Nazar, 2016, pp. 533–536; Słyk, 2017, pp. 1288–1291; Długoszewska, 2012, pp. 175–186.

140 Resolution of the Composition of the Seven Judges of the Supreme Court of November 14, 2014, CZP 65/14, Ruling of the Supreme Court Civil Chamber 2015, Item 38. 8.

### *10.3. Deprivation of parental authority*

This institution has two forms—an obligatory one, when a court is obliged to deprive the parents of parental authority upon the emergence of grounds specified by law, and an optional one, when the court has the option to deprive the parents of parental authority upon the emergence of grounds specified by law.

The court is obliged to deprive parents of parental authority if

- parental authority cannot be exercised because of a permanent obstacle;
- the parents abuse parental authority (what they do is not an exercise of their right, and such behavior does not deserve protection but a strong reaction from the law as it is illegal and often exhibits features of a criminal offense, such as physical, psychological, sexual, and other violence); or
- the parents are blatantly neglecting their duties toward their child.

Deprivation of parental authority is optional if

- the child has been placed in foster care on the grounds of a decision on the limitation of parental authority;
- the parents have been provided with assistance to enable the child to return to their family;
- despite the support, the reasons for imposing the limitation of parental authority on the parents in the form of placing the child in foster custody have not been eliminated (returning the child to their parents would entail a renewed threat to the child's good), in particular when the parents are permanently uninterested in the child (do not communicate with them, do not show interest in contacting persons exercising foster custody, etc.).[141]

The grounds for both forms of deprivation of parental authority place a moral burden on the parents and reflect badly on their parental competence. Unlike the restriction of parental authority, the purpose of deprivation is not to improve the situation in the child's family and return the child to their family; of course, this may happen, but the function of the termination of parental authority is mainly to protect the child from the consequences of the parents' reprehensible behavior. However, if the reasons for the termination of parental authority cease to exist, the guardianship court may restore parental authority. The court may also refuse to restore parental authority, in particular, if the child is integrated into a foster environment. The restoration of parental authority is excluded if, as a consequence of the termination of parental authority, the child is adopted.

Both forms of deprivation of parental authority may be decided with regard to one or both parents.

The good of the child may constitute grounds for reviewing the judgment on parental authority and the exercise of that authority.

141 Długoszewska, 2012, pp. 236–262; Słyk, 2017, pp. 1300–1305.

### *10.4. Obligation to notify the court*

The court may have the right to intervene in the sphere of parental authority after it has been notified of the child's difficult situation. Any person who knows an event justifying the initiation of proceedings shall be obliged to inform the guardianship court.[142] This obligation rests primarily with "*civil registry offices, courts, prosecutors, notaries, bailiffs, local government and government administration bodies, police, educational institutions, social guardians, and organizations and establishments involved in the care of children or mentally ill persons*." Employees of the abovementioned bodies are public officials, which means that failure to comply with the said obligation may entail labor law sanctions for them.

## 11. Other modifications to the exercise of parental authority

### *11.1. Suspension of parental authority*

The court may order a suspension of parental authority if there is a short-term obstacle to its exercise.[143] Since the person concerned still has the right but does not exercise it for a short period of time, the suspension should not be regarded as interference in the sphere of this right (in this case, parental authority). In addition, it should be noted that the grounds for suspension are such obstacles that are expected not to last long, and when they pass, the parents will again exercise full parental authority.

### *11.2. Placement of a child in foster care upon parents' request*

Placement of a child in foster care on the basis of a motion filed by the parents[144] is not a form of interference in parental authority. The placement is conducted by a chief official of local government in Poland. During the stay of a child in foster care, the parents have full parental authority. The guardianship court notified of the situation may issue a decision on the child's stay in foster care based on the aforementioned Art. 100 of the FGC (without interfering in the sphere of parental authority), but it may also issue a decision on the child's stay in foster care and concomitant limitation of parental authority (from that moment on, it will be the court's interference in that sphere).[145]

142 Art. 572 CCP.
143 Art. 110 FGC.
144 Art. 100 FGC.
145 Prusinowska-Marek, 2018, pp. 189–224.

### *11.3. Removal of a child by a social worker*

A constitutional controversy may be raised in relation to Art. 12a of the Act on Counteracting Family Violence,[146] which authorizes a social worker, "in the case of direct threat to a child's life or health," to take the child away from the family and place them with a relative who does not live with the family, in a foster family, or in a care institution. The essence of the social worker's action (taking the child away) is interference with parental authority, and Art. 48(2) of the Constitution RP provides for the exclusive competence of the court in this respect. This decision is taken by a social worker together with a police officer, a doctor, a paramedic, or a nurse; in its wake, the guardianship court is immediately notified.

### *11.4. Parental authority of a fully incapacitated child*

If a regional court decides that a child is completely incapacitated (this is possible once the child has reached the age of 13), then the parents are subject to the same restrictions as guardians,[147] meaning that they are subject to the supervision of the guardianship court, and this solution is justified by the need to correct the parents' behavior if they have difficulties in meeting their obligations due to their child's mental illness or intellectual disability (see Section 12).

### *11.5. Termination of parental authority as a consequence of parent incapacitation*

As a consequence of the long-term serious mental illness of a parent, which prevents them from exercising parental authority, the courts should not order a termination of parental authority. Such a judgment sends a clear message about the parents' reprehensible behavior; to ensure the legal protection of the child and, simultaneously, to make a judgment that is fair to the sick parent, it would be preferable to partially or fully incapacitate the parent. This would result in the termination of parental authority without blaming them for their reprehensible behavior and the need to establish legal custody and appointment of a guardian for the parent and the child.

146 Ct. Journal of Laws of 2021, Item 1249.
147 Art. 108 FGC.

## 12. Persons replacing parents (adopters, foster family, legal guardians)

Various situations require extraordinary solutions should parents not be able to exercise parental authority. The law has provisions that allow the substitution of parents in the performance of their duties toward the child—in particular, to exercise custody of the child in various forms. Such situations can arise as a result of the following:

- the necessity to provide support to parents when they fail to adequately fulfill their care and upbringing function (restriction of parental authority by placing children in foster care—Art. 109 §2 point 5 FGC);
- the need to protect the child against negative parental influence (Art. 111 §1 and §1a FGC—deprivation of parental authority)—in other words, as a consequence of long-term inability to exercise parental authority, blatant negligence, abuse of parental authority, passivity toward the child placed in foster custody; under these circumstances, it becomes necessary to establish the child's legal custody and place the child in foster care or refer them to an adoptive family;
- the parents' request for supporting them in exercising parental authority by temporary placement of a child in foster care;[148]
- short-term inability to perform parental duties (suspension of parental authority, Art. 110 FGC), which entails the necessity to establish legal custody and place the child in foster care; however, without the possibility of adoption, as suspension assumes that the parents will soon return to their duties toward the child;
- the death of both parents or their incapacitation, which entails the necessity to establish legal custody of the child; it is also possible to place the child in foster care or to adopt them;
- court decision on placing a child in foster care under the Act on Juvenile Delinquency Proceedings of October 28, 1982[149], which is caused by the child's demoralization and by the parents' failure to raise the child properly;
- the parents' consent to the adoption of their child and their placement in an adoptive family.[150]

In some cases, this substitution of parents is limited in time (a child may remain in foster care until they reach the age of majority, usually for several months to a few years); in others (adoption), it is unlimited in time.

148 Art. 100 FGC.
149 Ct. Journal of Laws of 2018, Item 696.
150 Art. 119-119[1] FGC.

When in foster care, a child establishes a formal relationship only with the persons exercising that care; however, it is not a family-legal bond. No formal relationship is established between the child and the members of the foster family. As a result of adoption, on the other hand, the child is fully integrated into the adopters' family, becoming a grandson/granddaughter to their parents' parents, a brother/sister to their other children, and so on.

The law provides procedures and criteria for the selection of suitable persons to whom custody of a child may be entrusted for the purposes of (1) adoption,[151] (2) foster care,[152] (3) legal custody,[153] and (4) performing the tasks of an educator in care and educational institutions.[154]

Re. (1),a person with full legal capacity and suitably older than the adopted person may adopt a child, provided that "*his/her personal qualifications justify the conviction that he or she will duly fulfill the duties of an adopter, and has a certificate of qualification, good reputation, and a certificate of completion of training course organized by the adoption center/…/*" (Art. $114^1$ FGC).[155] The key role in finding a suitable candidate for a child to be adopted is played by the adoption center (Chapter V of the Act of June 9, 2011 on Family Support and Foster Care System).[156]

Re. (2), the function of a foster family and running a family children's home can be assigned to persons with full legal capacity to act and who can guarantee that they will fulfill this function properly. In addition, these persons must not have limited parental authority over their own children, and this authority has never been withdrawn from them. They must fulfill the obligation to pay the ordered maintenance, have adequate motivation (psychological examination), housing conditions allowing the child to satisfy their individual needs, and proper health condition (medical certificate). Moreover, a person who has been legally convicted of an intentional crime cannot be a foster family. These conditions should be fulfilled throughout the whole period of foster care.[157] The Supreme Court issued an *in abstracto* decision that, if it is in the child's best interest, it is permissible to establish a foster family with a person who does not fulfill all the conditions set out by law.[158] In specific cases, the courts apply the thought expressed by the Supreme Court too broadly.[159]

Re. (3),legal guardianship may be exercised by a person who provides grounds to assume that they will duly fulfill the duties of a guardian, has full legal capacity, has not been deprived of public rights (honorable criminal sanction) or parental

151 Art. 114 FGC.
152 Art. 42 of the Act on Family Support and the System of Foster Care.
153 Art. 148 FGC.
154 Art. 98 of the Act on Family Support and the System of Foster Care.
155 Łukasiewicz, 2019, pp. 85–14.
156 Nitecki, 2016, pp. 688–768.
157 Andrzejewski, 2021b, pp. 30–32; Nitecki, 2016, pp. 240–249.
158 Judgment of the Supreme Court of November 24, 2016, II CA 1/16, Rulings of the Civil Division of the Supreme Court of 2017, no. 7–8, Item 90.
159 Andrzejewski, 2021, pp. 29–50.

authority, nor has been convicted of an offense against sexual freedom or morality, of an intentional offense of violence against any person, or an offense committed to the detriment of or in cooperation with a minor. In addition, this person has not been prohibited from conducting activities related to the upbringing, treatment, education or care of minors, and so on. A guardian shall be appointed by the court, ant the indicated person is obliged to undertake the guardianship.[160]

Re. (4),the Act on Support for the Family and the System of Foster Care defines the conditions for employing (in in-care and educational institutions) educators, pedagogues, psychologists, therapists, child minders, social workers, and persons managing such institutions. In addition to describing the required level and field of education, it has indicated that a person who has ever been deprived of parental authority, whose authority is suspended or limited, who has maintenance debts, or who has been convicted of an intentional crime or an intentional fiscal crime is prohibited from working with children. Their ability to work in the institution must be confirmed by a medical certificate.

## 13. Parental authority in the case of divorce (separation, parents living apart)

In a divorce judgment, the court is obliged to decide on parental authority over a minor child of the parties, on contact between the child and the parent who will not live with the child after the divorce, and on the method of maintenance of the child by the parents.[161]

To create a situation as favorable as possible for the child despite the divorce of their parents, institutions of mediation and parental agreement have been established. Their task is to address issues related to the situation after divorce;[162] they are a sign of a shift in divorce proceedings from the adversarial principle to conciliation.

Mediation can be ordered by the court of its own motion or at the request of the parties. It is voluntary, which has the effect that the court will not find out about the parties' conduct during the mediation but only about what they jointly agreed on. When pronouncing a divorce, the court is obliged to take into account what the parties have jointly agreed (a written agreement between the spouses) concerning the exercise of parental authority, as well as contact with the child after the divorce and maintenance, if such arrangements are consistent with the child's best interests. If the court finds that the arrangements are not in the child's best interests (for

160 Kociucki, 2017, pp. 1641–1777.
161 Art. 58 §1 FGC.
162 Antoszek and Zajączkowska, 2018, pp. 233–254; Pawliczak, 2017, pp. 735–742.

example, if the parties agree on low maintenance "in exchange" for token contact), or if the parties fail to reach an agreement, it is the court that will rule on these matters.

When deciding on custody and contact, the court is obliged to ensure that "the right of the child to be brought up by both parents" is realized after divorce. In the last two decades, this directive has often been implemented by deciding on alternate custody. This is a formally acceptable way of exercising parental authority by the parents of a child to whom the court has granted full parental authority and has deemed that their relationship allows the court to assume that the two parents will jointly and loyally raise the child, who will alternate between living with one parent and then with the other parent for similar periods of time. This solution has the disadvantage that it is based on a promise to create an educational community by persons who, in a divorce case, must prove a complete and permanent breakdown of their marriage, including the termination of the emotional bond between them (Art. 56 §1 FGC)[163]; a lack of a permanent place of residence for the child; the dependence of the educational results on many factors beyond the parents' control, such as the influence of the parents' new partners; the difference in their economic status; the evolution of their views on the child's upbringing; the differences in their approach to the problems encountered; the negative consequences of the lack of joint discussions and agreements concerning the child; and many others.

The decision on alternate custody is the result of a change in men's approach to issues connected with custody. It is also, undoubtedly, a form of competition with women for equal treatment by the courts and the consequence of both spouses having lived in a toxic marriage. In such cases, alternate custody becomes more of a battlefield between adults than a sign of concern for the child's good.

However, the idea has strong supporters.[164] The law is evolving toward strengthening the tendency to award alternate custody by providing for it explicitly in Articles $582^1$ §4, $598^{22}$, and $756^2$ of the CCP as well as in Art. 26 §2 CC, which delegates the determination of the child's place of residence to the guardianship court if the child does not reside permanently with either parent.

In addition to deciding on alternate custody, a frequently adopted formula is to give both parents full parental authority but to entrust one parent with direct custody. The latter parent is obliged to inform the other on important matters concerning the child (upbringing, education, health), in which the parents should be jointly involved.

The decision on the exercise of parental authority influences the decision on how to use the joint home of the spouses for the period during which they will live there together. The court is obliged to take into account the needs of the children and of the spouse to whom it entrusts the exercise of direct parental authority.

163 Sokołowski, 2013a, pp. 455–460.
164 Emery, 2019.

Until recently, it was the court's duty to decide on contact with the child after a divorce, but since 2015, the parties can request that the court should not rule on it. Given the numerous cases where contact with the other parent has been restricted, the court should be obliged to rule on this issue, unless the parties reach an agreement in line with the child's best interests.

Since the issue of divorce has been dominated by a conflict between adults, a suggestion has been made to provide the child with a representative to protect their interests in these proceedings. Another proposal is to increase, in the proceedings, the role of experts (psychologists, educators) who would help the court (lawyer) choose the most beneficial solution for the child. Their participation is essential in the case of a child's hearing (outside the courtroom), in which not only judges should participate.

All matters concerning the child that are settled in the divorce judgment may be modified according to the criterion that things should be done in the child's best interests. Apart from the modification of the amount of maintenance costs, this may concern the manner in which contact is maintained (e.g., as a result of the child's growing independence), the exercise of parental authority (if it is taken away or restricted), and the child's place of residence (if the circumstances determining this issue change, e.g., a serious mental disorder of the parent with whom the child lives). For the child, the best way of making the abovementioned modifications is through an agreement between the parents, of which they would inform the family court. If the parents fail to reach an agreement, in all of the abovementioned cases decided by a regional court in a divorce (separation) judgment, it is the family court that issues the modifications, acting *ex officio* or at the request of the person concerned.

## 14. The status of a child not subject to parental authority

The guardianship court is obliged to appoint a legal guardian for a child over whom neither parent exercises parental authority.[165] This applies when the child's parents are deceased, unknown, or have been deprived of parental authority; their parental authority has been terminated by incapacitation; or their parental authority has been suspended.[166] If at least one of the parents has even limited parental authority, it is not possible to establish legal custody.

Legal guardianship is a substitute for parental authority—in other words, the guardian appointed by the court exercises custody over the child's person and property and is also their legal representative. The most important difference between guardianship and parental authority is that the guardian is supervised by the

165 Arts. 145 et seq. FGC; see Section 12.
166 Kociucki, 2017, pp. 1641–1777.

court, which may summon the guardian to give explanations on matters concerning the child, and the guardian must also obtain the court's permission when making decisions on all important matters concerning the ward (concerning both their person and property).

## 15. Conclusions *de lege ferenda*

(1) In proceedings before the court in family matters, it is necessary to move away from the adversarial approach (antagonizing parties or participants) to conciliatory solutions. This is important in cases of divorce, separation, and maintenance establishment.

(2) The legitimacy of deciding on alternate custody should be considered after a period of parental cooperation following a divorce judgment (minimum 6 months). During the divorce proceedings, the parties demonstrate a complete and permanent breakdown of their relationship, *inter alia*, in the spiritual (emotional) sphere, which is incompatible with proving that they form a parental upbringing community.

(3) The court hearing of a child should always take place in the presence of a psychologist.

(4) It should be mandatory to obtain a psychological opinion when deciding on alternate custody.

(5) There are grounds to support the proposal for the child to be protected in divorce proceedings (representative) as the parents involved in a dispute fail to recognize the needs of the child and do not adequately protect them.

(6) Parents who make it difficult for a child to contact their relatives—especially those who do not live with the child—threaten the good of the child. In such circumstances, the courts should consider limiting their parental authority (participation in therapy, supervision by a probation officer) and consider the possibility of the child living with the other parent.

(7) A foster family making it difficult or impossible for the parents and other persons close to the ward to have contact with the ward provides grounds for its dissolution.

(8) Training courses for family judges should include teaching cooperation with institutions that operate in the community to support families (local government, non-governmental, and associated with churches and religious associations).

(9) The guardianship court should have the authority to grant the status of an adult to a pregnant minor if—according to a psychological and educational evaluation—she is mature enough to exercise parental authority over the child after delivery.

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Chapter VI

# Serbia: Parent–Child Relationships in Serbian Family Law

Gordana Kovaček Stanić

## 1. Introduction

In the historical context of Serbia, before World War II, the Civil Code of the Kingdom of Serbia of 1844 regulated family issues. The basic institution concerning parent–child relations was paternal authority (power; "*očinska vlast*"). We consider paternal authority to comprise a set of rights and powers that belong to both parents jointly, but the holder of which is the father, as well as those prerogatives given exclusively to the father. These are the right to represent the child, to give marriage permission, and to manage the child's assets as their legal repersentative. The rule for resolving a disagreement between parents concerning the child's issue states that the father's word prevails.[1]

After World War II, in the former Yugoslavia (nowdays Serbia), parents became equal in parent–child relations. Parental equality was introduced with the Yugoslav Constitution of 1946 based on the general principle of gender equality.

However, in some European countries, the father's role was predominant until the 1980s. For example, in Italy, the father had parental power until 1975.[2] In Greece,

> … until 1983, the only custodial power we had was paternal power exercised by the father, while the mother looked after the child in accordance with the instructions

1 Marković, 1920, p. 194.
2 Foyer, 1974, p. 45.

Gordana Kovaček Stanić (2022) Serbia: Parent–Child Relationships in Serbian Family Law. In: Paweł Sobczyk (ed.) *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates,* pp. 187–216. Miskolc–Budapest, Central European Academic Publishing.

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and decisions of the father. In other words, the child was under the authority of the father.[3]

The evolution in the relations between parents and children has an impact on the changes in legal terminology. In the legal history of ancient times, specifically Roman law, the term *patria potestas* existed, and paternal authority (power) was used, for example, in the Civil Code of the Kingdom of Serbia of 1844.

In the contemporary family law of European legal systems, the terminology differs. One group of legal systems adopts the term "parental authority" —for example, in the French *Code Civil* ("*autorite parentale*") and the Italian *Codice Civile* ("*potestà dei genitori*"). Some terms have, in their evolution, given priority to the child and to parental responsibility or parental care, as in the United Kingdom's Children Act, which addresses "parental responsibility." In some legal terms, "parental care" is used, such as in the German Civil Code ("*sorgerecht*"), in the Croatian Family Act ("*roditeljska skrb*"), and in the Slovenian Family Code ("*starševska skrb*").

For the harmonization of family law in Europe, of great importance are the Principles of European Family Law Regarding Parental Responsibilities,[4] which use the term "parental responsibility." In international law, in the Hague Convention of October 19, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility, and Measures for the Protection of Children, the term "parental responsibility" is also used.[5] In the Brisel II and Brisel II *bis* Regulations, the same term is used, but in the plural form—"parental responsibilities."[6]

The Serbian Family Act adopts the term "parental right" ("*roditeljsko pravo*"). This term is redefined as parental rights are derived from the parents' duties and exist only to the extent necessary for the protection of the child's personality, rights, and interests.[7] Term "parental responsibility" is not accepted in the Serbian Family Act as it could be confused with liability for damage as, in the Serbian language, these are same terms ("*odgovornost*").

The research on parental responsibility raises different factual and legal questions in the contemporary family law. One of the most important issues is the exercise of parental responsibility after the divorce (or if the parents do not live together), especially the form of joint exercise of parental responsibility. The *pro et contra* of the child's alternate residence is certainly the most intriguing current issue. In addition, the current factual and legal problem is parental decision-making on issues that significantly influence the child's life.

3 Kotzabassi, 2011, p. 800.

4 Boele-Woelki et al. (2007) Available at http://www.ceflonline.net/ (Reprinted September 21, 2012).

5 Available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

6 Council Regulation (EC) No. 2201/2003 of November 27, 2003 concerning the jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters of parental responsibility [2003] OJ L 338/1 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33194.

7 Art. 67.

## 2. Constitutional foundations for the protection of parental responsibility

The Constitution, as a legal source in family law, defines principles that must be respected in family law in general. In Serbia the Constitution from 2006 is in force.[8] Principles in connection with family law are stipulated in the second part of the Constitution on "Human and minority rights and freedoms."

The gender equality principle is stipulated in the Constitution in Art. 15.[9] A more concrete version of this principle is that of equality between mother and father as parents according to Art. 65/1 and between male and female children. This principle was introduced into the domestic legal system through the Constitution of the Federal People's Republic of Yugoslavia in 1946. The mother and father have the same rights and obligations with respect to their children, and male and female children have the same rights in the family and all other relations. Historically, in domestic law prior to World War II, the mother had an inferior status with respect to the father (pursuant to the institute of paternal authority), while female children had a considerably narrower set of rights than male ones (pursuant to the Civil Code of the Kingdom of Serbia of 1844, female children did not have any inheritance rights). The Constitution especially stipulates under Art. 62/3 the equality between women and men in connection with concluding marriage, its duration, and divorce. Furthermore, a principle explicitly stipulates that all direct or indirect discrimination based on any grounds (including gender) shall be prohibited.[10] On the other hand, affirmative action is not considered discrimination.

The principle of special protection of the family, mother, single parent, and child is stipulated in the Constitution in Art. 66. Mothers shall be given special support and protection before and after childbirth, and this protection shall be provided for children without parental care as well as for those with mental or physical disabilities. Children under 15 years of age may not be employed, nor may children under 18 years of age be employed at jobs detrimental to their health or morals. The protection of the family should include issues of what the best way to protect the family is but also when, namely whether the protection and development of healthy family relationships should be addressed even before the family is formed. In that sense, counseling or conversations with competent persons can be of special importance for spouses or future spouses as well as for non-marital partners. The question is whether the principle of special protection of the family is realized, in practice, in a sufficient manner. It could be said that the protection

8 The Constitution of the Republic of Serbia was adopted in 2006. *Official Gazatte of the Republic of Serbia* 98/2006.

9 In addition to gender, all direct or indirect discrimination on other grounds—particularly on race, national origin, social origin, birth, religion, political or other opinion, economic status, culture, language, age, and mental or physical disability shall also be prohibited (Art. 21/3).

10 Art. 21.

is given mostly to families that cannot satisfy their functions according to the contemporary standards.

The principle of equating children born out of wedlock and those born in marriage is stipulated in the Constitution in Art. 64/4. This principle was introduced into the domestic legal system through the Constitution of the Federal People's Republic of Yugoslavia of 1946. The equality of children born out of wedlock and those born in marriage was not full at first, and a difference existed depending on whether fatherhood was established voluntarily or against the father's will. Thus, a child born out of wedlock entered into a legal relationship with the mother and her relatives, while, if the father acknowledged the child, they also entered into a relationship with him and his relatives. However, if fatherhood was established through court proceedings, the child only entered into a legal relationship with the father and not his relatives. In jurisprudence, there existed a position by which the child acquired rights and obligations with respect to the father's relatives if the father accepted the child following a court decision, and full equality was introduced with the Constitution of the Republic of Yugoslavia of 1974.[11] Today, children born out of wedlock have the same rights and obligations as those born in marriage, and they enter into a legal relationship with the mother and her relatives as well as with the father and his relatives. A difference exists, however, in the manner in which fatherhood is established, which is important since the legal relationship between the father and the child is formed as a consequence of previously established fatherhood. Marital fatherhood is established based on the legal presumption that the mother's husband is the father of the child (*pater is est quem nuptiae demonstrat*), while non-marital fatherhood is established with acknowledgment or through court proceedings. In other words, marital fatherhood is established *ex lege*, while non-marital fatherhood must be established with the acknowledgment of the father or through court proceedings. Historically, non-marital children were discriminated against, and they entered into a legal relationship primarily with the mother.[12]

The principle of equating adoption with parentage is stipulated in the Constitution in Art. 6/5, which provides that an adopted child has equal rights with respect to its adopters as a child does toward its parents, while the adopters have the same legal status as the parents.

The principle of free decision of childbirth is stipulated in the Constitution in Art. 63: "*Everyone shall have the freedom to decide whether they shall procreate or not. The Republic of Serbia shall encourage the parents to decide to have children and assist them in this matter.*"

11 Constitution of the Republic of Yugoslavia, *Official Journal of the Socialist Federal Republic of Yugoslavia* 9/1974.

12 The Civil Code of the Kingdom of Serbia of 1844 contains the following provisions: *"A child born out of wedlock or bastard, the mother is obliged, equally as with a child born in marriage, for its upbringing and to follow down the path of faith and law and happiness"* (Para. 129).

This principle was introduced for the first time by the Constitution of the Republic of Yugoslavia of 1974. Article 191 provides for the free decision on childbirth as a human right that could be restricted only on the ground of health protection.

The principle of free decision on childbirth in the contemporary society is exercised according to the advancement of medicine and technology (artificial reproduction technology). Further, the Serbian Constitution explicitly prohibits the cloning of human beings.[13]

The principle of the child's rights was introduced in the Constitution for the first time in 2006. It is stipulated that a child shall enjoy human rights suitable to their age and mental maturity; that every child shall have the right to a personal name and entry in the registry of births, the right to learn about its ancestry, and the right to preserve their own identity. According to Art. 64 child shall be protected from psychological, physical, economic, and any other form of exploitation or abuse.

The principle of the rights and duties of parents stipulates that they shall have the right and duty to the maintenance, upbringing, and education of their children in which they shall be equal. All or individual rights may be revoked from one or both parents only by the ruling of the court if this is in the best interests of the child, in accordance with the law.[14] The court is a competent organ for these procedures, which means that all other institutions are excluded (e.g., center for social work). This solution is in accordance with international conventions and reflects the extreme legal and factual importance of parental rights; thus, only the court could decide on their full or partial deprivation.

In connection with the children's upbringing and education, the provision on the promotion of respect for diversity is important. In Art. 48, it is stated: "The Republic of Serbia shall promote understanding, recognition and respect of diversity arising from specific ethnic, cultural, linguistic or religious identity of its citizens through measures applied in education, culture and public information."

The principle of the right to education is stipulated in Art. 71:

> Everyone shall have the right to education. Primary education is mandatory and free, whereas secondary education is free. All citizens shall have access under equal conditions to higher education. The Republic of Serbia shall provide for free tertiary education to successful and talented students of lower economic status in accordance with the law.

The Constitutional Court of Serbia was called to assess the constitutionality of the provisions of the Family Act in a period of 9 years (2007–2016) and, in no case, determined their unconstitutionality. One decision involves the content of parental rights; the Constitutional Court confirmed the constitutionality of

13 Art. 24/3.
14 Art. 65.

the provisions of the Family Act on the obligation of parents to maintain their adult children who are incapable of work and do not have sufficient means of subsistence.[15]

One decision of the Constitutional Court is worth mentioning in the context of parental responsibility as it involves a case of so-called "missing babies":

The decision of the Constitutional Court in the Case of G. R. and draws attention on the fact that although the allegations and claims of the applicant in this case are substantially similar to the assessments of the European Court of Human Rights in the Case of Zorica Jovanovic v. Sebia, the facts and circumstances established by the Constitutional Court in the constitutional appeal Case of G. R. are significantly different from the facts established by the European Court in the Case of Zorica Jovanovic v. Serbia… Contrary to the findings of facts by the European Court of Human Rights in the judgment Zorica Jovanovic v. Serbia (it is noted that the body of the applicant's son was never released to the applicant or her family, the cause of death was never determined, the applicant was never provided with an autopsy report or informed of when and where her son had allegedly been buried, and his death was never officially recorded) from the documentation that has been filed with the Constitutional Court follows that the constitutional complainant could not have had any doubts regarding the report on the death of his children or uncertainty about the "crucial factual or legal issues," i.e., credible information as to what really happened to his children. The Constitutional Court also found that all the neatly guided medical protocols with data on the health status of twins, undertaken diagnostic and therapeutic procedures, anamnesis and discharge lists were delivered to the complainant. Unfortunately, despite all the efforts of doctors to save two premature infants, who were born with serious deficits in their basic functions, a fatal outcome was inevitable. The Constitutional Court also found that the facts of birth and death of both children were properly recorded in the Birth and Death Registers, that the parents did not respond to the call of the medical institution to bury their children, and that there is a credible evidence that funeral was carried out in the organization and at the expense of the Institute for neonatology, where children were treated and where a lethal outcome was performed. Therefore, the foregoing considerations were sufficient to enable the Constitutional Court to conclude that allegations of the complainant that he had no credible information about what happened to his children were unfounded in regard to allegations of violation of the right to respect for family life under Art. 8 of the European Convention on Human Rights.[16]

15 Draškić, 2017a, pp. 48–51.
16 Draškić, 2017b, p. 232.

# 3. Protection of parental responsibility in the system of legal sources

## *3.1. Domestic legal sources for the protection of parental responsibility*

The main legal source concerning family law in Serbia is the Family Act 2005, which regulates parental rights and all legal relations between parents and children. Some acts that regulate other fields of law have provisions protecting the family.[17]

The law on labor of 2005[18] stipulates the right to maternity leave and childcare leave. The former lasts for 3 months after the child is born, and the latter lasts for an additional 9 months. Maternity leave applies mostly to the mothers, while the father can take it only if mother cannot care for the child; on the contrary, childcare leave is available for mothers and fathers in the same way, depending of the parents' agreement. It is also possible for the parents to share childcare leave. The law on labor stimulates the birth of a third and fourth child as maternity leave and childcare leave last for 2 years instead of the 1 year allocated for the first and second child.

The law on biomedical assisted fertilization[19] stipulates different procedures (technologies) available to men and women to help them become parents (not including surrogate motherhood). From 2020, the procedures for stimulation are free of charge and limitless, and three embryo transfers for a woman until she reaches 43 years of age are free of charge as well.[20] For the second child, two stimulation procedures and one embryo transfer are free of charge.

The law on financial support for a family with children[21] stipulates different allowances, such as parental allowance and child allowance. Parental allowance is a sum that every parent receives as financial help when the child is born. This allowance is progressive and depends on the number of the children. The social status of parents does not have any impact on receiving it, which means that every parent is entitled to it. For the first child, parental allowance is 100,000 din as a lump sum; for the second child, it is 240,000 din paid in 24 monthly payments; for the third child, it is 1,440,000 din paid in 120 monthly payments; and for the fourth child, it is 2,160,000 din paid in 120 monthly payments. Thus, this is a birth-rate stimulative measure. Child allowance is a payment for the parents of lower economic status; this law stipulates payments for the maternity leave and childcare leave in accordance with law on labor.

The law on retirement and disability insurance[22] favors the birth of a third child stipulating that an insured's seniority—here, that of a woman who gave birth to her third child—is to be accrued during the 2-year maternal leave as a special type of

17 Family Act, *Official Gazette of Serbia* No. 18/05 with amendments, hereinafter FA.
18 *Official Gazette of Serbia* no. 24/05.
19 *Official Gazette of Serbia* no. 40/17.
20 State Instructions for Conducting Biomedical Assisted Fertilization no. 06/20.
21 *Official Gazette of Serbia* no. 113/17 and 50/18.
22 *Official Gazette of Serbia* no. 34/03, 84/04, 85/05.

seniority.[23] Changes and amendments to this law in 2005 extended the rights of the children without both parents to receive not only one parent's pension but two separate family pensions.[24] This measure does not directly affect family planning but is certainly significant as a measure that protects a child.

The law on preventing domestic violence was enacted in 2016.[25] Domestic violence is broadly defined to include physical, sexual, psychological, or economic violence. Victims of domestic violence have the right to information, the right to free legal aid, and the right to an individual plan of protection and support. The law also regulates data records on cases of domestic violence and data protection, and it prescribes that state authorities and institutions are obliged to act in a timely manner and to provide each victim with legal, psychosocial, and other types of aid for recovery, empowerment, and self-reliance. These institutions are the police, prosecution offices, courts, and centers for social work. In addition, relevant information and help is provided by other institutions dealing with childcare, social protection, education, and health as well as local bodies for gender equality. In addition, a coordination and support body must be established for each of the 58 basic prosecution offices covering a territorial area, with the aim to prepare an individual plan for protection and victim's support. The implementation of the law is monitored by the Council for the Prevention of Domestic Violence.

### *3.2. International legal sources for the protection of parental responsibility*

International law is of great importance at the national level for the protection of parental responsibility. According to the Serbian Constitution, treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. Ratified international treaties must be in accordance with the Constitution[26]:

For parental responsibility, the most important conventions are as follows: the Convention on the Rights of a Child[27]; the *Convention* on the Civil Aspects of *International* Child *Abduction*[28]; the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children[29]; the Convention for the Protection of Human Rights and Fundamental Freedoms[30]; the Council of Europe *Convention* on Preventing and Combatting Violence against Women and Domestic Violence[31]; the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[32]; the Worst

23 Art. 60.
24 Art. 73/1.
25 *Official Gazette of Serbia* no. 94/16; https://www.equalitylaw.eu/downloads/4028-serbia-law-on-combatting-domestic-violence-pdf-132-kb
26 Art. 16/2.
27 Ratified: *Official Journal of Yugoslavia* no. 5/90.
28 Ratified: *Official Journal of Yugoslavia* no. 7/91.
29 Ratified: *Official Journal of Yugoslavia* no. 1/01.
30 Ratified: *Official Journal of Serbia and Montenegro* no. 9/03.
31 Ratified: *Official Gazette of Serbia* no. 12/13.
32 Ratified: *Official Gazette of Serbia* no. 1/10.

Forms of Child Labor Convention no. 182[33]; Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.[34] In 2009, Serbia signed, but did not ratify, the European Convention on the Adoption of 1967, which was revised in 2008.

The Convention on the Rights of a Child regulates, in the first place, a child's rights. The Convention has specific articles that regulate parental care; for instance, in Article 7, it is stated: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents." In Article 9, it is stated: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child…" In Article 18, is stated: "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child…" The Serbian Family Act is in complete accordance with the Convention.

The Convention on the Civil Aspects of International Child Abduction is very important in contemporary times. The frequency of child abduction cases is a consequence of modern lifestyles, mobility, moving from one state to another, and marriages between persons with different nationalities or habitual residences. On one hand, it could be said that these phenomena are positive consequences of globalization. On the other hand, the increasing divorce rates, including the divorce of marriages between persons of different origins, nationalities, and habitual residences or domiciles, influence the relationships between parents and their children. The increasing divorce rates and child abduction are some of the negative consequences of globalization. Removal or retention shall be deemed as wrongful under domestic family law in all situations when an agreement between the parents on the change of domicile (habitual residence) is absent; thus, this constitutes child abduction.[35] It could be said that the

33 Ratified: *Official Journal of Yugoslavia* no. 1/01.

34 Ratified: *Official Gazette of Serbia* no. 12/13.

35 In one case, (Matejić v. Skinner) British attorneys (of both the mother and the father) approached the Faculty of Law in Novi Sad and myself to give an expert's opinion on the matter of alleged Convention breach. The case was about a minor girl born in 1999 in London in a nonmarital cohabitation of a Serbian citizen—father, Z. M. —and a British citizen—mother, R.D.S. —who both moved to Belgrade after the child's birth. After the breakup of the nonmarital cohabitation, the girl was entrusted to the mother's care by the decree of the guardianship authority in Belgrade. The mother departed to the United Kingdom with her daughter, stayed there and enrolled the daughter into school. The father filed a petition to the court deeming that the mother had taken the child wrongfully to the United Kingdom as he had not consented to the child's change of residence, implying that the Convention on child abduction had been breached. The Court in London applied Serbian law. My view was that the Convention on abduction had been breached since the father, according to the-then applicable law—the Marriage and Family Relations Act (as well as according to now applicable Family Act)—had the right to consensually decide with the mother on issues of significant influence related to the child, and one of such issues is moving abroad. On the basis of the given opinion, the court in London ruled that the Convention had been breached. Kovaček Stanić, 2014b, pp. 283–297.

regulations in Serbia are very strict in this matter. In a situation when both parents are alive, one parent is authorized to make an independent decision on the change of domicile (habitual residence) only when the other parent is fully or partially deprived of their parental right. The partial deprivation of parental right should include the deprivation of the right to decide on issues of significant influence in a child's life (Art. 82/4 Family Act).[36] If the parental right is exercised jointly, the parents jointly and mutually agree on all issues related to the child. If one of the parents exercises their parental rights independently, the other parent is authorized to decide jointly and mutually with the parent who exercises parental rights on the issues of significant influence in the child's life. Issues of significant influence, in line with the Family Act, are considered to be, in particular, the education of the child, conducting major medical procedures on a child, the change of the child's domicile, and the disposal of child's assets of major value (Art. 78/3,4). The available means, which could result in a no wrongful change of the child's domicile in spite of the lack of parental consent, is a special procedure for the protection of the child's rights that could be initiated in such case, a procedure in which a court would have to assess whether the change of a child's domicile would be in the child's best interest (Art. 261-263). The other means is the deprivation of parental right, but this is applicable only if the parent unconscionably exercises his/her parental rights or abuses his/her rights or grossly neglects them.

The most important decisions of the European Court of Human Rights involving Serbia, in connection of the violation of Art 8 (violation of family life), are *V.A. M. v. Serbia* no. 39177/05; 13.3.2007; *Tomić v. Serbia* no. 25959/06 26.6.2007; *Jevremović v. Serbia* no. 3150/05. 17.7.2007; *Damnjanović v. Serbia* no. 5222/07. 18.11.2008; *Felbab v. Serbia* no. 14011/07. 14.4. 2009; *Krivošej v. Serbia* no. 42559/08. 13.10. 2010; *Jovanović v. Serbia* no. 21794/08 26.3.201; *Boljević v. Serbia* no. 47443/14 16.06.2020. In these cases, the issue of court proceedings is the parent–child relationship. In three, it is the right to visitation (*V.A. M. v. Serbia, Felbab v. Serbia, Krivošej v. Serbia*); in two cases, it is entrusting the child to parental care (*Tomić v. Serbia, Damnjanović v. Serbia*); in two, establishing paternity for the father of a child born out of wedlock (*Jevremović v. Serbia, Boljević v. Serbia*); also, in one case, it is the "missing babies" (*Jovanović v. Serbia*).

## 4. The concept of a parent

The definitions of a parent (mother and father) in jurisprudence and doctrine have a legal ground in the Family Act.

For a long time, in legal history, there has been little question of who was the mother of a child. The ancient Roman law principle of *mater semper certa est etiam*

36 Kovaček Stanić, 2010, pp. 147–161.

*si vulgo conceperit* was broadly accepted,[37] and the mother was the woman who gave birth to the child. In contemporary family law, statutory provisions often establish or define motherhood, and this is so in Serbian family law. Art. 42 of the Family Act contains a provision explicitly stating that a woman who gave birth to a child is to be considered the child's mother. If the woman who gave birth to a child is not entered in the register of births as the child's mother, her maternity may be established by a final court judgment. Under Art. 43 the child and the woman claiming to be the child's mother have a right to the establishment of maternity.

Maternity can also be contested.[38] The child, the woman entered in the register of births as the child's mother, the woman claiming to be the mother (if she, by the same action, requests the establishment of her maternity) and the man considered to be the father of the child have the right to contest maternity. A child may initiate action to contest maternity regardless of the time limit, and a woman entered in the register of births as the child's mother may initiate action to contest her maternity within 1 year from the day on which she learned that she had not given birth to that child and no later than 10 years from the birth of the child. A woman who claims to be a child's mother may initiate action to contest the maternity of the woman entered in the register of births as the child's mother within 1 year from the day on which she had given birth to that child and no later than 10 years from the birth of the child. A man considered to be the child's father under this Act may initiate action to contest maternity within 1 year from the day on which he learned that the woman entered in the register of births as the child's mother had not given birth to the child and no later than 10 years from the birth of the child.[39] There are restrictions to contesting maternity. Maternity may not be contested if established by a final court judgment, after the adoption of the child, and after the death of the child.[40]

The Family Act regulates the situation of a child conceived through biomedical assistance, stating that their mother is the woman who gave birth to them. According to Art. 57 if a child is conceived through biomedical assistance by a donated ovum, the maternity of the woman who donated the ovum may not be established.

A common rule that regulates who is considered the father of the child born in a marriage states that the husband of the child's mother is to be considered the father.[41] In Serbian law, the husband of the child's mother is to be considered the father

37 *Corpus Juris Civilis,* Dig. 2.4.5 (Theodor Mommsen & Alan Watson, eds., 1985): "*Quia semper certa est, etiam si vulgo conceperit.*"

38 This procedure is necessary in cases when the wrong data of a child's mother have been entered into the register, in case of default or substitution of children, or if somebody else's health identification card has been used in a delivery hospital. In a number of cases, false documents are used in the hospital because the mother does not have medical insurance and is not aware of the fact that giving birth is free, regardless of insurance. Although, in such cases, there is no dispute as to maternity, court proceedings must be initiated so this can be properly established.

39 Art. 250.

40 Art. 44.

41 *Corpus Juris Civilis,* Dig. 2.4.5 (Theodor Mommsen & Alan Watson, eds., 1985): *"Pater vero is est, quem nuptiae demonstrant"*.

if the child was born within 300 days after the termination of marriage, but only if the marriage was terminated owing to the husband's death and if the mother did not end another marriage in the same period. The husband from the new marriage of the child's mother is to be considered the father of a child born during that marriage, regardless of how short a time may have elapsed between the termination of one marriage and the commencement of the other.[42]

Under Art. 45/4 if a child was born out of wedlock, paternity must be established by acknowledgment or by a court judgment. A person who has reached 16 years of age may acknowledge paternity,[43] which may be acknowledged only if the child is alive at the moment of acknowledgment. Acknowledgment of paternity before childbirth is effective, but only if the child is born alive.[44] The acknowledgment takes effect only if the mother and, under some circumstances, the child consent to the father's acknowledgment. A mother and child can consent if they are 16 years of age.[45] If the mother or the child cannot give consent, the consent of either one is sufficient;[46] if neither the mother nor the child can give their consent, the child's guardian can give consent to the acknowledgment of paternity with prior consent of the guardianship authority;[47] thus, the acknowledgment is not a unilateral act. These provisions vividly illustrate the principle of family autonomy as the acknowledgment depends almost entirely on the will of the parties concerned. If the man acknowledges his paternity and the mother consents (and the child is older than 16), this man is considered the father, and the biological truth is not examined. Action to establish paternity by a court judgment may initiate a child regardless of the time limit. A mother may initiate action to establish paternity within 1 year from the day of learning that the man she considers to be the child's father did not acknowledge paternity and no later than 10 years from the birth of the child. A man claiming to be a child's father may initiate action to establish his paternity within 1 year from the day of learning that the mother or the child's guardian did not consent to his acknowledgment of paternity and no later than 10 years from the birth of the child.[48]

In Serbian law, paternity can be contested. In the case of a child born within wedlock, another man can claim to be the father and seek to rebut the presumption of the husband's paternity; indeed, such a challenge can be brought by the mother—or by the child, if over a certain age—and also by the husband himself. A child may initiate action to contest paternity regardless of the time limit. A mother may initiate action to contest paternity of the man considered to be the child's father within 1 year from the day of learning that he is not the father and no later than 10 years from the birth of the child. A mother's husband may initiate action to contest his paternity

42 Art. 45/1-3.
43 Art. 46.
44 Art. 47 FA.
45 Art. 48/1, 49/1.
46 Art. 48/2, 49/2.
47 Art. 50.
48 Art. 251.

within 1 year from the day of learning that he is not the child's father and no later than 10 years from the birth of the child. A man claiming to be a child's father may initiate action to contest paternity of the man considered to be the child's father within 1 year from the day of learning that he is the child's father and no later than 10 years from the birth of the child.[49]

Challenges to paternity can also apply to children born out of wedlock. Only a man claiming to be a child's father may initiate action to contest the paternity of the man considered to be the child's father on the grounds of the acknowledgment. The mother, the father, and the child cannot contest paternity based on acknowledgment as they gave their consent to acknowledgment. Under Art. 56/4 if the paternity of the child born out of wedlock is established by a court decision, it cannot be contested at all. The provisions introduced in the Family Act of 2005, which state that the child has no time limit to initiate the proceedings to establish and contest maternity and paternity, are in favor of the child's right to know their biological origin. In these proceedings, the court is obliged to determine the biological truth, which may be based on DNA and other biomedical evidence. This provision is in favor of the child's right to know their biological origin as well.

The Family Act regulates the situation of the child conceived through biomedical assistance, stating that the mother's husband (or the mother's partner) is to be considered the father or of a child conceived through biomedical assistance, provided that he has granted written consent to the procedure of biomedically assisted fertilization. The paternity of the man considered to be the child's father may not be contested, except if the child was not conceived through the procedure of biomedically assisted fertilization. According to Art. 58 if a child was conceived through biomedical assistance by donated semen, the paternity of the man who donated the semen may not be established.

## 5. The concept of a child

Serbian family law does not explicitly define the term "child." Thus, in jurisprudence and doctrine, the definition of the UN Convention on the Rights of a Child is accepted. The definition of the child is stipulated in Art. 1 of this Convention: "*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.*"

In Serbian family law, majority is achieved at the age of 18, whereby the above definition is suitable.[50] With majority, one obtains full legal capacity, which can also be obtained prior to the age of 18 (emancipation) in two ways—both connected to

49 Art. 252.
50 Art. 11 Family Act.

family relations and restricted to the minimum age of 16. The first is to enter into marriage, while the other is parenthood.[51] If the minor obtains full legal capacity through marriage, this capacity remains intact even if, for example, the marriage ends prior to the person turning 18. The Family Act of 2005 introduces the possibility for a minor parent to obtain full legal capacity, which advances their position. By obtaining full legal capacity, the minor parent obtains the right and obligation to independently care for themselves and their child. It is the court that gives permission for marriage to a minor and decides if the minor parent should obtain full legal capacity based on parenthood. The proceeding is non-contentious. The minor who wants to get married is required to have the physical and mental maturity necessary to exercise the rights and obligations of marriage and to independently care for themselves and their rights and interests.[52]

One of the current problems in Serbian legal practice is the issue of "missing babies." The specific act on this issue, namely the "Law on establishing facts on the status of newborn children suspiciously missing from maternity hospitals in the Republic of Serbia," was adopted in 2020. The aim of this Act is to establish facts for finding the truth on the status of newborn children suspiciously missing from maternity hospitals in the Republic of Serbia and to exercise the obligation of the Republic of Serbia arising from the judgment of the European Court for Human Rights in the case Jovanović v. Serbia (application no 21794/09; Art. 2).[53]

## 6. Principles of parental responsibility

The Family Act stipulates principles on the family, adopting constitutional principles but defining some others. One of the most important principles is that of the child's best interest.[54] This principle was explicitly formulated in the Family Act of 2005 for the first time, where it was stated that "*everyone is under the obligation to act in the best interest of the child in all activities related to the child*." However, statutory texts, including the Family Act of 2005, do not offer a definition of the best interest of the child principle (legal standard), whereby the content is dependent on interpretations in jurisprudence. In Article 3 of the UN Convention on the Rights of the Child, it is provided that the best interests of the child should be of primary importance in all activities having to do with them, regardless of which institutions or organs are undertaking such activities.

51 Art. 11/2,3.
52 Kovaček Stanić, 2009, p. 599.
53 Zakon o utvrđivanju činjenica o statusu novorođene dece za koju se sumnja da su nestala iz porodilišta u Republici Srbiji, *Official Gazette of Serbia* no. 18/20.
54 Art. 6/1.

It is worth mentioning one of the explanations of the best interests of the child principle existing in Swedish law theory: the child, from birth until the age of majority (18 years) should develop from the initial full dependence into a person who is independent, mature, and responsible in a personal, economic, and social sense. Behavior and actions that are in favor of this kind of development are in the best interests of the child, and those that prevent this kind of development are against such best interests.[55]

Another principle is that of the special protection of the family by the state.[56] The principle of protection of the child from neglect and from physical, sexual, and emotional abuse, as well as from every form of exploitation, is also a duty of the state.[57] Protection from domestic violence was, for the first time, governed by the Family Act of 2005.[58]

The principle of equating of children born out of wedlock and those born in marriage is stipulated in Art. 6/4. As explained earlier, children born out of wedlock have the same rights and obligations as those born in marriage in contemporary Serbian family law.

The state is obliged to provide protection for children without parental care in a family environment whenever it is possible to do so.[59]

The principle of equating adoption with parentage is stipulated in Art. 7/4. The Family Act of 2005 fully equates the rights and obligations of children regardless of adoption, providing for only one form of adoption, in contrast to the earlier Law on Marriage and Family Relations of 1980, which recognized two forms of adoption—full and partial.[60] In partial adoption, the adoptee did not have the same rights with respect to its adopters that a child had toward its parents; it was possible to limit their inheritance rights and rights to a surname, and the adoptee did not have any relationship with the adopter's relatives.

The principle of free decision on childbirth is stipulated in Art. 5/1: "*The woman has the right to freely decide on birth*." It should be noted that, in fact, this formulation encompasses only the woman's right as other rights that constitute family planning are not stipulated. Men, as subjects of particular rights, are not mentioned (e.g., the right to medical treatment for cure fertility), and neither are the rights of women and men that they exercise jointly, such as access to artificial reproduction technology. Having in mind the formulation accepted in the Constitution, "*everyone shall have the freedom to decide whether they shall procreate or not*," it is obvious that formulation accepted in Family Act is not sufficient enough. The Serbian Family Act has a provision with regard to one's family life: "*Everyone has a right to have his/her family life respected*".[61] On the

55 Wetter and Appelberg, 1986, p. 484.
56 Art. 2.
57 Art. 6/2, 3.
58 Art. 197–200.
59 Art. 6/6.
60 The Law on Marriage and Family Relations 1980, *Official Gazette of the Republic of Serbia* 22/1980, with amendments 22/1993, 35/1994, 29/2001.
61 Art. 2/2.

contrary, the Serbian Constitution does not contain a similar provision. Historically, in the period of the state of Serbia and Montenegro, a constitutional document with the name of "Constitution Charter" on the state union of Serbia and Montenegro in the Charter on Human and Minorities Rights and Civil Freedoms (which was the part of the Constitution Charter) includes a provision on the respect for private and family life (Art 24).[62] It is not clear why a similar provision was not stipulated in the subsequent Constitution of Serbia of 2006.

According to the Family Act, parental rights are derived from the obligations of the parents and exist only to the extent necessary for the protection of the personality, rights, and interests of the child.[63]

## 7. The rights and obligations of parents and children resulting from parental responsibility

The content of parental rights comprises the rights and obligations of the parent to care for the child and covers the following: protecting, educating, upbringing, representing, and maintaining the child, as well as managing and disposing of the child's property.[64] The Family Act expressly provides that parents have the right to receive all information about the child from educational and healthcare institutions.[65] This provision is extremely important for the exercise of parental rights. The Family Act directly limits parental autonomy regarding the upbringing of the child, forbidding parents to leave a child of preschool age unsupervised[66] and to entrust the child, even temporarily, to the care of a person who does not meet the requirements for being a guardian.[67]

Parental autonomy regarding the upbringing of the child is limited by a provision that forbids humiliating actions and punishments insulting the child's human dignity.[68] Parents have the duty to protect the child from such actions by other persons;[69] historically, parents were empowered by law to punish their children.[70]

62 *Official Journal of Serbia and Montenegro* no. 1/2003, 6/2003.
63 Art. 67.
64 Arts. 67–74.
65 Art. 68/3.
66 Art. 69/3.
67 Art. 69/4.
68 More on corporal punishment of the child: Draškić, 2021, pp. 27–45.
69 Art. 69/2.
70 Pursuant to the Serbian Civil Code of 1844, the parents had the right to return run-away of lost children and to "…what more, punish corrupted and insubordinate children with a moderate domestic punishment of castigating power." In addition to the application of "domestic punishment," Serbian law also provided for the possibility of imprisoning children for up to 10 days, pursuant to criminal law legislation (Para. 120 of the Serbian Civil Code) for a prison sentence (Para. 350 Penal Code, op. cit. Marković, 1920: 192). The child's obligation to obedience toward the parent and tutor was

In Serbian family law, the rights of the child are expressly regulated in the Family Act of 2005 and, for the first time, under a separate chapter consisting of eight articles.[71] The legal status of the child is governed in accordance with international documents and contemporary standards. The Family Act regulates the following rights of a child: the right to know who their parents are, to live with their parents, to maintain personal relations with their parents and other persons, the right to a proper and full development, the right to education, the right to an opinion, as well as the obligations of the child. The main obligation is to help parents in accordance with their age and maturity. In addition, a child who earns wages or has an income from property has the duty to partially provide for their own maintenance, the maintenance of their parent, and that of their minor brother or sister.[72] In addition to providing a broad scope of children's rights, the Family Act also ensures the exercise of the former. The child can exercise their rights independently at a certain age, and these rights can be divided into rights regarding status (right to family name, domicile/habitual residence, nationality, and to know who one's parents are); rights derived from parent–child relations (right to living with parents, to maintain personal relations with parents and other persons, to development, and to education); and rights on property. A child has the right to express an opinion, and due attention must be given to a child's opinion in all issues concerning them and in all proceedings where their rights are decided on, in accordance with the age and maturity of the child.[73] The Family Act of 2005 has introduced a special procedure for the protection of the child's rights (Art. 263).

The autonomy of the child as one of the European family law principles is formulated in the following way: "*The child's autonomy should be respected in accordance with the developing ability and need for the child to act independently.*"[74] Despite the autonomy of the child as one of the principles in contemporary child law, the need for their protection as a vulnerable individual still exists. The Commission on European Family Law has found the balance between the different concerns by emphasizing the child's age and maturity:

> A younger and less mature child needs more care and protection than an older and more mature child who may enjoy the rights of participation in a decision concerning him or her and who may also, within certain limits, make decisions and act independently on his or her own.[75]

provided for in Hungarian law, which was applied in Vojvodina, while minors could be forced to be obedient with "domestic discipline," which "was to be carried out so as not to affect the child's health" (Para. 10 Tutelage and Guardianship Act). Bogdanfi and Nikolić, 1925, pp. 130–165.

71 The Family Act, *Official Gazette of the Republic of Serbia* 18/2005 of February 24, 2005, entered into force 8 days after publishing and was implemented from July 1, 2005. The Draft of the Family Act was prepared by a draft team, with Professor Marija Draškić as a coordinator and me as one of the members.

72 Arts. 59–66.

73 Art. 65.

74 See Boele-Woelki et al., 2007, p. 39.

75 Boele-Woelki et al., 2007. Chapter II contains the principles regarding the rights of the child.

The rights of a child are graded. A child who is 15 years of age and able to reason has a number of rights in family law; for example, the right to change a personal name is attained by the child at the age of 15 if they are able to reason. This right was introduced into domestic family law for the first time with the Family Act of 2005. A child of the age of 10 and able to reason has the right to give consent to change their personal name (Art. 346), and one who has reached the age of 15 and is able to reason has the right to inspect the birth register and other documentation related to their origin (Art. 59/3). A child who has reached the age of 15 and who is able to reason has the right to decide which parent they are going to live with (Art. 60/4). The Family Act of 2005 has expanded the rights of children with respect to the maintenance of personal relations by providing that a child who is 15 years of age and able to reason can decide on their own about maintaining personal relations with the parent with whom they do not live (Art. 61/4). If the child is 15 and is able to reason, they can decide which secondary school they will attend (Art. 63).

A child who is 16 years of age and able to reason can acknowledge fatherhood or give consent to the acknowledgment of fatherhood (being the underaged mother or a child), and they can also request a marriage license.

The Family Act of Serbia of 2005 explicitly governs the child's right to express an opinion for the first time (Art. 65). The child has the right to freely express their opinion if one condition is met, namely if the child is capable of forming an opinion. A prerequisite for the formation of an opinion is being informed, whereby the Family Act of Serbia of 2005 provides that the child has the right to be duly informed. The child's opinion must be given due consideration in all matters and procedures regarding their rights in accordance with their age and maturity. At the age of 10, the child can freely and directly express their opinion in any judicial or administrative proceedings involving their rights; in addition, the child can independently—or through some other person or institution—address the court or administrative organ and request assistance in the exercise of their right to freely express an opinion.

The Family Act obligates state institutions, the court, and governing institutions to determine the child's opinion in a particular manner appropriate for the child in collaboration with the school psychologist or the guardianship institution, family counseling service, or another institution specialized in family mediation, in the presence of the person chosen by the child themselves. Since, in these procedures, the child and their lawful representative can have opposed interests, the Family Act stipulates that, in those cases, the child is represented by the collision guardian. The appointment of a collision guardian can be required by a child who has turned 10 and is capable of reasoning, by themselves or through another person or institution.[76]

At the age of 10, a child who is able to reason gives consent to adoption,[77] to fostering,[78] and has the right to propose the person who shall be appointed as their

76 Art. 265 Family Act.
77 Art. 8.
78 Art. 116.

guardian.[79] If the child's property was acquired through their employment, the child has the right to manage and dispose of this property if they are 15 years of age or older.[80]

Concerning legal capacity, the legal age of majority is 18, but full legal capacity can be acquired beforehand by entering into marriage with the court's permission. Moreover, a court may allow a person who has reached the age of 16 to acquire full legal capacity if they have become a parent and have the physical and mental maturity to take independent care of their person, rights, and interests (this possibility was introduced in the legal system by the Family Act of 2005). A child who has reached 14 years of age (senior minor) may undertake all legal transactions with the prior (or subsequent) consent of their parents.

The child's rights are stipulated in other branches of law as well. Thus, pursuant to the Inheritance Act 1995,[81] a person who is 15 years old has active testamentary capacity and can put together a will. Pursuant to the Labor Act of 2005, a person aged 15 has the right to enter into employment relations but "*with the written consent of the parents, adopter or guardian, if such employment will not endanger the health, morals or education of the child, or if the employment is not otherwise prohibited by law*" (Arts. 24/1, 25/1).[82] A pregnant woman who is 16 years of age has the right to independently request for an abortion.[83]

The limitations of parental rights with respect to their children by broadening children's rights and by prohibiting humiliating actions and punishments that insult a child's human dignity promote a modern, democratic, and less paternalistic family model.

## 8. Detailed issues related to parental responsibility

The parents are the child's legal representative. The representation concerning a child's property depends on how this is acquired, which is regulated in the Family Act of 2005. If the property is acquired through the child's employment, the child has the right to manage and dispose of this property independently if they are 15 years of age or older.[84] If the property is acquired, for example, by gift or inheritance, then the

79 Art. 127.
80 Art. 192/1, Art. 193/1, Art. 64/3.
81 Art. 79.
82 Inheritance Act 1995, *Official Gazette of the Republic of Serbia* No. 46/1995; Labor Act 2005, *Official Gazette of the Republic of Serbia* No. 24/2005.
83 Cessation of Pregnancy in a Healthcare Institution Act of 1995, *Official Gazette of the Republic of Serbia* No. 16/1995.
84 Art. 192/1, Art. 193/1, Art. 64/3.

right to manage and dispose of the property belongs to the parents, who have the right to undertake legal affairs through which they manage and dispose of the income that a child under the age of 15 has acquired[85], for example as revenue from engagement in theater shows, film, media, and so on. Since a child under the age of 15 cannot establish employment relations, such cases are governed by adequate contracts.

The child has certain obligations in these situations. If they acquire income or have property revenue, the child is obligated to cover the expenses of their own maintenance, as well as the maintenance of parents or minor siblings under the conditions provided by law.[86] The obligation of the minor child to partially fulfill their maintenance needs from their own income is subsidiary in relation to the same obligation of parents and blood relatives.[87]

Parents are not fully independent in the disposal of the child's property; therefore, the disposal of immovable and movable property of great value can be conducted only with the prior or later consent of the guardianship authority.[88] In deciding whether to approve the disposal of the child's property, the guardianship authority should take the child's best interests into account.[89]

The guardianship authority may decide to appoint a temporary guardian for the child under parental care if it finds that necessary for the temporary protection of the personality, rights, or interests of the child. Thus, a temporary guardian should be appointed in the situation of a child whose interests are averse to the interests of their parents as legal representative (collision guardian). The decision on the appointment of a temporary guardian must also state the legal operations or type of legal operations that the guardian may undertake depending on the circumstances of each specific case.[90]

One of the contemporary issues concerning a child's upbringing is their access to cyberspace tools (social networks, e-mail, and so on). It is stipulated that parents have the right and obligation to develop relations with the child based on love, trust, and mutual respect as well to guide the child in adopting and respecting the values of the emotional, ethical, and national identity of their family and society (Art. 70). One of the significant issues regarding the caring for and raising of children is the statutory regulation of the acceptability of corrective measures toward the child by the parents. Thus, the parents should be informed regarding how and to what extent their child uses cyberspace tools, and they should react if the child uses these tools contrary to their best interests. Denying access to cyberspace tools could be a corrective measure toward the child as well.

The child's education, in contrast to their upbringing—which, in many respects, falls within the scope of the family—is conducted in schools as institutions. The

85 Art. 72/3.
86 Art. 66/2.
87 Art. 154/3.
88 Art. 193/3.
89 Art. 6/1.
90 Art. 132.

Serbian Constitution provides for the obligation to elementary schooling.[91] The Family Act of Serbia of 2005 provides that a child has the right to education in accordance with their abilities, wishes, and inclinations. The child has the right to decide on their education; if the child is aged 15 and able to reason, they can decide which secondary school they will attend[92] —a right that was first introduced with the Serbian Family Act of 2005. The child's education, as a component of parental care, encompasses the parents' obligation to provide schooling for the child, while further education must be provided in accordance with the child's abilities. According to Article 71 the parents also have the right to provide education for the child in accordance with their religious and ethical beliefs.

The parallel existence of private and state-owned schools offers the parents and child a broader choice of schooling.[93] Contrary to secular education, religious education depends on the wishes of the parents and children. In previous times, even state organs could decide on the religious affiliation of children.[94] Religious education in Serbia has been introduced into secular schools again in 2001 as an option for parents and children. The wide scope of possibilities for religious schools to be opened, as well as the fact that religious education is predominantly organized by representatives of the governing religion, whereby other religions are in a less advantageous position, raises the question of whether religion has any place in secular schools.

One of the contemporary issues concerning education is children's sexual education. The ministry for education, science, and technological development of Serbia has provided information on the matter. In Serbia, in public and private schools, no special subject is concerned with sexual education, but this is part of other subjects such as biology or civil education. The Trade Union of Teachers is of the opinion that the sexual education of children ought to be part of other subjects, such as biology, civil education, and physical education, and that it should be introduced in elementary schools. In 2013, in the Autonomus Province of Vojvodina, the pilot project "Education on Reproductive Health" was conducted in secondary schools by the provincial secretariat for sport and youth and the nongovermental organization "Skaska" among 1,200 pupils. As the project became highly popular in 2014, it was introduced in all secondary schools in Vojvodina. In 2015, the program "Sexual Education for Beginners" was introduced in elementary schools in Vojvodina as well.[95]

The protection of life and health of the child in contemporary conditions has, to a great extent, become a function of healthcare institutions. The role of the parents,

91 Art. 71.

92 Art. 63.

93 In Serbia, private schooling has been legalized with the Public Services Act 1991, *Official Gazette of the Republic of Serbia* 42/91.

94 According to Hungarian law, which was applied in Vojvodina, the tutorship organ had the authority to determine the child's religious affiliation prior to their commencement of schooling, if this was not done by the parents themselves.

95 Author Jasminka Petrović has published the manual *Sexual Education for Beginners*. The nongovermental organization Incest Trauma Center has published material on sexual education as well.

however, is no less important. In addition to direct care for the child's life and health, it also covers the provision of consent to any medical procedures being performed on the child. In contemporary law, an older child has the right to independently decide on any medical procedures. The Art. 62/2 of the Family Act of Serbia of 2005 is in line with this approach, by which a child aged 15 and able to reason can give consent to any medical intervention.

According to the Cessation of Pregnancy in a Healthcare Institution Act, a pregnant woman who is 16 years of age has the right to independently request an abortion[96]; thus, the parents make decisions about abortions if the pregnant woman is younger than 16 years, but if she is 16 or older, they do not have any right to influence the decision of their child in this procedure. According to the law on patients' rights if the patient is a child, the parents have the right to inspect health documentation;[97] however, a child aged 15 and able to reason has a right to the confidentiality of the data in their health documentation.[98] In the situation of a child aged 15, this means that the parents cannot get information on contraception or abortion from their child's health documentation. Having in mind that parents have the right and obligation to develop relations with the child based on love, trust, and mutual respect, in most cases, the minor is expected to ask their parents about their opinion on the possibility of abortion and contraception.

## 9. Parental responsibility in case of divorce

Parental rights in Serbian family law can be exercised in two ways: jointly or independently. Parents exercise parental rights jointly and consensually when they cohabitate, and married parents automatically acquire parental rights when the child is born. If the parents are not married, the mother automatically acquires parental rights in the moment of the child's birth, and the father does when paternity is established (by the father's acknowledgment or by court judgment).

Parents may continue to jointly exercise parental rights even after divorce, provided that they make an agreement on the joint exercise of parental rights and provided that the court is satisfied that this agreement is in the child's best interests.[99] This provision has been introduced in the domestic legal system for the first time by the Serbian Family Act of 2005. This kind of parental agreement enables parents to exercise all the rights and duties comprised within parental rights if they do not

96 Cessation of Pregnancy in a Healthcare Institution Act, *Official Gazette of the Republic of Serbia* No. 16/1995.
97 Art. 20/2.
98 Art 24/1.
99 Art. 75–76.

lead a common life, and it is intended to avoid the hostility and antagonism caused by a court's decision granting the exercise of the parental rights to one of them. Thus, Serbian law affords parents a degree of autonomy in decision-making and in arranging their relationship with a minor child not only during marriage or partnership but also after divorce or separation. Broadening family autonomy should have positive implications for parent–child relationships. If parents can agree on the exercise of parental rights—especially after their divorce or separation—their conflict as partners would not influence their relations with respect to their children, or at least, the influence would be less significant.

The wording of the provision on the joint exercise of parental rights confers great freedom upon the parents as it enables them to agree on the matters related to their child in a manner that is most appropriate for their own particular situation. The only limitation is the parents' duty to reach an agreement on the issue of the child's domicile, which, followed by the child's address, must be established for the sake of legal certainty and especially for the sake of facilitating legal acts (communication of legal documents, notification, and so on). In the opinion of the commission that produced the draft, this limitation does not necessarily mean that the parents cannot agree on so-called "factual joint custody" (shared residence, alternate residence). A court has the power to examine the agreement and to decide to accept it or not based on a determination as to whether the agreement is in the child's best interest. Other countries take different approaches regarding the necessity of parental agreement on joint custody.[100]

Thus, the joint exercise of parental rights is possible after parental divorce but also if the parents separate; if they end their heterosexual, non-marital cohabitation; if the marriage is annulled; or even if the parents never lived together.

The concept of joint exercise of parental rights is the attempt to separate parents–child relations from relations between parents as partners, respecting the fact that the child needs both parents. From a theoretical perspective, it could be said that legal ground for parents–child relationship is moving from relations between parents (who could be married, divorced, separated, or never married) to the biological or legal relations between parents and their children. On the other hand, limitation of family autonomy should also have positive implications in parent–child relationships.

Another form of exercise of the parental right in Serbia is independent exercise. One parent exercises parental rights independently when the child lives with this parent only and the court has not yet made a decision on the exercise of parental

100 For example, in Sweden, courts have the option to award joint custody when the parents have not agreed. According to Åke Saldeen, however, the power to order joint custody in a case where a parent opposes joint custody should be used with great caution and sensitivity. Saldeen (2000) p. 354; Act on the Children and Parents, SFS 1949: 1, amendments SFS 199: 19, from October 10, 199, Ch 6, §5, available at http://www.sweden.gov.se/content1/e6/0 /76/55/1. In France, the judge has the power to order, even if the parents are not in agreement, that the child's residence should alternate between the homes of each parent. Civil Code, Art 7–9; Ferré-André, Gouttenoire-Cornut, and Fulchiron, 2003, p. 176.

rights, or on the basis of a court decision after divorce.[101] As parents could make an agreement on the independent exercise of parental right, this is another way of realizing family autonomy. This agreement must include the parents' agreement on entrusting the common child to one parent, an agreement on the amount of contribution for child maintenance from the other parent, and an agreement on the manner of maintaining the child's personal contact with the other parent.

The Serbian Family Act favors parental agreements on the exercise of parental rights and enables parents to reach the agreement in the mediation conducted mainly in the divorce procedure.[102] This mediation includes the procedure for attempting reconciliation and the procedure for attempting the consensual termination of a dispute (settlement). The purpose of settlement is to resolve the troubled relation between spouses without conflict after annulment or divorce. The court or institution entrusted with mediation proceedings is to endeavor that the spouses reach an agreement on the exercise of parental rights and an agreement on the division of joint property. Mediation proceedings are conducted before an individual judge; however, the judge should recommend spouses to go to psychosocial counseling. Under Art. 232 if the spouses agree, the court may entrust mediation to the competent guardianship authority, a marriage or family counseling service, or another institution that specializes in mediating family relations. A wide range of specialized institutions should provide efficient and high-quality counseling.

Based on the foregoing, it is obvious that under the domestic jurisdiction, the joint and independent exercise of parental rights may be acquired under law and also by a court decision that is preceded by parental agreement whenever it is a matter of the joint exercise of parental rights, while this agreement is a possibility in the matter of the independent exercise of parental rights as well.

In Serbian family law, a specific solution concerns the right of the parents to decide jointly and consensually on issues that significantly influence the child's life, if the parents do not live together. The issues considered to be of significant influence on the child's life, in terms of the Family Act, are the education of the child, larger medical interventions on the child, the change of the child's residence, and the disposal of the child's property of great value.[103]

Both parents have the right to decision-making jointly and consensually regardless of whether they have the joint exercise of parental rights, or one parent independently exercises parental rights. It could be said that Serbian family law is, in a way, theoretically inconsistent as the parents' rights are similar in both situations of joint and independent exercise of parental rights concerning decision-making on issues that significantly influence the child's life. This is due to the assumption that the independent exercise of parental rights would be predominant in practice as joint exercise needs the parents' agreement, which is not easy to reach. Thus, if the

101 Art. 77.
102 Art. 229.
103 Art. 78/4.

parent who does not exercise their parental rights loses their decision-making ability (a right that existed according to the previous the Law on Marriage and Family Relations of 1980), their rights would actually decrease in practice. This is the reason why the Family Act has kept the right to decision-making for the parent who does not exercise their parental rights.

The Serbian Family Act defines that the child has the right to maintain a personal relationship with the parent with whom they do not live; thus, the child is explicitly entitled to this right. A child who has turned 15 and is capable of reasoning can decide about the maintenance of a personal relationship with the parent with they do not live;[104] however, it is also included that the parent who does not exercise the parental right has the right and obligation to maintain a personal relationship with the child,[105] so that not only the child is entitled to this right, but the parent is as well. For the parent, the maintenance of a personal relationship with the child also presents an obligation. To maintain a personal relationship, it is necessary, in many situations for the parent with whom the child lives, to enable its maintenance (for example, if the child is small, the maintenance of a personal relationship is impossible without the active participation of the parent with whom the child lives); thus, this is an obligation to the parent with whom the child lives as well.[106]

The Serbian Family Act determines that only the court has the authority to decide on establishing a personal relationship, in contrast to an earlier law according to which the maintenance of a personal relationship was decided by the guardianship institution (or the court in exceptional circumstances). With the change of jurisdiction in favor of the court, the Serbian Family Act indicates the importance of this question—factual as well as legal.

In the implementation of the decision on the right to contact, the most severe family-legal measure can be determined against the parent who evades the maintenance of a personal relationship with the child or against the parent who impedes the maintenance of a personal relationship between the child and the parent with whom the child does not live—the complete deprivation of parental rights. In that way, the Serbian Family Act has made the parental obligations regarding the maintenance of personal relations with the child much stricter than earlier. The reason for this is that the maintenance of a personal relationship between the child and the parent with whom they do not live is extremely important for the child—especially

104 Art. 61.

105 Art. 78/3.

106 In comparative law, the right of contact with the parents is determined as the right of the child (England and Wales), as the right of the child and the right of the parent who does not live with the child (Russia, Germany, etc.), and as the obligation of the parent who does not live with the child and that of the parent who lives with the child to enable the contact (in the large majority of legislations). In some countries, it is not determined as an obligation of the parent who does not live with the child (Finland, Norway, Greece) but as an expression of the understanding that contacts are useful for the child only if the contact is realized on a voluntary basis. Kovaček Stanić, 2013, pp. 410–411.

for their emotional development. Disabling the execution of the decision on maintaining a personal relationship of the minor with the parent represents a felony regulated by the Criminal Code of Serbia from 2005 (Art. 191/2).[107]

One of the issues considered to be of significant influence to the child's life is the decision on the child's domicile/habitual residence. The parents jointly make this decision in both cases, if they jointly exercise parental rights but also if one of them independently exercises parental rights. One parent is authorized to make an independent decision on the change of domicile/habitual residence only when the other parent is fully or partially deprived of their parental right. Another means that could result in a not wrongful change of the child's domicile despite the lack of parental consent is to use a special procedure for the protection of the child's rights that could be initiated in such case. In these procedures, a court would have to assess whether the change of a child's domicile would be in the child's best interest or not.[108]

The scope of parental rights could be changed as a consequence of the judgment of deprivation of parental rights.

A court decision on the full deprivation of parental rights deprives the parent of all rights and duties that comprise parental rights, except the duty of maintaining the child. A court decision on the full deprivation of parental rights may prescribe one or more measures for protecting the child from domestic violence.[109] A court decision on the partial deprivation of parental rights may deprive the parent of one or more rights and duties that comprise parental rights, except the duty to maintain the child. A parent who exercises parental rights may be deprived of the rights and duties of protecting, raising, upbringing, educating, and representing the child as well as of managing and disposing of the child's property. A parent who does not exercise parental rights may be deprived of the right to maintain personal relations with the child and to decide on issues that significantly influence the child's life. The court decision on the partial deprivation of parental rights may prescribe one or more measures for protecting the child from domestic violence.[110]

The consequence of the decision on the deprivation of parental rights depends on how parents exercise parental rights and if the deprivation is full or partial. If they exercise parental rights jointly and one of them is fully deprived of parental rights, then the other parent would exercise parental rights by themselves if this is in the child's best interest. The same consequence is if one of them exercises parental rights and they are fully deprived of parental rights; if one of the parents is partially deprived of parental rights, the future exercise of parental rights depends of what rights they are deprived of and how the parental rights were exercised in the first place.

107 The Criminal Code (Krivični zakonik) *Official Gazette of the Republic of Serbia* 85/05. The penalty is a fine or prison for maximum 1 year.
108 Art. 261-63.
109 Art. 81.
110 Art. 82.

The court may decide on the deprivation of parental rights in the procedure for the deprivation of parental rights but also in its judgment on a dispute over the protection of a child's rights and in its judgment on a dispute over the exercise of parental rights.[111]

## 10. The status of a child not subject to parental responsibility

If the child is without parental care adoption,[112] foster care[113] and guardianship[114] may be established. The Family Act defines a child without parental care who may be adopted as a child who has no living parents; a child whose parents are unknown, or their dwelling place is unknown; a child whose parents are fully deprived of parental rights; a child whose parents are fully deprived of legal capacity; and a child whose parents gave their consent to adoption.[115] The scope of care and protection of the adopters are the same as rights and duties between a child and their parents.[116] Adoption terminates the parental rights of parents, unless the child is adopted by the spouse or the cohabitee of the child's parent.

The Family Act defines a child who can be placed in foster care. This is a child who has no living parents, a child whose parents are unknown or their dwelling place is unknown, a child whose parents are fully deprived of parental rights or legal capacity, a child whose parents have not yet acquired legal capacity, a child whose parents are deprived of the right to protect and raise or educate the child, and a child whose parents fail to take care of the child or take care of them in an inappropriate manner.[117] Foster care may also be established if the child is under parental care but has an impediment in psycho-physical development or a behavioral disorder. The scope of care and protection of the foster parent includes the right and duty to protect, raise, and educate the child. A foster parent has the duty to take special care to prepare the child for independent life and work,[118] and the parents of a child given over to foster care have the right and duty to represent the child, to manage and dispose of the child's property, to maintain the child, to maintain personal relations with the child, and to decide on issues significantly influencing the child's life jointly and consensually with the foster parent, unless the parents are fully or partially deprived of parental rights

111 Art. 273.
112 Art. 91.
113 Art. 113.
114 Art. 124.
115 Art. 91.
116 Art. 104.
117 Art. 113/3.
118 Art. 119.

or legal capacity or they fail to take care of the child or to do so in an inappropriate manner.[119] In these situations, a guardian to the child should be appointed, who has the same aforementioned rights and duties as the parents. When foster children are siblings, foster care is generally established with the same foster parent.[120]

A child without parental care (a minor ward) is placed under guardianship. By the decision of placing someone under guardianship, the guardianship authority appoints a guardian and decides on the accommodation of the ward. The guardianship authority will first try to accommodate the ward in a family of their relatives.[121] The guardian is under the obligation to take care of their ward conscientiously, which includes taking care of the ward's personality, representing the ward, acquiring assets to support the ward, and managing and disposing of the ward's property.[122] The guardian is under the obligation to take care that the protecting, raising, upbringing, and educating of a minor ward lead, as soon as possible, to their ability to lead an independent life. The guardian is under the obligation to pay visits to the ward and directly gain information on the conditions under which the ward lives.[123] The guardian is under the obligation to represent their ward, who has legal capacity equal to a child under parental care. The guardian represents their ward in the same way that a parent represents their child. The guardian may—but only with prior consent of the guardianship authority—decide on the education of the ward; decide on medical interventions on the ward; give consent to the undertaking of legal operations by a ward over 14 years of age; and undertake legal operations whereby they manage and dispose of the income acquired by a ward under 15 years of age.[124]

## 11. *De lege ferenda* conclusions

The Serbian law on parent–child relationships is modern law founded on the principles of equality (regarding sex and children born in wedlock or out of wedlock); children's rights; the protection of the family, mothers, single parents, and the child; and the principle of free decision on childbirth. The concept of the joint exercise of parental right is accepted as a contemporary form of parent–child relationship existing even after divorce.

In the Serbian Family Act, the term "parental right" is used ("*roditeljsko pravo*"). This term is redefined as parental rights derived from the duties of the parents and existomgonly to the extent necessary for the protection of the personality, rights, and

119 Art. 120.
120 Art. 113/4.
121 Art. 124.
122 Art. 135.
123 Art. 136/1,3.
124 Art. 137.

interests of the child. The term "parental responsibility," which is broadly acceptd in European and international law, is not accepted in the Serbian Family Act as it could be confused with liability for damage (in the Serbian language, these are same term—"*odgovornost*"). Apart form the term "parental responsibility," in some European jurisdictions, the term "parental care" is used (e.g., "*sorgerecht*" in Germany, "*roditeljska skrb*" in Croatia, and "*starševska skrb*" in Slovenia). Although the Serbian term emphasizes the personality, rights, and interests of the child, *de lege ferenda* it seems appropriate to change it and replace it with the term "parental care" ("*roditeljska briga*") as a term more in accordance with the contemporary trends in family law.

In Serbia, there is a specific concept in decision-making regarding issues that significantly influence the child's life. Both parents have the right to decision-making jointly and consensually regardless of whether they have the joint exercise of parental rights or one parent independently exercises parental rights. This concept causes a great deal of parental conflict in practice; thus, the need for explicit regulation of possible ways to resolve the conflict would be of practical importance. The solutions suggested for resolving the parental conflict *de lege ferenda* would be as follows. The competent authority should be the court, which can make decisions on the most important issues concerning the child; as they act in family law, the court's judges should be particularly specialized in this field of family law and children's rights. The court should have different options for resolving the conflict. First, to try to conciliate the parents, it should encourage family mediation conducted by competent authorities (court, guardianship authority, a marriage or family counseling service, or another institution specialized in mediating family relations). In addition, the court should have the option to authorize one of the parents to act alone with regard to one or more specific decisions. At the end, the court should be authorized to make decisions by itself and to have discretion to choose option(s) that it finds most appropriate for the current situation in the child's best interest. This will depend on different circumstances—for instance, if the matter is urgent, if the parental conflict is an exception or frequent, and so on.

In Serbia, it is is common to enact domestic acts that contain provisions of the retified conventions; thus, courts and other organs can refer to domestic law in their decisions. This practice would be particularly helpful in connection with the Hague *Convention* on the Civil Aspects of *International* Child *Abduction*. A certain confusion is noted among judges, primarily regarding the procedures for decision-making on child abduction. As a matter of fact, the draft titled "Civil Protection of Children from Wrongful Cross-border Removal and Retention Act" was prepared but never enacted.[125] This law suggests the determination of concentrated jurisdiction, such that only a few courts shall rule on requests under the Convention. The law proposes the following courts as actually competent to rule in abduction cases: Belgrade, Novi Sad, Niš, and Kragujevac—all of them primary courts. *De lege ferenda*, it would be of a great importance to enact the law on child abduction.

125 Kovaček Stanić, 2014a.

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Chapter VII

# Slovenia: Parental Care in the Context of the Modern Family

Suzana Kraljić

## 1. Introduction

The relationship between parents and children is the cornerstone of family law and one area that has undergone extraordinary dynamism and change over the last 100 years. It is a significant area of our lives and, in particular, of the law, since every individual goes through this period, which, following Art. 1 of the Convention on the Rights of the Child[1] (hereinafter, CRC) and Art. 5 of the Slovenian Family Code[2] (hereinafter, FC), generally extends from birth to the age of 18. Changes in child law and the relationship between parents and children have been gradual as, until the nineteenth century, child law was influenced by Roman law. The child was seen as an "object of control by the father."[3] Although children have always been a significant component for the continuation of the family, their position has historically been poor; today, the child is no longer an object but has become a legal subject

1 See Art. 1 of the Convention on the Rights of the Child (Slovene: Konvencija o pravicah otrok): Official Gazette of the RS – MP, no. 9/92): "*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*"

2 See Art. 5 of the Family Code (Slovene: Družinski zakonik): Official Gazette of the RS (Slovene: Uradni list RS), no. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI): "*Under the Code, a child is a person who has not yet reached the age of 18 unless they have previously acquired full legal capacity.*"

3 Dethloff, 2015, p. 275; Oliphant and Van Steegh, 2016, p. 149.

Suzana Kraljić (2022) Slovenia: Parental Care in the Context of the Modern Family. In: Paweł Sobczyk (ed.) *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates,* pp. 217–251. Miskolc–Budapest, Central European Academic Publishing.

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and thus a bearer of rights—both general rights that belong to all human beings and rights that only children have. Therefore, the present work also briefly presents selected key historical starting points for developing child's law.

Roman law, whose influence is also present in Slovenian family law, shaped the position of children, which then extended until the nineteenth century when significant changes in child's law began. It is characteristic of family law at this time that, at the outset, the father, as the elder of the family, had complete and unrestricted authority (Latin *pater familias*), which was manifested both concerning the wife (Latin *manus*) and the children (Latin *patria potestas*).[4] Over time, these powers of the father or husband weakened, and mutual rights and duties were established; thus, in the earlier period of Roman law, the father had the right to decide on the life and death of his child (Latin *ius vitae necisque*). This right allowed him to determine, for example, the punishment of his child—even on a possible death sentence. However, in the earliest times, before imposing the most severe punishments, he had to consult the council of the house (*consilium domesticum*), which comprised the adult males of the house (including friends). The state also began to intervene in law enforcement through the censor, who punished abuses of paternal authority with a punishment of censure (Latin *nota censoria*), and this had severe consequences. As mentioned above, over time, there was greater control and a stricter view of the possible arbitrariness of the *pater familias*. In the fourth century, the death penalty imposed by a *pater familias* was considered homicide; at this time, in the case of severe misconduct by a child, the father could only report the matter to the authorities and could no longer decide for himself. Apart from the *ius vitae necisque* mentioned above, the father also had the right to sell the child (Latin *ius vendendi*) into *in mancipium* and slavery (Latin *trans Tiberim*). The father's right was limited as he could only sell the child three times. The father also had the right to demand the delivery of the child from third parties (Latin *ius vindicandi*). He, therefore, had the action of *vindicatio filii*; later, the praetor allowed the use of a special interdict for this purpose.[5,6]

In the Middle Ages, children's situation was generally deplorable. They were consistently distinguished between legitimate and illegitimate children, and owing to the influence of the Christian religion, children born out of wedlock were not even recognized as kinship.[7] Initially, any child born out of wedlock was considered an illegitimate child; later, the circle of legitimate children was broadened to include children conceived in a putative or pre-marital union but subsequently born in wedlock as well as children legitimized by subsequent marriage or an act of mercy (e.g., owing to the impossibility of marriage).[8]

4 Romac, 1973, p. 99.
5 Latin *interdictum de liberis exhibendis item ducendis*.
6 Romac, 1973, p. 117.
7 Bubić and Traljić, 2007, p. 23.
8 Neuhaus, 1979, p. 226.

Another significant breakthrough in children's rights also came in 1641 with the Massachusetts Body of Liberties, which advised parents not to choose their children's partners and not to use unnatural harshness against their children. Children also had the right to complain to a state authority if their parents did not comply. However, it should not be ignored that the same source also provided the death penalty for children over 16 who were disobedient to their parents.[9] On the other hand, in the second half of the eighteenth century, France developed the idea that children should be treated differently and need special protection, and in 1881, it also recognized children's right to education.[10]

Another significant milestone in child's law was reached in 1923, when Save the Children International Union (hereinafter, SCIU) adopted a five-point declaration setting out the fundamental conditions that society should adopt to provide adequate protection and care for children. In 1924, the League of Nations, influenced by the SCIU, adopted the so-called Geneva Declaration on the Rights of the Child (hereinafter, Geneva Declaration)—the first international document to recognize children's vulnerability as a source of special rights and protection and to define the responsibilities of adults in five simple principles.[11] The Geneva Declaration also stressed that the child's care and protection is no longer the sole responsibility of the family or community or the individual state but of the world as a whole because "humanity owes to the child the best that it has to give."[12]

With the Second World War, the situation of children deteriorated again. The events of the war left many children without parents; therefore, it was necessary to provide adequate care for these children after the cessation of hostilities. On December 11, 1946, the United Nations General Assembly established The International Children's Emergency Fund (hereinafter, UNICEF), whose primary purpose was to assist all (European) children affected by the war. UNICEF's purpose, however, needed to have a broader scope. Therefore, in 1953, UNICEF became a specialized and permanent UN organization, and its scope was extended to all countries and children needing assistance owing to war-related events, placing particular emphasis on education, health, and nutrition. The acronym UNICEF (today United Nations Children's Fund) has been retained, but the words "International" and "Emergency" have been removed from the organization's name.[13]

9 Rama Kant Rai, n. d., p. 3.

10 Kraljić, 2019, p. 372.

11 The fundamental needs of children were summarized in five principles: "*The child must be given the means requisite for its normal development, both materially and spiritually; 2. the child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored; 3. the child must be the first to receive relief in times of distress; 4. the child must be put in a position to earn a livelihood, and must be protected against every form of exploitation; the child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.*"

12 Kraljić, 2019, p. 373.

13 UNICEF, n. d.

Just over 10 years later, on November 20, 1959, the United Nations General Assembly adopted the Declaration on the Rights of the Child.[14] Although the text of the 10 principles of the Declaration on the Rights of the Child is not binding, it set a further milestone in recognizing and regulating children's rights, and 1979 was declared the "International Year of the Child." Ten years later (November 20, 1989), the CRC was finally adopted, containing 54 articles regulating the child's civil, economic, social, and cultural rights. Today, the CRC represents a fundamental milestone in protecting the child's best interests. The CRC recognizes children as having all the rights to which they are entitled as human beings, which they enjoy according to their age and maturity.

Slovenia succeeded to the status of a contracting party to the CRC and other international treaties as one of the successor states of the former Yugoslavia. Slovenia accepted, on July 1, 1992, the Act of Notification that entered into force on July 17, 1992.[15] Slovenian legislation aligns with the international standards of children's protection in CRC and other international treaties. In 2017, Slovenia adopted the new FC, which also enacted significant changes in the relations between parents and their children. The FC has also redefined some fundamental concepts, replacing the term "parental right"—which was criticized because it was understood as a parents-centered term in the past[16]—with "parental care."

## 2. Axiological and constitutional foundations for the protection of parental responsibility

The Constitution of the Republic of Slovenia[17] (hereinafter, CRS) already references the content of children's rights in several articles; thus, Art. 14 of the CRS already provides the constitutional legal basis for the equality of children. Children are guaranteed the same rights and fundamental freedoms as adults according to their age and maturity, irrespective of their national origin, race, gender, language, religion, political or other conviction, material standing, birth, education, social status,

14 Declaration of the Rights of the Child – United Nations General Assembly, November 20, 1959, Resolution 1386 (XIV).

15 Notification of succession in respect of United Nations Conventions and conventions adopted by IAEA (Slovene: Akt o notifikaciji nasledstva glede konvencij Organizacije združenih narodov in konvencij, sprejetih v Mednarodni agenciji za atomsko energijo): Official Gazete of the RS, no. 9/92, 9/93, 5/99, 9/08, 13/11, 9/13, 5/17.

16 See Drnovšek and Markač Hrovatin, 2019, p. 105.

17 Constitution of the Republic of Slovenia (Slovene: Ustava Republike Slovenije): Official Gazette of the RS, no. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121, 140, 143, 47/13 – UZ148, 47/13 – UZ90, 97, 99, 75/16 – UZ70a, 92/21 – UZ62a.

disability, or any other personal circumstance. Whether within or outside marriage, the birth of a child should not be the basis for treating children differently.

Article 41(3) of the CRS gives parents the right to provide their children with a religious and moral upbringing in accordance with their beliefs. Children's religious and moral guidance must be appropriate to their age and maturity and be consistent with their free conscience and religious and other beliefs or convictions. Article 10 of the Freedom of Religion Act[18] (hereinafter, FRA) complements the CRS by giving parents the right to educate their children according to their religious beliefs. In doing so, they must respect the child's physical and mental integrity. A child who has reached the age of 15 has the right to make their own decisions relating to religious freedom.

Article 52(2) of the CRS guarantees children with physical or mental disabilities the right to education and training for an active life in society. This reflects the principle of equality from Art. 14 of the CRS, which stipulates that disability may not be the basis for differential treatment. There is a double qualification of a vulnerable group here as it concerns children and children with special needs.

The state shall protect the family, motherhood, fatherhood, children, and young people and create the conditions necessary for such protection.[19] The family is the fundamental unit of any society, and the child is the central subject that makes up the family. A family may be a family in the narrow sense (e.g., nuclear family) or a family in the broader sense (e.g., foster family, extended family). Motherhood and fatherhood are critical concepts related to child's law or the relationship between a child and their parents. The state ensures that these family law relationships are respected through its protection system. The state's intervention in these relationships must be in accordance with the principle of proportionality and be primarily directed toward protecting the child and their best interests.

The rights and duties of parents are the subject matter of Art. 54 of the CRS. Parents have the right and duty to maintain, educate, and raise their children,[20] and this right and duty may be revoked or restricted only for reasons provided by law to protect the child's best interests. The foundations of the principle of the primacy of parents as holders of the right and duty to maintain, educate, and raise their children are established in Art. 54(1) of the CRS. Only if the statutory prerequisites are met can there be a deprivation or limitation of these rights and duties of parents (see, e.g., Articles 171, 173, and 174 of the FC). Article 54(2) of the CRS, in conjunction with Art. 14 of the CRS, reaffirms the principle of the equality of

18 Freedom of Religion Act (Slovene: Zakon o verski svobodi): Official Gazette of the RS, no. 14/07, 46/10 – odl. US, 40/12 – ZUJF, 100/13.

19 Art. 53(3) of the CRS.

20 See ECLI:SI:VSLJ:2014:IV.CP.3120.2014, December 10, 2014: "*When parents have new children, they take on new responsibilities for their survival, upbringing and education. But they cannot make excuses for having too many children and earning too little, but must do their best to earn enough to support all their children, which is their duty under Article 54 of the Constitution of the Republic of Slovenia.*"

children by birth: children born out of wedlock have the same rights as children born within it.

The freedom to decide whether to bear children is enshrined in Art. 55 of the CRS. The state shall guarantee the opportunities for exercising this freedom and create such conditions to enable parents to decide to bear children.

The CRS provides that children shall enjoy special protection and care and that they shall enjoy human rights and fundamental freedoms consistent with their age and maturity.[21] The CRS guarantees children special protection and care because of their vulnerability and defenselessness. Parents must bear the primary responsibility for this, and the child's best interests must be their primary concern.[22] The principle of the child's best interests, to which the duties of parents correspond, is set out in Art. 56(1) of the CRS and must be respected even if they are divorced. Concern for the safety and upbringing of their children is a constitutional value.[23]

Children shall be guaranteed special protection from economic, social, physical, mental, or other exploitation and abuse. Provisions to give effect to this are contained in numerous legal acts e.g., FC, Criminal Code[24] (hereinafter, CC-1), and Domestic Violence Prevention Act[25] (hereinafter, DVPA). Children and minors who are not cared for by their parents, who have no parents, or who are without proper family care shall enjoy the state's special protection. Many laws regulate their protection (e.g., FC, Provision of Foster Care Act[26] [hereinafter, PFCA], Placement of Children with Special Needs Act[27] [hereinafter: PCSNEA], etc.).

Primary education is defined as a minimal educational standard supplied by states to all people—particularly children—in several international documents and Art. 57 of the CRS. Primary education may be seen as an investment in the child's future and an opportunity for joyful activities, respect, participation, and the fulfillment of ambitions.[28] Therefore, primary education is also compulsory in Slovenia.[29]

21 Art. 56(1) of the CRS.

22 See ECLI:SI:VSLJ:2019:IV.CP.2533.2018, January 17, 2019.

23 See ECLI:SI:VSLJ:2021:VII.KP.9926.2020, August 19, 2021.

24 Criminal Code (Slovene: Kazenski zakonik): Official Gazette of the RS, no. 50/12 – official consolidated version, 6/16 – popr., 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21.

25 Domestic Violence Prevention Act (Slovene: Zakon o preprečevanju nasilja v družini): Official Gazette of the RS, no. 16/08, 68/16, 54/17 – ZSV-H, 196/21 – ZDOsk.

26 Provision of Foster Care Act (Slovene: Zakon o izvajanju rejniške dejavnosti): Official Gazette of the RS, no. 110/02, 56/06 – odl. US, 114/06 – ZUTPG, 96/12 – ZPIZ-2, 109/12, 22/19.

27 Placement of Children with Special Needs Act (Slovene: Zakon o usmerjanju otrok s posebnimi potrebami): Official Gazette of the RS, no. 58/11, 40/12 – ZUJF, 90/12, 41/17 – ZOPOPP, 200/20 – ZOOMTVI.

28 Committee on the Rights of the Child, 2013, p. 17.

29 See more in Kraljić, 2020, pp. 29–30.

## 3. Protection of parental authority in the system of legal sources

Because of the child's vulnerability and sensitivity, special care must be taken to safeguard their best interests, rights, and well-being. The parents play the primary role as holders of parental care; however, where they are unable to do so appropriately, the state should intervene in the parent–child relationship. The state will take measures aimed primarily at safeguarding the child's best interests. Conversely, such measures are considered to constitute an intervention by the state in the autonomy of parental care and, as a consequence, may also limit it. The measures taken by the state have their basis in the CRS and the new Slovene FC as the fundamental family law legal act.

Slovenia also has ratified relevant international treaties. Article 8 of the CRS states that ratified and published international treaties are directly applicable in Slovenia, which is a party to the following international treaties that, by their content, also affect the field of parental care and have also influenced the content of the new FC:

a) 1950: European Convention for the Protection of Human Rights and Fundamental Freedoms[30] (hereinafter, ECHR);
b) 1980: Hague Convention on the Civil Aspects of International Child Abduction;[31]
c) 1989: CRC;
d) 1993: Conventions on Protection of Children and Co-operation in Respect of Intercountry Adoption;[32]
e) 1996: European Convention on the Exercise of the Rights of the Child;[33]
f) 1996: Hague Conventions on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children;[34]
g) 2011: Council of Europe Convention on preventing and combating violence against women and domestic violence[35] (the Istanbul Convention).

The case law of the HCHR has also contributed to developing the understanding of parental care in Slovenia and has made its way into Slovenian case law. The latter is particularly visible through the principle of proportionality,[36] which is also derived from international law that binds the Republic of Slovenia. The principle of

30 Official Gazette of the RS – MP, no. 7/94.
31 Official Gazette of the RS – MP, no. 6/93, 14/12.
32 Official Gazette of the RS – MP, no. 14/99.
33 Official Gazette of the RS – MP, no. 26-82/99.
34 Official Gazette of the RS – MP, no. 24/04.
35 Official Gazette of the RS – MP, no. 1/15.
36 For more on principle of proportionality, see Kraljić and Drnovšek, 2021, pp. 264–276.

proportionality forms the basis for establishing positive obligations for active state action concerning the balance between the interests of society and those of the individual. The state is obliged to intervene and protect the child's interests,[37] and this intervention must always be proportionate; otherwise, the child and parents' rights might be violated.

## 4. The concept of a parent

### *4.1. Motherhood*

Motherhood is the legal bond between mother and child, established when the child is born. Starting from Art. 112 of the FC, the child's mother is the woman who gave birth to the child. This is an ancient Roman legal presumption of "*mater sempre certa est*," which has survived to the present day, although not explicitly mentioned in the prior Marriage and Family Relations Act[38] (hereinafter, MFRA).

Today, the FC explicitly defines this presumption in Art. 112, and it is a mandatory provision that does not allow for autonomy in determining who will be the child's mother. Although the presumption of maternity was considered irrebuttable in the past, the development of medical science in biomedicine has led to the conclusion that a mother who gives birth to a child is not necessarily their biological mother. A woman expecting a child (the pregnant woman) usually outwardly displays the physical changes in her body that have been historically shaped as signs of pregnancy (e.g., a large belly, a clumsy gait, weight gain, childbirth, and so on). Moreover, we should not ignore the fact that it is medically and legally possible for a person who is recognized as a man to become pregnant and give birth.

Although deviations from the legal presumption of maternity may have occurred in the past (e.g., switching a child in hospital and deliberately switching or abducting a child), with the development of biomedicine, significant deviations from this classical legal presumption have occurred. The development of biomedicine has also led to various assisted reproductive techniques (artificial insemination, in vitro fertilization, egg and embryo donation, surrogacy).[39] Artificial insemination with donated egg cells and surrogacy, where the gestational mother is not necessarily the biological mother, constitute a deviation from maternity legal presumption as the woman expecting a child is not necessarily the child's biological mother.

37 Art. 9 of the CRC.

38 Marriage and Family Relations Act (Slovene: Zakon o zakonski zvezi in družinskih razmerjih): Official Gazette of the RS, no. 69/04 – official consolidated version, 101/07 – odl. US, 90/11 – odl. US, 84/12 – odl. US, 82/15 – odl. US, 15/17 – DZ, 30/18 – ZSVI.

39 See more in Lowe and Douglas, 2007, p. 306.

On the other hand, adoption also constitutes a derogation from the presumption. Through the adoption, the child will be separated from the biological family and, as a legal act, will be given the same status to the adoptive parent as a biological child would have had. The presumption of maternity is distinguished from the presumption of paternity as it does not differentiate whether a child is born within or outside marriage.

The importance of maternity is already enshrined in the CRS as Art. 53(3) provides that the state shall protect maternity and create the necessary conditions for it. This constitutional provision on maternity is complemented by the content of Art. 55 of the CRS, which provides that parents shall be free to decide whether to bear children. The state shall guarantee opportunities for exercising this freedom and shall create conditions that will enable parents to decide to bear children. The Infertility Treatment and Procedures of Medically Assisted Reproduction Act[40] (hereinafter, Infertility Act) and the Health Measures in Exercising Freedom of Choice in Childbearing Act[41] (hereinafter, Health Measures Act) are particularly relevant to the exercise of this freedom. A child's mother is considered the woman who gave birth to the child; from the above, it follows that the birth of a child is sufficient for this legal relationship to arise, and entry into the civil registry merely verifies that relationship.[42] The child must be registered in the civil register immediately after birth. The registration in the civil register is also defined as a fundamental right of the child in the CRC.[43] In addition, Art. 4(1)(4) of the Register of Deaths, Births and Marriages Act[44] (hereinafter, Register Act) supports this right of the child. The civil register records birth data for citizens of the Republic of Slovenia and, in particular, information on the parents (i.e., the mother and father of the child).

### *4.2. Fatherhood*

The child's mother's husband is considered the father of a child born in wedlock according to Art. 113(1) of the FC, and this legal presumption of paternity has its roots in Roman law (Latin *pater est quem nuptiae demonstrant*[45]). While maternity could be linked to birth, which someone usually witnessed, paternity was long considered impossible to establish with certainty. Therefore, to ensure, above all, the child's financial security, the mother's husband was presumed to be the father of a

40 Infertility Treatment and Procedures of Medically-Assisted Reproduction Act (Slovene: Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo): Official Gazette of the RS, no. 15/17 – DZ.

41 Health Measures in Exercising Freedom of Choice in Childbearing Act (Slovene: Zakon o zdravstvenih ukrepih pri uresničevanju pravice do svobodnega odločanja o rojstvu otrok): Official Gazette of the SRS, no. 11/77, 42/86; Official Gazette of the RS, no. 70/00 – ZZNPOB.

42 Hrabar IN Alinčić et al., 2007, p. 133.

43 Art. 7(1) of the CRC.

44 Register of Deaths, Births and Marriages Act (Slovene: Zakon o matičnem registru): Official Gazette of the RS, no. 11/11 – official consolidated version, 67/19.

45 Paulus D. 2, 4, 5.

child born in wedlock.[46] Since marriage was based on monogamy, it was assumed that the mother's husband was the one with whom the mother had most sexual relations.

Therefore, the legal relationship between the child and the father is based on a presumption rather than the actual establishment of genetic paternity. The legal presumption of paternity is based on the probability that the child's mother's husband is also the child's father. The legal presumption of paternity for a child born in wedlock is based on two suppositions:

a) the positive presumption: the husband of the child's mother had sexual relations with his wife—the child's mother—at the critical time, namely at the time when conception could have occurred; and
b) the negative presumption: the wife—the child's mother—did not have sexual relations with another man, namely a man who is not married to her, at the critical time.[47]

The second paragraph of Art. 113 of the FC is a novelty. Under Art. 86 of the MFRA, the legal presumption of paternity was extended to 300 days after the dissolution of the marriage, irrespective of the manner of dissolution. The new FC, however, extends the legal presumption of paternity to 300 days after the dissolution of the marriage only in the case of dissolution due to the death of the mother's husband. In this case, the narrowed legal presumption of paternity (300 days after death) will only be relevant if the death is sudden and unexpected and takes into account the subjective characteristics of the deceased husband, including medical and age characteristics:

The paternity of a child born within the marriage—or within 300 days of the dissolution of the marriage by the death of the husband of the child's mother—shall be established by the birth of the child itself based on a legal presumption of paternity.

Last, with regard to the relationship between the spouses before death, the arrangement is based on the idea of avoiding the so-called mixing of blood (Latin *turbatio aut perturbatio sanguinis*). The legal presumption of paternity is based on the further presumption that, after the husband's death, the wife has entered into mourning (Latin *tempus lugandi*) and has not had sexual intercourse. In the past, a widow could not contract a new marriage before the mourning period had expired. The legal presumption of paternity and the mourning period prevented blood mixing, thereby extending "legal paternity" to the period after the father's death. This was to prevent the child, with whom the wife was already pregnant at the time of her husband's death, from being left without a father. Therefore, the scope of the legal presumption of paternity extended to 300 days after the dissolution of the marriage, either by the death of the mother's husband or by divorce. The new FC has abolished the latter.

46 Cretney, 2000, p. 193.
47 Mladenović, 1981, p. 38.

Another novelty is represented by Art. 114(3) of the FC, which has a dual purpose. On the one hand, it excludes the application of the legal presumption of paternity to a child born 300 days after the divorce or annulment of the marriage; the legislator was guided by the premise that spouses who divorce because of mutually aggravated (hostile) relations do not have sexual relations. On the other hand, it expressly provided that the father of a child born in a marriage entered by the mother within 300 days of the dissolution of the previous marriage is to be considered the mother's husband from the new marriage, irrespective of the reason for the dissolution of the previous marriage.

Article 7 of the CRC provides that a child has the right to know their parents where possible. States parties to the CRC must ensure that this right is exercised under their domestic law and the obligations imposed on them by the relevant international instruments in this field. Article 7 of the CRC is then complemented by Art. 8 of the CRC, which commits states parties to respect the right of the child to maintain their own identity, including family relationships. States parties must ensure, through their legislation, no unlawful interference or, in the event of deprivation, that appropriate assistance and protection is provided to secure the child's identity.

The rights of a child to know their parents and their own identity are also guaranteed and enforced through the legal arrangements for establishing the paternity of children born out of wedlock (i.e., through the acknowledgment or judicial establishment of paternity). The new FC does not speak of "legitimate" and "illegitimate" children as Art. 14 of the CRS states that discrimination based on birth is prohibited. This is also confirmed by Art. 54(2)[48] of the CRS.

However, a difference exists regarding the creation of a legal relationship between the child and the father (i.e., paternity). The father of a child born out of wedlock or 300 days after the dissolution of the marriage by the death of the child's mother's husband is the man who acknowledges paternity or whose paternity is established by a court decision. In both cases, the children are not subject to the legal presumption of paternity. Such child is a child who is "*filius nullius*" at birth.[49]

In the first case, the man who makes the acknowledgment will be considered the father (subject to the requisite conditions established in the FC). This is a consent of the wills since the child's mother must also agree to the acknowledgment. Whether the man who makes the acknowledgment is also the child's father is not examined. The situation is different in the case of paternity by judicial decision, where, at the end of the judicial proceedings, the man whose paternity has been established in the judicial proceedings will actually know whether they are the father or not (which is not necessarily the case if the child is born in wedlock or if an acknowledgment of paternity is made).

48 Article 54(2) of the CRS: "*Children born out of wedlock shall have the same rights as children born into wedlock.*"

49 Gernhuber and Coester-Waltjen, 1994, p. 795.

The paternity acknowledgment and consent to acknowledgment are strictly personal declarations of will and do not prohibit a man who knows that he is not the father of a child from acknowledging that child as his own. The same applies to the mother of a child, who may consent to the acknowledgment of any man with whom she wishes to exercise parental care, irrespective of whether a biological link exists between the man and the child.[50]

It should also be pointed out that it is impossible to acknowledge paternity as long as the legal presumption of paternity is provided.[51] The principle of priority, which favors the legal presumption, applies; therefore, the acknowledgment of paternity is a subsidiary since it may be granted in the absence of a legal presumption of paternity.

## 5. The concept of a child

Article 1 of the CRC provides that for the purposes of the CRC, a child means every human being under the age of 18 years, unless majority is attended earlier under the law applicable to the child. The prior MFRA did not contain a definition of "child"; still, following Art. 8 of the CRS, ratified and published international treaties are directly applicable in the Republic of Slovenia. The definition of a child in the CRC was binding even without the MFRA's definition. Despite the direct application of the CRC, the new Slovene FC still expressly provided in Art. 5 that a child is a person who has not yet reached the age of 18.

Eighteen years of age is accepted in international treaties and national jurisdictions as the general legal boundary separating a child from an adult. The boundary between child and adult—or between minority and majority—is defined by chronological age, namely the age of 18.[52] The onset of adulthood is thus linked to an objective circumstance[53] leading to so-called "legal emancipation."[54] When a child reaches the age of 18, a legal presumption is established, based on which the child is presumed to be old and mature enough to acquire full legal capacity. This enables the child to enter into legal transactions independently and acquire the rights and obligations arising therefrom. When a child reaches the age of majority, parental

50 See ECLI:SI:VSRS:2020:II.IPS.127.2019, June 5, 2020.

51 Art. 113(1) of the FC.

52 Although the CRC set a uniform threshold separating a child from an adult, the exceptions and the lower age limit (15 under the FC) for acquiring full legal capacity before the age of 18 vary from country to country. Moreover, according to some authors, despite the adoption of the CRC, certain issues relating to the beginning (pre-birth) or end (post-maturity) of childhood remain open and are regulated in different ways (Bainham & Cretney, 1993, p. 249).

53 Kraljić, 2019, str. 60.

54 See more in Kraljić and Drnovšek, 2020, pp. 111–127.

care ceases; consequently, the parents are no longer the child's legal representatives, and they are left with the obligation to maintain the child, provided that the child is in full-time education. The parents have this obligation until the child completes their education but not after they turn 26.

However, the FC provides two exceptions under which a child under the age of 18 can acquire full legal capacity if the prescribed conditions are met. Under the FC and Non-Contentious Civil Procedure Act[55] (hereinafter, NCCPA-1), the emancipation of a child before the age of 18 can only occur based on a court decision in a non-contentious procedure.

The first exception is the marriage of a child over 15 years of age, which the court may, for justified reasons, authorize. The court will permit the marriage if the child has attained such physical and mental maturity that they can understand the meaning and consequences of the rights and obligations arising from it.[56] Therefore, the court will have to determine, on a case-by-case basis, whether the child is given a sufficient degree of physical and mental maturity to understand the meaning and consequences of their rights and obligations. If all prescribed conditions are fulfilled, the court will give them permission to marry before the age of 18 (the so-called "overlooking minority").

The second exception arises when a minor has become a parent and the court grants them full legal capacity in a non-contentious procedure based on a petition filed.[57] Proceedings for full legal capacity may be initiated upon the petition of the child who has become a parent or, with the child's consent, upon a petition filed by the social work center[58].

## 6. Principles of parental responsibility

The term "parental care" is new in the Slovenian legal system, having been introduced in 2017 by the new FC, which is comparable in content to the term "parental right" in the former MFRA. The change in terminology was necessary as the FC is child-centered and thus also terminologically aligned with contemporary guidelines and developments.

In the Slovenian language, the term for "parental rights" was "*roditeljska pravica*," which originates from the word "*roditelji*" (a word for "parent," but it implies that the person gave birth or is a biological parent of a child) and "*roditi*" (to

55 Non-Contentious Civil Procedure Act (Slovene: Zakon o nepravdnem postopku): Official Gazette of the RS, no. 16/19.

56 Art. 24 of the FC in conjunction with Art. 152 of the FC.

57 Art. 152 of the FC and Art. 71-75 of the NCCPA-1.

58 Art. 71 of the NCCPA-1.

give birth).[59] The use of the term "*roditeljska pravica*" was unsuitable because it implied that only the child's biological parents have this right and not, for example, their adoptive parents (who would not be considered "*roditelji*"). In the Slovenian language, the new term for parental care is "*starševska skrb*," which originates from the word "*starši*," meaning, *inter alia*, "men and women in relation to their child" or "men and women with children."[60] This term has a notably broader scope and covers all persons who may be considered parents to a child and are therefore granted parental care. Another reason why this expression is more appropriate is because some parents understood the word "right" in a somewhat possessive manner, implying that the child is the subject of their rights and—in a way—their property. The new expression is more child-oriented and implies that the parents have not only the right but also obligations to take care of the children and their interests.[61]

The FC provides a definition of parental care in Art. 6, which is further elaborated in later provisions. Parental care thus constitutes the whole of the parents' obligations and rights to create, following their respective capabilities, conditions in which the child's complete development will be ensured. Parental care belongs jointly to both parents. This definition is a derivation of the constitutional provision, which grants parents the right to maintain, educate, and raise their children.[62] Parental care may be revoked or restricted only for the reasons provided by law to protect the child's interests. These constitutional rights and obligations are reflected in the family law provisions that regulate parental rights (now parental care), the right to maintenance, and the right to contact.

The content of parental care is therefore specified in several articles of the FC; however, the basic principle is that parents must follow the child's best interests. The principle of the best interests of the child is a fundamental principle of child law; it dictates that parents must, in all activities relating to the child, look after the child's best interests and raise them with respect for their person, individuality, and dignity.[63] Parents are considered to be acting in the best interests of the child if, considering the child's personality, age, and stage of development and desires, they adequately meet their material, emotional, and psychosocial needs by acting in a manner which demonstrates their care for and responsibility toward a child and by providing the child with appropriate educational guidance and encouragement for their development.[64] State authorities, public service providers, holders of public powers of attorney, local authorities, and other natural and legal persons also have a duty of care for the best interests of the child in all activities and procedures relating

59 See Slovar slovenskega knjižnega jezika (Dictionary of Standard Slovenian Language), ZRC SAZU, available at https.www://fran.si/ (Accessed: April 20, 2022).

60 See Slovar slovenskega knjižnega jezika (Dictionary of Standard Slovenian Language), ZRC SAZU, available at https.www://fran.si/ (Accessed: April 20, 2022).

61 Drnovšek and Markač Hrovatin, 2019, pp. 107–108.

62 Art. 54(1)(1) of the CRS.

63 Art. 7(1) of the FC.

64 Art. 7(3) of the FC.

to them.[65] To develop positive parenting, the state provides the conditions for the activities of nongovernmental organizations and professional institutions.[66] Following Art. 3 of the CRC, in all actions concerning children—whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies—the best interests of the child shall be a primary consideration.

Consequently, states parties to the CRC undertaking to ensure the child with such protection and care as is necessary for their well-being and considering the rights and duties of the parents, legal guardians, or other individuals legally responsible for the child, shall, to this end, take all appropriate legislative and administrative measures. States parties shall also ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities—particularly in the areas of safety, health, the number and suitability of their staff, as well as qualified supervision.

The child's best interest is a legal standard to be developed for each child on a case-by-case basis. Although parents have an obligation to care for and protect their children, they have no absolute right to invade a child's privacy. As children grow up, their need for privacy increases. If child-rearing used to be an absolute right of parents, today, it is increasingly becoming a part of the public and professional services. There is a great interest in defining the elements of successful parenting as this can aid parents in helping their children reach their potential and lead fulfilled lives.[67] The concept of good parenting cannot be generic and static as its content may vary from family to family, and the underlying values (moral, educational, religious, philosophical, etc.) distinguish a particular parent or family from others.[68]

However, it should be noted that the state cannot and should not take on the primary role in regulating family relationships as this is a role of parents.[69] The primacy of parental care principle entitles parents to take precedence over all others in their care and responsibility for the child's best interests.[70] Article 135 of the FC provides that parents have the primary and equal responsibility for the child's care, upbringing, and development. This also follows from Art. 8 FC, according to which children enjoy the special protection of the state when their healthy development is endangered and when the child's other interests require it. Parents are the ones who should know their children and their wishes and needs best. It follows from the above that the state (e.g., social work centers, police, courts), through its bodies/authorities, will only intervene in the family relationships if the child's best interests are at stake (e.g., if the parents, as the primary holders of parental care, fail to exercise this).

From Roman law until the end of the nineteenth century, paternal authority (Latin *patria potestas*) prevailed, placing the father at the forefront as the key person

65 Art. 7(4) of the FC.
66 Art. 5(4) of the FC.
67 Scott, 1998, p. 90.
68 Shmueli and Blecher-Prigat, 2011, pp. 787–789.
69 Wardle, 2013, p. 209.
70 Art. 7(2) of the FC.

in the child's care. This legal presumption was based primarily on the fact that the father had the means to support the child.[71] Today, parental care in Slovenia and many other jurisdictions belongs jointly to both parents following the principle of parental equality, which gives parents primary and equal responsibility for their child's care, education, and development. The best interests of the child must be their primary concern, and the state shall assist them in exercising their responsibility.[72] Article 5 of Protocol 7 to the ECHR also guarantees the equality of spouses, who have equal civil rights and consequences for their children both during and after the dissolution of the marriage[73]; however, states may take measures dictated by the children's best interests.

In Slovenia, joint parenting/custody was first established with the amendment to the MFRA-C,[74] which stipulated, in Art. 105, that if the parents do not or will no longer live together, they must agree on the care and upbringing of their common children in accordance with their best interests. As a novelty, it was also made possible by law to agree that they should both have or retain the children's parental rights (under the MFRA). The FC went further by making joint custody the first choice in Art. 151(2),[75] even in cases where the parents no longer live or will no longer live together. As a matter of primacy principle, the parents should reach an agreement on the child's custody; if they fail to do so, the court will proceed based on the legal presumption that both parents—and thus shared parenting—are acting in the child's best interests. This legal presumption will only apply if the court finds that the parents have already shared the parental tasks reasonably before the court's decision and no circumstances disqualify one parent as being unsuitable for the care and upbringing of the child (e.g., mental illness, violence, abuse of the child, etc.).[76]

The principle of joint parenting/custody is the starting point for implementing parental care under the new FC. Parental care is shared by both parents,[77] reflecting the principle of parental equality. Parental care is shared by the parents of a child born in wedlock as well as by those of a child born out of wedlock, and it is also irrelevant whether the parents live together or not. In doing so, the FC has consistently implemented the constitutional provision in Art. 54(2) of the CRS (and international conventions), which guarantees the equality of children born out of wedlock and

71 See more in Šelih, 1992, pp. 16–17; Vučković Šahović and Petrušić, 2016, p. 25.

72 Art. 135 of the FC.

73 See ECLI:SI:VSLJ:2021:IV.CP.98.2021, May 19, 2021: "*From the point of view of the parents' rights, it would be preferable for them to care for and exercise their rights together at all times, even if they are separated.*"

74 Marriage and Family Relations Act (Slovene Zakon o zakonski zvezi in družinskih razmerjih – official consolidated version [ZZZDR-UPB1]): Official Gazette of the RS, no. 69/2004.

75 See Art. 152(1) of the FC: "*Where the parents do not live together and the child is not entrusted to the care and upbringing of both parents, they shall decide by agreement and in accordance with the best interests of the child on matters which substantially affect the child's development.*".

76 Oliphant and Van Steegh, 2016, p. 153.

77 Art. 6(2) of the FC.

children born in wedlock. The new FC has thus gone one step further and established joint parenting as a rule that can only be waived in cases provided for in the FC.

Parental care belongs initially to both parents;[78] however, the court may prohibit one or both parents from exercising individual rights of parental care if the child is endangered. Following the least restrictive measure principle, the measure should interfere as little as possible with the parent–child relationship while ensuring adequate protection. Restrictions on parental care must be based on legitimate grounds and should not be discriminatory.

Parents exercise their parental care consensually. Following the principle of equality, the parents agree on exercising the obligations and rights constituting their parental care. The child's best interests must always be the primary consideration; if they fail to reach an agreement, they may be assisted by the social work center or, if they so wish, by family mediators. However, if they cannot reach an agreement even with the help of the social work center and/or mediators, the court will decide.

## 7. The rights and obligations of parents and children resulting from parental responsibility

Parental care encompasses all the parent's responsibilities and rights to establish, to the best of their abilities, the conditions that will enable the child's full development. Both parents share responsibility for parental care,[79] and they have the right and responsibility to care for, educate, and raise their children. Therefore, parents are the key persons in the child's life and development; they play a central role as they have priority over all others in their care and responsibility to fulfill the child's best interests.[80] The child's rights represent a correlation with the parents' obligations.

Article 136(1) of the FC provides that parental care comprises the following obligations and rights of parents:

a) to care for the child's life and health;
b) upbringing, protection, and care;
c) supervision of the child;
d) care for child's education;[81]
e) representation;
f) maintenance of the child; and
g) the management of the child's property.

78 Art. 6(1) of the FC.
79 Art. 6 of the FC.
80 Art. 7(2) in conjunction with Art. 135 of the FC—the principle of primacy.
81 See ECLI:SI:VSLJ:2021:IV.CP.906.2021, June 8, 2021: "*According to case law, the question of where a child goes to school and where they will live is a question of the exercise of parental care and must be agreed between the parents; if there is no agreement, the court decides.*"

Parents have autonomy in exercising parental care, but the principle of the child's best interests limits this.[82] As far as possible, every effort is made to preserve the child's family of origin and family environment; however, where parents are unable (e.g., disability), inadequate (e.g., young age), or prevented (e.g., deprivation of parental care) from caring for their child, the state provides them with assistance in exercising their parental care. Thus, state authorities, public service providers, holders of public powers, local authorities, and other natural and legal persons are obliged to look after the child's best interests in all activities and proceedings relating to the child. Only for legal reasons for preserving the child's best interests[83] may this right and obligation be revoked or limited.[84]

Parents' rights and obligations are not set out only in the FC but also in other legal acts.[85] One such legal act is the Personal Name Act[86] (hereinafter, PNA), which stipulates that parents must determine the child's personal name (first name and surname) and register it with any administrative unit no later than 30 days after the child's birth.[87] The parents determine the child's personal name consensually unless one of the parents is unknown, no longer alive, or unable to exercise parental care. In this case, the other parent shall determine the child's personal name. The child may be given the surname of one or both parents, or the parents may give the child a different surname. However, if the child's parents are no longer alive or are unable to exercise parental care, the child's personal name is assigned to the child by the person entrusted with their care, with the consent of the competent social work center (Art. 7 of the PNA).

It is important to note that parental care, the right to maintenance, and the right to contact are independent and separate rights and should be interpreted as such (e.g., the withdrawal of parental care does not affect the parents' obligation to maintain their children).

82 See ECLI:SI:VSCE:2016:CP.506.2016, May 29, 2016: "*Deprivation of parental care must be subject to exceptional circumstances, so as not to violate the constitutional right to family life.*"

83 Art. 54(1) of the CRS.

84 See ECLI:SI:VSLJ:2016:IV.CP.2650.2016, November 9, 2016: "*Child sexual abuse is one of the most serious and rejected forms of violence against a child, and it causes irreparable harm to the child. If the perpetrator is a parent, this constitutes grounds for deprivation of parental right.*"

85 See also Obligations Code (hereinafter: OC) (Slovene: Obligacijski zakonik – Official Gazette of the RS, no. 97/07 – official consolidated version, 64/16 – odl. US, 20/18 – OROZ631), Elementary School Act (hereinafter: ESA) (Slovene: Zakon o osnovni šoli (Official Gazette of the RS, no. 81/06 – official consolidated version, 102/07, 107/10, 87/11, 40/12 – ZUJF, 63/13, 46/16 – ZOFVI-K); Patients' Rights Act (hereinafter, PRA; Slovene: Zakon o pacientovih pravicah): Official Gazette of the RS, no. 15/08, 55/17, 177/20; etc.

86 Personal Name Act (Slovene: Zakon o osebnem imenu): Official Gazette of the RS, no. 20/06, 43/19.

87 Art. 6(1) of the PNA.

## 8. Sexual education of children and parental responsibility

No systemic sex education has been provided in Slovenian schools since 1985. At that time, the abolition of health education meant that two other curricula of real importance for life were eliminated: hygiene, safety, and with it, first aid.

Experts point out that in Slovenia, sex education in primary schools is not adequately regulated. No existing legislative provisions determine who can provide formal or non-formal forms of sexual education in educational institutions; in practice, this is mainly done by biology teachers in the subject of biology, although some schools involve external providers, most often nurses or other professionals (e.g., the VIRUS Society). Because these sex education programs are voluntary and not systematically regulated, few schools are involved. In addition, the school management has a decisive role in implementing the content delivered by the invited experts.[88]

The VIRUS Project is an educational and health-preventive program that operates within the framework of Slovenian Medical Students' Association. The project is run voluntarily by medical students. The main motive for the implementation of the VIRUS Project programs is the spread of the epidemic of sexually transmitted infections and the need for effective sex education in Slovenian primary and secondary schools. The project's main activity is transferring knowledge and motivation for safe and healthy sex and preventing the spread of sexually transmitted infections, focusing on HIV and AIDS. To this end, several activities are regularly conducted within the project, the main activity of which is peer education workshops on the topic of healthy and safe sexuality. Workshops are held in primary and secondary schools and youth associations throughout the school year, and the providers of the workshops are volunteers—mostly medical students—who are appropriately professionally educated.[89]

## 9. Detailed issues related to parental responsibility

### *9.1. General on the representation of the child*

Parents are the legal representatives of their children (Art. 145 of the FC).[90] Representing their child is one of parents' fundamental rights and obligations, and it is a broader concept than the conclusion of legal transactions, regulated by Art. 146 of

88 Arula, 2020.

89 See more in Projekt VIRUS, 2011.

90 See ECLI:SI:VSLJ:2022:VII.KP.32793.2020, January 12, 2022: "*The father of the minor victims as prosecutors is their legal representative by law and is entitled by law to act on their behalf and to make pleadings before the court…It is clear from the description of the offense and the contents of the indictment that the father is bringing the indictment as the legal representative of the minor victims as prosecutors, and not as the injured party.*"

the FC. Because of their young age, children are not capable of looking after their rights and interests and, consequently, of representing their interests in legal transactions. Parents have autonomy and equality in representing their children, and the child's best interest is the main guiding principle regarding representation. Parents must act diligently and carefully in their representation. In assessing the diligence and care of a parent, the standard of good stewardship applies.[91]

If something must be served, delivered, or communicated to the child, it can be done by either parent and, if the parents do not live together, by the parent with whom the child lives or the parent named in the court settlement or court decision on joint custody as the parent to be served, delivered, or communicated.[92]

### *9.2. Restrictions*

Parents cannot represent their children in matters of a personal nature[93] or concerning the child's personal rights, even though they are minors. Where the law provides, the child's independent consent is required in cases expressly provided for. The children will have to give their consent if the prerequisites are met. The first presumption is that they can provide this consent and also understand the meaning of the act (subjective presumption); however, some legal acts require an objective presumption, namely a certain age (usually 15 years), in addition to the subjective presumption. For example,

a) Registration of marriage: a minor over 15 years of age must register (together with the future spouse) for marriage with the administrative unit in whose territory they intend to marry. Representation through parents as legal representatives is impossible as this is a personal decision.[94]
b) Art. 24 of the FC provides that a child may not enter into a marriage unless the non-contentious court permits a child who has attained the age of 15 to enter a marriage. The court will permit the child—who has reached such physical and mental maturity that they can understand the meaning and the consequences of the rights and obligations arising from the celebration of the marriage—to enter into a marriage. The legislator has thus set an objective limit of 15 years as a starting point for the possibility of marriage.[95] The subjective criterion is the individual's personal maturity and judgment, which are examined on a case-by-case basis. Parental representation is not possible.[96]

91 Kraljić, 2019, p. 494.
92 Art. 145(2) of the FC; cf. also Art. 139 of the FC.
93 Latin *intuitu personae*.
94 Art. 30(1) of the FC.
95 See ECLI:SI:VSLJ:2019:V.KP.61744.2018, September 10, 2019: "*In the context of assessing whether a witness is privileged, the existence of an extramarital union relationship must be assessed by reference to the time when the witness was questioned. Since the victim was not yet 15 years old at the time of her examination before the examining judge, an extramarital union relationship between the defendant and the victim could not have existed at that time.*"
96 See more in Kraljić and Drnovšek, 2020, pp. 111–127; Novak IN Novak, 2019, pp. 117–118.

c) Acknowledgment of paternity can also only be made in person by a man capable of understanding the meaning and consequences of the acknowledgment.[97] As a result, the new FC is based only on the subjective assumption that the man making the acknowledgment is capable of understanding the meaning and consequences of the given acknowledgment of paternity.
d) Last will (testament) may be made by anyone who is of sound mind and has attained the age of 15[98]. Since a will is a strictly personal legal transaction, in our case, it may be made only by the ward themselves. Parents in the context of legal representation cannot validly substitute the child's will in drawing up, modifying, or revoking it.

### *9.3. Education*

In Slovenia, primary education is compulsory.[99] It is, therefore, an obligation rather than a right. Parents can choose the form of their child's primary education between public school, private school, and home-schooling (Art. 5 of the ESA).[100]

Parents must enroll their children in primary education in the year they turn 6. Parents deriving from Art. 4 of the ESA must ensure that the child fulfills the primary education obligation. Compulsory primary education lasts for 9 years and ends when the pupil successfully completes the ninth grade or fulfills the primary education obligation after 9 years of education.[101]

Parents are involved in all the activities of primary education arising from the ESA, and they may also be fined if they fail to enroll their child in the first grade of primary school or to ensure that the child fulfills the primary education obligation.[102] The aim of caring for a child's education is directed toward the ultimate goal of enabling the child to work and live independently after they reach the age of majority.[103]

97 Art. 116 of the FC.
98 Art. 59(1) of the Inheritance Act (Slovene: Zakon o dedovanju): Official Gazette of the SRS, no. 15/76, 23/78, Official Gazette of the RS, no. 13/94 – ZN, 40/94 – odl. US, 117/00 – odl. US, 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – odl. US, 63/16.
99 Art. 57(2) of the CRS.
100 See ECLI:SI:UPRS:2016:I.U.1412.2016, October 27, 2016: "*In the present case, the transfer of a pupil from a branch school to the parent primary school cannot be regarded as a transfer within the meaning of Article 54 of the Elementary School Act. In the context of the implementation of the principle of the protection of the best interests of the child of a minor who is in the process of being re-schooled for the purpose of educational measures, the rights to the safety and dignity of other children and of the members of the teaching staff and other staff of the primary school, as well as the inviolability of the physical and mental integrity, must also be taken into account, privacy and personality rights of other pupils and teachers and other employees of an institution providing primary education, and the exercise of the legal rights of children to primary education under the Elementary School Act, which are endangered by the actions of a particular child.*"
101 Art. 2 of the ESA.
102 Art. 102 of the ESA.
103 Kraljić and Križnik, 2021, p. 283.

### *9.4. Medical treatments*

Parental care is the totality of the obligations and rights of parents to create, following their abilities, the conditions in which the child's full development is ensured.[104] Parental care, therefore, also includes the obligations and rights of parents, which (among others) relate to the care of the child's life and health.[105] Parents are obliged to take care of the physical as well as the mental health of their children. However, when the child becomes capable of consenting independently to medical treatment or care, the parents' obligation and right to decide on this also ceases.

When a child can consent independently to medical intervention or treatment under the PRA, an interim measure for medical examination or treatment can only be made with the child's consent. Where a child lacks the capacity to consent to a medical procedure or treatment, treatment may only be conducted with the permission of their parents or guardian.[106] The PRA has established a legal presumption that a child under the age of 15 is not capable of consenting unless the doctor, in light of the child's maturity, assesses the child's capacity to do so. The doctor will consult the child's parents or guardian on the circumstances relating to the child's capacity to make decisions for themselves.

A child who has reached the age of 15 shall be presumed to have the capacity to consent unless the doctor assesses that they are incapable of doing so in light of their maturity. In such cases, the doctors shall, as a general rule, consult the parents or guardian concerning the circumstances relating to the capacity to make decisions concerning themselves.[107] A child is therefore capable of deciding if, in light of their age, maturity, state of health, or other personal circumstances, they are able to understand the meaning and consequences of exercising their rights under the PRA.[108]

The Oviedo Convention[109] has not adopted a specific age as a threshold for allowing minors to make their own decisions about interventions. The minor's opinion is considered an increasingly decisive factor in proportion to their age and level of maturity and is therefore primarily taken into account. However, if the minor is legally incapable of consenting to the medical treatment, the parents will be involved in the procedure following the principle of subsidiarity. This standpoint is also taken up in the Slovene PRA.[110]

On the other hand, when parents decide on medical treatment, they usually decide mutually; however, the consent of both parents is required for medical

104 Art. 6(1) of the FC.
105 Art. 136(1) of the FC.
106 Art. 35(1) of the PRA.
107 Art. 35(2) of the PRA.
108 Art. 19(2) of the PRA.
109 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine – Convention on Human Rights and Biomedicine (Oviedo convention): Official Gazette of the RS – MP, no. 17/98.
110 Kraljić, 2019, p. 555.

treatment involving a higher risk or greater burden or medical intervention likely to have significant consequences for the child. However, consent of both parents is not required if

a) one of the parents is unknown or of unknown residence;
b) one of the parents has been deprived of parental responsibility;
c) one of the parents is temporarily absent and cannot give an opinion in time without risk of serious harm to the child;
d) one of the parents does not fulfill the conditions required for the patient to be able to make decisions for themselves.[111]

Where the parents cannot reach a mutual decision on a surgical or other medical treatment involving a higher risk or more significant burden or on a medical procedure likely to have significant consequences for the child, they may propose that the social work center or mediators assist them. If the parents cannot reach a mutual decision even with the help of social work center or mediators, they may apply to the non-contentious court.[112] For other medical treatments or care that do not involve a higher risk or burden, the parent who is present may give consent; if both are present and do not consent, the doctor shall obtain the consent of the consilium, which will follow the principle of the best interests of the child. If it is not possible to obtain the consent of the consilium, the consent should be obtained from another doctor who has not been and will not be involved in the patient's treatment. The decision on a consent form shall be signed by the parent who consents to the medical treatment or care and by the members of the consilium or the doctor who gave the consent.[113] When other persons decide on their medical treatment, the child has the right to have their opinion taken into account as much as possible, provided that they can express it and understand its significance and consequences.[114]

The court does not need the parents' consent to make an interim measure for medical examination or treatment of a child who lacks capacity to consent to medical treatment or care. The starting point for issuing even this interim order is a demonstrated likelihood of the child's endangerment; the purpose of the interim measure is to prevent harm to the child's physical or mental health and development.[115] Therefore, parental consent for medical examination or treatment is not required in this case, since the aim is to protect the child's best interests. However, where the child is capable of consenting to medical intervention or treatment under the PRA, their consent is required for an interim order for medical examination or treatment. If the child objects to making this interim order, the court will not make it; however, if the child consents to the interim measure, this consent does not extend to the

111 Art. 35(4) of the PRA.
112 Art. 35(6) of the PRA.
113 Art. 35(7) of the PRA.
114 Art. 35(8) of the PRA.
115 Art. 161 in conjunction with Art. 157(3) of the FC.

consent to the medical intervention or treatment itself. This consent will be given by the child, who is competent under the PRA, after the doctor has performed their explanatory duty in the health care institution. However, the child also has the right to refuse the proposed medical treatment or care if they are capable.

An interim measure for medical treatment or care can only relate to a specific medical procedure or treatment. It cannot relate to the whole of medical interventions and medical care as it would be difficult—if not impossible—to demonstrate the child's risk for all interventions in advance; the risk must be preexisting or highly probable. The harm or probability of harm must be the result of an act or omission of the parents or the result of psychosocial problems of the child, manifested as behavioral, emotional, learning, or other difficulties in their upbringing.[116]

However, the court may decide to medically examine or treat a child without the parents' consent or contrary to their decision, where this is strictly necessary because the child's life is in danger or their health is seriously endangered. When a child is capable of consenting to a medical intervention or to medical treatment under the law governing patients' rights, this measure may be conducted only with their consent.[117]

However, emergency medical treatment of a child can also be provided when the parents or guardian refuse it,[118] thus ensuring the protection of the child's best interests.

Slovenia is one of the countries that implemented a mandatory vaccination program for children. In line with Art. 22(1)(1) of the Communicable Diseases Act[119] (hereinafter, CDA), mandatory vaccination for nine contagious diseases (tuberculosis vaccination is no longer mandatory since 2005) has been enacted. The question of whether or not a parent consents to vaccination does not arise in the context of compulsory vaccination as the parent is obliged to vaccinate the child, as mandated by the CDA. The CDA also foresees the possibility of omitting mandatory vaccination only based on health reasons. The doctor must establish reasons for an eventual temporary or complete omission of vaccination before each vaccination by examining the child, having insight into their health documentation and establishing whether some reasons might permanently worsen the child's health. Among the health reasons for the omission of vaccination are

a) allergy to composite parts of vaccine;
b) serious unwanted effect of vaccine after a prior dose of the same vaccine;
c) disease or health status that is incompatible with vaccination.[120]

116 Art. 157(2) of the FC.
117 Art. 172 of the FC.
118 Art. 36 of the PRA.
119 Communicable Diseases Act (Slovene: Zakon o nalezljivih boleznih): Official Gazette of the RS, no. 33/06 – official consolidated version, 49/20 – ZIUZEOP, 142/20, 175/20 – ZIUOPDVE, 15/21 – ZDUOP, 82/21, 178/21 – odl. US; see more in Kraljić and Kobal, 2018, pp. 434–436.
120 Art. 22a(2) of the CDA.

### *9.5. Decisions about contraception and abortion*

The provisions of Art. 55 of the CRS on the freedom to decide on the birth of children regulate a fundamental freedom (not a right), which the state guarantees the possibility of exercising by creating conditions that allow parents to decide freely on the birth of their children.

Starting from Art. 6 of the Health Measures in Exercising Freedom of Choice in Childbearing Act[121] (hereinafter, Childbearing Act), women and men have the right to advice on how they can prevent conception. Prevention of conception is either temporary (contraception) or permanent (sterilization); thus, a woman and a man have the right to be advised by a doctor or to be prescribed by a doctor the means best suited to them for the temporary prevention of conception.

As a general rule, artificial termination of pregnancy (hereinafter, abortion) can only be conducted at the pregnant woman's request. Abortion is possible if it lasts less than 10 weeks.[122]

Pregnant women may also request an abortion of a pregnancy lasting more than 10 weeks. In this case, abortion will be performed only if the danger of the procedure to the pregnant woman's life and health, as well as her future maternity, is lesser than the risk to the pregnant woman or the child from continuing the pregnancy (Art. 18 of the Childbearing Act). If a minor pregnant woman requests an artificial termination of pregnancy, as a general rule, the health organization performing the termination of pregnancy will inform on the procedure the parents or guardian.[123]

### *9.7. Conflict of interests*

The social work center or the court will appoint a so-called conflict guardian in case of a conflict of interests. Anyone faced with such a situation must immediately inform the court or social work center. The interests of the legal representative and the child in conflict are assessed according to the circumstances of the case.[124]

If there is a conflict of interest, parents/guardians (as legal representatives) cannot represent their child/ward because of this as they cannot appear in a dual role: on the one hand, representing their own interests in a dispute or proceeding, and on the other hand, representing the interests of their child/ward. The purpose of appointing a conflict guardian is to ensure that the rights and best interests of the child or ward are safeguarded as they cannot do so independently. The appointment

121 Health Measures in Exercising Freedom of Choice in Childbearing Act (Slovene: Zakon o zdravstvenih ukrepih pri uresničevanju pravice do svobodnega odločanja o rojstvu otrok): Official Gazette of the SRS, no. 11/77, 42/86, Official Gazette of the RS, no. 70/00 – ZZNPOB.

122 Art. 17 of the Childbearing Act.

123 Art. 22(2) of the Childbearing Act.

124 ECLI:SI:VSLJ:2021:IV.CP.627.2021, May 7, 2021.

of a conflict guardian ensures that an objective and impartial person represents the child or ward. The court or social work center will therefore appoint the conflict guardian

a) to a child over whom the parents exercise parental care, if their interests conflict;
b) to a ward, if the interests of the ward and their guardian conflict;
c) to any child, where the interests of children over whom the same person has parental care conflict;
d) to any person where the interests of persons having the same guardian conflict.[125]

### *9.8. Cyberspace tools*

The Slovenian FC does not contain provisions that explicitly address the issue of children's access to cyberspace tools. However, following Art. 35[126] of the CRS, children also have the right to the protection of their privacy and personality rights. The Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and the repeal of Directive 95/46/EC[127] (hereinafter, GDPR) also intervenes in the area of legal protection of children in the online environment. Children merit specific protection regarding their personal data as they may be less aware of the risks, consequences, and safeguards concerned and their rights in processing personal data. Such specific protection should, in particular, apply to the use of children's personal data for marketing or creating personality or user profiles and the collection of personal data concerning children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary for the context of preventive or counseling services offered directly to a child (Para. 8 of the GDPR).

Concerning offering information society services directly to a child, the processing of a child's personal data shall be lawful when the child is at least 16 years old. Where the child is below the age of 16, such processing shall be lawful only if and to the extent that consent is given or authorized by the holder of parental care over the child. According to Art. 8(1) of the GDPR EU Member States may provide by law for a lower age for those purposes, provided that such lower age is not below 13 years.

125 Art. 269 of the FC.
126 See Art. 35 of the CRS: "*The inviolability of the physical and mental integrity of every person and his or her privacy and personality rights shall be guaranteed.*"
127 *OJ L 119, 4.5.2016, pp. 1–88.*

# 10. Parental authority in case of divorce

## *10.1. General on divorce*

A marriage can undergo divorce:
a) by mutual consent, either
   i) in court or
   ii) before a notary,[128]
b) or at the request of one of the spouses.

The district courts are competent to decide on divorce in the first instance.[129] The court will dissolve the marriage in a non-contentious procedure based on a mutual agreement between the spouses if they have reached an agreement
a) on the custody, upbringing, and maintenance of the joint children and their contact with their parents; and
b) if they have submitted the agreement as an enforceable notarial deed
   i) on the division of community property,
   ii) on which of them shall remain or become the tenant of the dwelling,
   iii) and on the maintenance of a spouse who has no means of subsistence and who, through no fault of their own, is not employed.[130]

If one of the agreements that the petitioners must conclude for their marriage to be dissolved under Art. 96 of the FC is absent, the conditions for a divorce by agreement are no longer fulfilled.[131]

## *10.2. Protection of the child during divorce*

Before the court dissolves the marriage, it must determine whether the agreement between the spouses providing for the custody, upbringing, and maintenance of the children and contact between the children and their parents is in the children's best interests. If the court finds that this agreement is not in the children's best interests, it will reject the application for a divorce by mutual consent.[132] This is because the court cannot rule *ultra et extra petitum* in the case of a divorce by mutual consent.

The situation is different in the case of a divorce based on a petition by one of the spouses, whereby the spouse requests a divorce for whatever reason the marriage

128 Spouses can only divorce before a notary if they have no children in common over whom they have parental care. This form of divorce is therefore not discussed in detail. For more on notarial divorce, see Kraljić, 2020a, pp. 157–175.
129 Art. 10 of the NCCPA-1.
130 Art. 96(1) of the FC.
131 ECLI:SI:VSKP:2010:CP.675.2010, June 17, 2010.
132 Art. 96(2) of the FC.

has become unbearable[133]. In this case, the court also examines whether the spouses have reached an agreement on the custody, upbringing, maintenance of, and contact with their children and whether this agreement is in the children's best interests[134]. If the court finds that the agreement is not in the children's best interests, it will not be bound by the claims raised in the divorce petition and may even rule without a claim being raised. It can therefore rule *ultra et extra petitum*, which it cannot do in the case of a divorce by mutual consent.[135]

### *10.3. Child's residence*

Where the parents live separated, they must also agree on the child's place of permanent residence; if they fail to do so, the court will also decide on the child's place of permanent residence in the court order deciding on custody.

Under the Residence Registration Act[136] (hereinafter, Residence Act-1), one parent may declare the child's permanent residence with the other parent's consent; however, the consent of the other parent is not required when declaring the permanent residence of the child if the child's permanent residence is determined by an agreement on the custody, upbringing, and maintenance of joint children or by a decision of a competent court.[137] The establishment of the child's permanent residence is of paramount importance as it also determines the territorial jurisdiction of the court and of the social work center.

### *10.4. Parental care after divorce*

FC promotes joint custody also after divorce. Parental care pertains after divorce to both parents and is exercised, by joint mutual agreement, by both parents in the child's best interests. If the parents do not live together and the child does not live in the custody of both parents, the parent with whom the child lives in custody decides on issues about the child's everyday life. In contrast, both parents decide on issues critical for the child's development by common accord and in the child's best interests.[138] If the parents agree on custody, they can propose a court settlement. The court will examine the content of the proposal for a court settlement *ex officio*.

The line between the day-to-day and the essential issues in a child's life can be challenging. Issues that have a significant impact on a child's life include decisions on their education, profession, major medical interventions, decisions on the child's religious upbringing, taking the child on holiday outside the country of origin, changing

133 Art. 98(1) of the FC.
134 Art. 98(3) of the FC.
135 Kraljić, 2019, p. str. 276.
136 Residence Registration Act (Slovene: Zakon o prijavi prebivališča): Official Gazette of the RS, no. 52/16, 36/21, 3/22 – ZDeb.
137 Art. 5(5)(5) of the Residence Act-1.
138 Art. 151(4) of the FC.

the child's personal name,[139] disposing of assets of significant value, bringing an action to contest paternity, and so on.[140] These matters require the agreement and joint regulation of both parents. The parents are free to reach their own agreement with the assistance of the social work center or mediators. If the parents still disagree on an issue that significantly impacts the child's life, they can turn to the courts, which will have the child's best interests as their main consideration. Issues that affect the child's daily life include deciding on their food, their clothes, and how to spend leisure time, among others. However, the court can assess whether a given circumstance constitutes a significant issue likely to affect the child's life in each case.

However, one parent will exercise parental care alone when the other parent is absent.[141] If one of the parents is no longer alive or is unknown, or if they have been deprived of parental care, parental care will belong to the other parent.[142]

However, if the court finds neither parent suitable for the child's future development, the child may also be awarded to a third party—usually a close relative or a person to whom the child feels a special attachment or to an institution for the child's care and upbringing. When a child is placed in the care and custody of a third party, a foster care relationship is established, the purpose of which is to enable children to grow up healthily with persons other than their parents; to be raised, educated, and develop a pleasant personality; and to be trained for independent life and work.[143] These two measures are exceptions and are only applied by the court when the child cannot live with a parent or if it is contrary to the child's best interests.

### *10.5. Children's rights to contact or visit a parent*

The child has a right to contact both parents, and both parents have a right to contact the child. The child's best interests are ensured through contact (Art. 141 of the FC),[144] which means that there is a legal presumption that the contact secures the child's best interests. Therefore, when deciding whether a child will have contact with a parent with whom they will not live, it is not necessary to prove that the contact is in the child's best interests as this is presumed. However, where proceedings are to be brought to withdraw or restrict contact, for reassignment of the child[145] and for a change of contacts owing to the occurrence of changed circumstances,[146] this legal

139 ECLI:SI:VSKP:2007:I.CP.198.2007, March 6, 2007; ECLI:SI:VSLJ:2010:IV.CP.365.2010, May 12, 2010.
140 ECLI:SI:VSLJ:2016:IV.CP.1685.2016, September 7, 2016.
141 Art. 151(5) of the FC.
142 Art. 151(6) of the FC.
143 Art. 232(1) of the FC.
144 ECLI:SI:VSLJ:2022:IV.CP.344.2022, March 14, 2022: "*There is no doubt that without continuous contact between the father and the child, the latter's best interests are at stake. Since the mother repeatedly prevents contact without good reason, the Court of First Instance was right and justified in imposing a fine and threatening a new, higher fine if she did not immediately cease to prevent and impede contact.*"
145 Art. 141(7) of the FC.
146 Art. 141(8) of the FC.

presumption will have to be challenged. Suppose the legal presumption is rebutted and the court finds that the contact is not in the child's best interests; in that case, the court will withdraw or limit the contact, reassign the child's custody or, because of a change in circumstances, change contact arrangements. Enforcing contact is crucial when the child and parent do not live together as it helps maintain their mutual connection and attachment. Contact also allows the child to know their origins and can impact their overall development. The right of a child to contact is strictly personal and is inalienable and non-transferable; it is linked to the child's closest family relationship. The waiver of the right of access has no legal effect and is not extinguished by its non-exercise, nor can anyone be compelled to exercise contact if they do not wish to do so. The right of contact shall be protected against interference by third parties, and it includes the right to visit the child, the right to take part in the child's upbringing, the right to take the child on holiday, and so on.

Contact is primarily for the child's benefit because it allows them to maintain a connection and attachment to both parents, even when separated. The child's best interests must be the main consideration in implementing contact. To ensure the child's short-term—and, in particular, long-term—well-being, both parents must be able to communicate with each other and behave appropriately despite their separation, so that contact can take place without hindrance or obstruction. The parent to whom the child has been entrusted for care and upbringing, or the other person with whom the child has been placed, must refrain from anything that makes contact difficult or impossible. They must ensure that the child has an appropriate attitude toward contact with the other parent or parents. Anything that makes contact difficult for the other parent must therefore be abandoned, including any influence (conscious or unconscious) on the child that causes them to be reluctant to have contact. The parent with whom the child lives is even obliged to be active since their upbringing must positively influence the child and prepare them for contact. If the child is reluctant to have contact, the parent must help the child establish an appropriate and positive attitude toward contact with the other parent.

In the case of rejection of contact by the child, the court must determine whether the denial is a reflection of genuine resistance on the part of the child or whether it is the result of possible influence (manipulation) by the other parent or a third party (e.g., a grandparent). To determine the (il)legitimacy of the refusal of contact by the child, the court may involve a forensic expert (e.g., a psychologist or a pedopsychiatrician), who will ascertain the (in)authenticity of the child's refusal.

If the court finds that the exercise of contact would not be in the child's best interests, it may withdraw or restrict the right of contact.[147] Since contact ensures the continuity of the personal connection and attachment between the child and the parent with whom the child does not live, a disproportionate restriction or withdrawal of the right of contact may constitute a violation of the child's right to regular

147 Art. 141(6) of the FC.

contact and to have a direct relationship with the parent with whom the child is supposed to have contact.

The court may restrict or withdraw the right to contact from one or both parents who have acquired the right of contact by a court decision or a court settlement if the child is at risk of harm as a result of this access and their best interests can only be sufficiently safeguarded by restricting or withdrawing the right to contact. The court may also decide that the contact shall not be conducted by personal meetings and socializing but in other ways, if this is the only way to safeguard the child's best interests. A decision to exercise supervised contact with the child is only permissible by an interim order under Art. 163 of the FC.

### *10.6. Child's opinion*

In deciding on the custody, upbringing, and maintenance of the child, on contact, on the exercise of parental care, and on the granting of parental care to a relative, the court shall also take into account the child's opinion, expressed by the child themselves or through a person whom they trust and whom they have chosen, provided that the child is capable of understanding its meaning and consequences.[148]

The right of the child to express their opinion is a child's right of choice. The child should not be forced to give their opinion, but this should be their free choice. The child is free to express their views without pressure, and they can choose whether or not to express them. A child should express the opinion without any manipulation, influence, or pressure.[149]

When a child decides to express an opinion, they can do so

a) at a social work center; or
b) in an interview with the child's advocate assigned to them under the provisions of the ZVARCP; or
c) depending on the child's age and other circumstances, in an informal interview with a judge. The judge may include the assistance of a professionally qualified person but always without the presence of the parents.[150]

The position of a confidant person can therefore only be held by a person chosen spontaneously and by the child. This may be a sibling or other relative, a godparent, a teacher, a doctor, a trainer, and so on. The position of confidant is also held by a person with whom the child has come into contact in official proceedings and between whom and the child trust has spontaneously developed and been established (e.g., an expert in court proceedings, a social worker at a social work center, a conflict guardian).

148 Art. 143(1) of the FC.
149 United Nations, 2009, p. 7.
150 Art. 96(2) of the NCCPA-1.

Such a person or advocate can help the child express their views. The court may prohibit the presence of a person if it considers that they are not a person in whom the child has confidence and whom they have chosen or that the participation of that person in the proceedings would be contrary to the child's best interests.[151]

## 11. The status of a child not subject to parental responsibility

The new FC introduced a new institution of so-called "granting parental care to a relative." According to Art. 231(1) of the FC, a court may grant parental care to a relative of a child whose parents are no longer alive if this is in the child's best interests and if the relative is ready to assume custody and fulfill the conditions for a child's adoption. The court may grant parental care to a grandparent for their grandchild, to a brother or a sister for their sibling, to an aunt or an uncle for their niece or nephew, to a niece or a nephew for their (much younger) aunt or uncle, to a cousin for their cousin, or to a relative for their brother's or sister's grandchild. This also includes half-relatives (e.g., half-brothers and half-sisters).[152] The court may only grant parental care to be exercised jointly to married or cohabiting relatives who fulfill the necessary conditions.[153] If persons who were granted parental care jointly later divorce or separate, the court needs to establish whether the granted parental care is still in the child's best interest and either decide on the custody, withdraw either person's granted parental care, or replace a measure with a more suitable one. The relative who will be granted parental care will acquire the same rights and obligations that the child's parents would have and will become the child's legal representative.

A child whose parents are unknown or whose residence has not been known for a year may also be placed for adoption.[154] A child who does not have living parents may also be placed for adoption.[155] Adoption requires the child's consent if they can understand the meaning and consequences of the adoption.[156]

When parental care is withdrawn, the court also decides whether the child should be placed with another person, in foster care, or in an institution and whether they should be placed under guardianship.[157]

151 Art. 96(3) of the NCCPA-1.
152 Kraljić, 2019, p. 823.
153 Art. 231(2) of the FC.
154 Art. 218(2) of the FC.
155 Art. 218(4) of the FC.
156 Art. 215(3) of the FC.
157 Art. 176(4) of the FC.

## 12. Summary and *de lege ferenda* conclusions

The new Slovenian Family Code has replaced term "parental right" with "parental care," which has its own terminological implications; however, the fundamental aspects of a connection between parents and their children have remained the same. Parental care, under Slovene law, encompasses the obligations and rights of parents concerning care for the child's life and health, upbringing, care and treatment, supervision of the child, and provision of their education, as well as the obligations and rights of parents concerning the child's representation and maintenance and the management of a child's property. The term "parental care" is more pedocentric as it attempts to focus on the parent's obligations, duties, and responsibilities that they have toward their child. However, under Art. 6 of the Slovenian Family Code, parents have the autonomy to create, following their capacities, the conditions for the comprehensive development of a child. Such legal regulation also ensures respect for the principle of proportionality: on the one hand, it gives parents autonomy in the exercise of parental care; on the other hand, it still guarantees that the state will intervene in this relationship if the child's best interests are at stake. The new Slovenian legal regulation can thus be described as adequate.

Another important step forward is that, as a general rule, parental care belongs to both parents jointly, even when the parents are separated. This ensures the principle of parental equality and that the child continues to have both parents. In this way, Slovenia has also followed current guidelines on this issue and has put the child's best interests at the forefront in this case.

Slovenia has, however, left open the possibility of a more modern definition of maternity and paternity, in which it has continued the traditional approach. It should be borne in mind that the development of medicine caused by the traditional presumption of maternity does not always correspond to the reality of the situation, but it will be given in the case of surrogacy and donated gametes. Nor should we ignore the possibility that a person who is legally and medically a man can give birth to a child. These cases represent a deviation from the traditional definition of maternity, which is why some legal systems have already taken steps to deal with those modern family structures. There are, indeed, still few cases of this kind that depart from the traditional definition of maternity. Nevertheless, it is also necessary to consider harmonizing the legal regimes in these cases.

It should also be borne in mind that all countries are confronted with many secondary families where stepfather or stepmother also come into the role. Here, too, some states have taken a step forward and have approached the subject in question. An appeal should also be made to other states, encouraging them to address this issue more actively at the legislative and judicial levels. It should not be overlooked that here, too, the parties' autonomy and consensual resolutions must be placed at the forefront. The state must, however, provide appropriate legal support and assistance.

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Chapter VIII

# Slovakia: Content of the Right to Parental Responsibility – Family Law at a Crossroads

Lilla Garayová

## 1. Introduction

That of the family is an interdisciplinary concept, which is studied and defined in sociology, anthropology, psychology and pedagogy. The concept of family has many definitions. It can be understood, for example, as the basic social group where a child enters into social relations and within which they become a social being; it can also be understood as a basic stratification factor, since the status of the family from which an individual has emerged constitutes, for them, a capital of the highest importance and an important indicator of their present and future position society.

A family is a community of close persons between whom there are close kinship, psychosocial, emotional, economic, and other ties. Although the concept of family is highly variable in terms of social reality, it cannot be overlooked that it is the biological bond of blood kinship between family members that has traditionally been the basis of family ties. The social reality of the family is undergoing gradual changes, and the traditional European concept of the family is being increasingly fragmented; moreover, the legal regulation of the family is necessarily subject to these changes.

A family bonded by affection, within which the ability to empathize and provide emotional support to one another plays a large role, is a source of happiness, psychological resilience, and mental health for the minor child. Each person remembers and carries with them the memory of how feelings were expressed in their primary family. Positive expression is the fulfillment of children's basic emotional needs and

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evidence of the importance of the immediate family environment for the minor child, especially in their early years.

Within the family, each of us experiences a significant period of time that shapes us as unique beings. A harmonious family should fulfill a variety of functions, including biological, emotional, educational, cultural, and economic. The consistent fulfillment of these functions is a reflection of the exercise of parental responsibilities in the best interests of the child.

Parenthood always involves a relationship of responsibility and parental rights are vested in the parents to enable those responsibilities to be met. The way we view parenthood has undergone significant changes in the past two centuries all over the world. The notion of parents enjoying individual rights over their children has faded and the new term of parental responsibility emerged, which exists in the best interest of the child and for the protection of the child. The term parental responsibility gained worldwide recognition by its use in the UN Convention on the Rights of the Child and this label is now used regularly in international instruments concerning children. The term parental responsibility gives children a position of persons, to whom duties are owed and not possessions over which power is wielded. We can see this shift to move away from the concept of parental power and expressions related to this like parental rights, parental authority, parental power, however many countries have opted to keep these terms and have not yet introduced the term parental responsibility into their domestic legislations.

Parental responsibility encapsulates two key ideas, first, the duty of the parents towards the children, and that the parents must behave dutifully towards their children, and second, the notion that the responsibility for childcare is vested with the parents, not the state. This shows a weakening of the supervisory role of the state over the relationship between parents and children and possible further practical implications of this development. While the term is gaining more and more recognition across the world as countries are changing their legislation, there are still a lot of examples of other terms being used.

The Slovak Family Act does not define the concept of parent nor that of child. However, the definition of these terms can be deduced from the provisions on the determination of parenthood (Section 82 of the Family Act states that "*the mother of the child is the woman who gave birth to the child*, and Section 84 of the Family Act regulates the three rebuttable presumptions of paternity). In defining the concept of child for the purpose of exercising parental rights and obligations, it is necessary to look for support in international treaties and the case law of the courts.

The sources of international law can be divided into three groups in this respect. The first group comprises sources of law that use the term "child" but do not define it, such as Regulation Brussels II *bis*.[1] The second group includes those sources that

1 Council Regulation (EC) No 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

limit their application to children between birth and a certain age, such as the Convention on the Civil Aspects of Child Abduction.[2] The third group of sources consists of documents that, while defining who they mean by "child," define only an upper age limit, such as the Convention on the Rights of the Child, without defining the starting point.[3] The reason for the absence of a clear definition of the point at which protection is conferred on a child is the controversy surrounding the question of whether a child becomes a child at conception, at birth, or at some point of fetal development.

The Convention on the Rights of the Child, in Art. 1, defines the term "child" as any human being under the age of 18 years, unless, under the law applicable to the child, adulthood is reached earlier. It can be deduced from the established case law of the Slovak courts that a minor child means a person who has not reached the age of 18. The Civil Code of the Slovak Republic provides for the possibility of attaining the age of majority before a person reaches the age of 18.[4]

The mother and father have an irreplaceable role in the life of a minor child. The identity and uniqueness of the child is given by their mother and father, and the child needs to perceive and feel them in order to mirror, in some way, both the positive and negative qualities of the parents. In this process, the child learns their value and self-esteem, and different attitudes in life are shaped; in this way, their personality develops. The family environment undoubtedly has one of the strongest influences on a child's behavior. Each family has their certain specific features and is indispensable in the upbringing of children, shaping them from the time of birth. An orderly family considers the upbringing of the child as its primary duty.

The development of the family and family law relations has undergone many significant changes. The ancient concept of the family was characterized by polygamy and the dominance of the father, the so-called *pater familias*, while the medieval concept of the family preserved paternal power, the *patria potestas,* in which children were subordinated to the father. The social position of the man in the family was characterized by a set of rights and duties that flowed unidirectionally from the father to the child. The child was lawless, which was reflected in the fact that their survival was primarily decided by the father, who had the right over it over life and death—*ius vitae necisque*. The eighteenth century is sometimes referred to as the beginning of the family revolution, in which the child became the center of interest of the family and society.

It is important to note that, in the course of the family's historical development, the minor child went from being the object of a parent–child relationship—whether characterized by paternal power or, later, parental power—to becoming the subject of that relationship with equal status. The development of the legal regulation of the exercise of parental rights and obligations has, in this respect, had several significant milestones.

2 The Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction (1980 Hague Convention).

3 Convention on the Rights of the Child, 20 November 1989, United Nations.

4 Article 8 (2), Act No. 40/1964 Coll. Civil Code.

## 2. The codification of family law and the basic principles of family law in the Slovak Republic

Family law is one of the basic and oldest legal disciplines of private law. This is because, since time immemorial, it has applied to the interests of the most private nature of an individual, whether we talk about spouses, parents, children, or other persons holding family rights and responsibilities. The issue of children's rights is as old as humanity itself. The translation of these rights into law and their implementation has depended on specific historical conditions. The Slovak Republic has acceded to—and is therefore bound by—several international treaties and documents that may, to a certain extent, influence the standard-setting and application of law.

Family law relations in the Slovak legal system are regulated in our Act on the Family 36/2005 Coll.[5], which entered into force on April 1, 2005. Since 1950, family law relations have been set aside outside the scope of the Civil Code and are still regulated by a separate law. In the future, however, the regulation of family relations is to be returned to the Civil Code as a separate part of it in the framework of the forthcoming codification of general private law in Slovakia.

For the current relationship between family and civil law, the return to the dual structure of private and public law after 1989 means that the regulation of personal and property conditions in the family and marriage is closely linked to general civil law. The integration of both subsystems of private law is evident even now, especially in Art. 111 of the Family Act, which provides for the general subsidiarity of the Civil Code for legal relations regulated by the Family Act. Thus, unless the Family Act provides otherwise, the provisions of the Civil Code shall apply to family relationships.

Until 1949, family law was not uniformly regulated and codified in the territory of the Slovak Republic. Legal relations in the family were regulated by their nature by several civil law regulations. After the First World War, and after the establishment of the Czechoslovak Republic, Act no. 11/1918[6] reciprocated with some exceptions the then Austro-Hungarian law. In Slovakia, the reception standard took over Hungarian civil law, which was mostly an unwritten customary law. Of the written regulations concerning family law relations, the most important was the Marriage Act (Act No. XXXI/1894)[7], which regulated in detail the conditions for the formation and dissolution of marriage. The law was based on the contractual nature of the marriage, introduced an obligatory civil marriage, and allowed the separation of the marriage regardless of the confessional affiliation of the spouses. The content of the marital relationship and the rights and obligations of the spouses were, however, not regulated by

5 Act No. 36/2005 on Family and on amendment of some other acts.

6 Act No. 11/1918 Reception Act, Section 2 stipulated that "*all existing regional and imperial laws and regulations shall continue to be in force temporarily*" in order "*to avoid any confusion and to regulate an unobstructed transition to a new life of the State.*"

7 Marriage Act (Act XXXI/1894).

the Marriage Act and were therefore governed by customary law. Another important legal act that was reciprocated was Act no. XX/1877 on guardianship and custody. Many questions of family law, however, have remained in a gray area because of this legal dualism (sometimes even trialism of Austrian, Hungarian, and customary law, with further differences between customary laws of different regions of the newly formed state); thus, the newly established state set the unification of laws as a priority. Shortly after the reception of the Austro-Hungarian regulations, some questions of matrimonial law were unified in the 1919. The Amending Act on Marriage (Act No. 320/1919 Coll.)[8] was undoubtedly the most first important step on the path of an independent Czechoslovak legislation during the first republic, and it uniformly regulated the formation of marriage, marital obstacles, and the dissolution of marriage. The Amending Act on Marriage introduced an optional civil marriage in addition to a valid church marriage; in an exhaustive manner, it adjusted the reasons for the separation of marriage. This act was revolutionary in a sense, since it unified matrimonial law by being applicable to all citizens of the republic regardless of religion. The act broke the principle of the inseparability of Catholic marriage during the spouses' lifetime. Despite the unification tendencies discussed above, several issues remained fractured in the new legislation. For example, the issue of adjusting the joint property of the spouses remained different in Slovakia compared to the other territories of the country. While in Czechia, Moravia, and Silesia, the system of the separate property of spouses applied, with a wide range of contractual modifications, through so-called marriage contracts. In Slovakia, the institute of co-acquisition was applied, which represented a system of property community in case of marriage dissolution.

The fundamental political changes in Czechoslovakia after February 1948 were soon reflected in the entire legal order. The new communist government within the so-called biennial of legal proceedings launched a revision of legal regulations that also affected the area of family law. The first Act on Family Law No. 265/1949 Sb.[9], which entered into force on January 1, 1950, became, among other things, a legislative expression of the ideological principles of the new socialist law, which abandoned the classification of public and private law. The dominant paternal power was transformed, in light of equality, into parental power by the Family Law Act. The adoption of this Act was a significant milestone in the historical development of the family and the legal relationship between parents and children, and it also led to the equalization of children irrespective of their origin (i.e., irrespective of whether they were born into a marriage or out of wedlock), thereby giving effect to the principles of the Constitution of May 9 on the equal rights of women, the protection of men, the family, and motherhood. The Act on Family Law brought many important changes to the legal provisions on family relationships, and it featured the elaboration in terms of family law of the basic principles expressed in the 1948 May Constitution. Legal provisions on the family were separated from general civil law, and family law provisions were unified to the entire territory

8 Act No. 320/1919 Coll.
9 Act on Family Law No. 265/1949 Sb.

of the country. This Act featured obligatory civil wedding, full equality of the husband and the wife in their rights and obligations, the removal of discrimination of children whose parents did not enter marriage, and the reduction of impediments to marriage. The Act on Family Law undoubtedly represented the undertaking of the legislator to get the marriage and family life under the control of the state. The Act itself had the status of a separate legal regulation and did not contain any provision that would create its specialty in relation to the Civil Code as a general, applicable regulation; therefore, the act meant the complete separation of family law and civil law.

The Act on Family Law did not survive for very long. In 1960, a new socialist constitution was adopted in Czechoslovakia. Under this ideological influence, the victory of socialism and the subsequent social development were mistakenly anticipated. These misconceptions were legally expressed in the new constitution, and shortly thereafter, the basic branches of law were re-codified. Important changes in the legal order ensued, affecting all areas of law, including family law and matrimonial law. The result of the second wave of socialist codification of law was the new Family Act No. 94/1963 Coll.,[10] which entered into force on April 1, 1964 and was in force until April 1, 2005. The new Family Act followed the main principles of the regulation of individual institutes in the Family Law Act of 1949, with much greater emphasis on the paternalistic understanding of the relationship between the state and the family. The biggest changes affected the regulation of divorce and some basic principles of marriage; in particular, changes were made to the legal regulation of the relationship between parents and children. The new Family Act enshrined the principles of the upbringing of children not only by parents but also by the state and socialist organizations, which have the primary role in the upbringing of children. The opening provision of the Act stated that "*the morality of socialist society should become the basis for all relationships in family, for the marriage itself, and for raising children.*"[11] Therefore, the previously separate provisions on the legal protection of children and youth were incorporated into this Act, and the powers of national committees in terms of social control of raising children were substantially enlarged. Based on the Family Act, the family became the basic building block of society, where parents were responsible for the mental and physical development of their children, with the state and other social organizations being also ascribed some responsibilities in terms of raising children and fulfilling their material needs.

The dissolution of the Czechoslovak federation simultaneously meant the birth of new successor states – Slovakia and the Czech Republic – on January 1, 1993. After the establishment of the Slovak Republic, the Family Act of 1963, as amended, became the basis for the regulation of family law in Slovakia as stated in the reception norm contained in Article 152 of the Constitution of the Slovak Republic. The current statutory distinction in Slovak family law between "parental rights and obligations" and "other rights and obligations of parents and children" has no logical

10 Family Act No. 94/1963 Coll.
11 Family Act No. 94/1963 Coll.

justification. Moreover, a division which divides the whole into a part and another part without any apparent logical structure does not stand up to scrutiny.

In Slovakia, the Family Act of 1963 already stopped using the term parental authority and introduced the more fragmented parental rights and obligations. These contained all the rights and obligations of parents and children. Most of them were understood as mutual, i.e., where the rights and obligations of two subjects, parent and child, form the content of a legal relationship – e.g., a parent not only has a duty to bring up a child, but it is also his or her right. Conversely, the child has the right to parental upbringing and the obligation to submit to parental upbringing, as long as it complies with the legal requirements. Thus, the Family Act of 1963 fragmented the terminologically unified institute of parental authority into rights and obligations of parents and children, while only successively naming and regulating the individual rights and obligations, without any internal logical division.

In the mid-1990s, in the discussions on a new concept of legal regulation of relations under private law, expert opinions prevailed that understood the normative regulation of family law as an integral and natural part of the forthcoming recodification of the Civil Code. In other words, family law, together with other branches of private law, should be concentrated in the new Civil Code. As of today, this is still in the realm of the future evolution of family law.

The new Family Act No. 36/2005 Coll. was not originally included in the Plan of Legislative Tasks of the Slovak Republic. The plan required the Ministry of Justice of the Slovak Republic to prepare only an amendment to the Family Act No. 94/1963 Coll. as amended. However, the scope of the proposed changes exceeded the possibilities of direct amendment of the law and required not only a change in the system of the law, but also the adoption of a completely new legislation. The previous legislation was modern at the time and was in force for over 40 years. In the 21st century, however, it was not able to respond sufficiently to the dynamic development and fundamental changes that have taken place in society.

The new legislation from 2005 already reacted to the Convention on the Rights of the Child as well as to the legislative intention to recodify the Civil Code, which would also include the integration of family law into the Civil Code. In the preparation of the new Family Act, a comparison with foreign legal systems (Hungary, Germany, the Czech Republic, etc.) was also partially used.

According to the explanatory report of the new Family Act from 2005, the changes introduced by the new legislation effective from April 1, 2005 concern, in particular, the grounds for the invalidity and nonexistence of marriage in circumstances excluding marriage and the possibility of regulating the child's contact with close persons and distinguishing between guardianship and wardship institutes. Compared to the previous regulation, the rules for monitoring the method of performance and evaluation of the effectiveness of institutional education, educational measures, the evaluation of the guardian's performance, and the guardian for the administration of the child's property are tightened. The issue of foster care regulation was also included in the new law.

The core sources of Slovak Family Law are the Constitution of the Slovak Republic and the Family Act from 2005. Article 41 of the Constitution of the Slovak Republic, according to which marriage, parenthood, and the family are under the protection of the law, forms the basis of the national legislation. Simultaneously, special protection is guaranteed to children and adolescents. The protection and interest of minor children is a priority throughout the legislation. In the context of the exercise of parental rights and obligations, it is significant that the care and upbringing of children is the right of parents, but the fact that children have the right to parental education and care cannot be overlooked. The Constitution of the Slovak Republic also provides that these rights may be restricted and that minor children may be separated from their parents—even against their parents' wishes, but only by a court decision based on the law.

The legislation contained in the Civil Code cannot be omitted. In view of the fact that the Family Act does not have a general part, the place of the Civil Code is irreplaceable. Article 110 of the Family Act provides that unless this Act provides otherwise, the provisions of the Civil Code shall apply. It follows from the above that the relationship between the family law and the Civil Code is *lex specialis* and *lex generalis*. Other important sources of law are the Act 305/2005 Coll. on Social Protection of Children and Social Guardianship (in relation to interference with the exercise of parental rights and obligations and proceedings for the exercise of parental rights and obligations); the Act on Civil Registry 154/1994 Coll.; the Act on First and Last Name 300/1993 Coll.; and the Act on the Minimum Living Wage (in relation to the value of the minimum maintenance obligation of parents toward a child).

While a deeper dive into all the provisions of these acts would be impossible owing to the limitations of this publication, I believe that a look at the basic principles of Slovak family law is essential in understanding the state of family law in Slovakia in comparison with other EU countries. The Family Act from 2005 contains, in its first provision, a list of basic principles that, in essence, represent the pillars on which Slovak family law is built. These are the most important provisions of national family law, with the possible exception of Art. 41 of the Constitution of the Slovak Republic, which represents the framework of the entire family law regulation. The purpose of the basic principles lies mainly in the fact that they serve as common rules of interpretation of family law. These basic principles are enshrined in Articles 1–5 and represent the values and principles of family law in Slovakia.

> Marriage is a union of a man and a woman. The society comprehensively protects this unique union and helps its welfare. Husband and wife are equal in their rights and responsibilities. The main purpose of marriage is the establishment of a family and the proper upbringing of children (Art. 1).

Marriage under Slovak law is still a union of a man and a woman. This provision has even been incorporated into Art. 41 of the Constitution of the Slovak Republic, being the only legislative change that this article has undergone since

the Constitution has been in effect. To date, no legal alternative to marriage exists in the Slovak legal order (more on this in the following chapters). This is rooted in the traditional view of family law in the Slovak legal order and the emphasis on the biological-reproductive function of the family. In Art. 2, it is stated that the "*family founded by marriage is the basic cell of society. Society comprehensively protects all forms of the family.*" Based on this principle, a family is a group of at least one parent and at least one child. In principle, it is not possible to participate in any discrimination of other marriages (i.e., marriages that have remained childless) because these unions are also provided with protection in the sense of Art. 1 Basic principles. It can therefore be assumed that the protection provided under this article is a special type of protection that goes beyond the general principle of Art.1.

> Parenting is a mission of men and women recognized by society. The society recognizes that a stable family environment formed by the child's father and mother is the most suitable for the all-round and harmonious development of the child. Therefore, the society provides parents not only with its protection, but also with necessary care, especially with material support for parents and assistance in the exercise of parental rights and responsibilities. (Art. 2)

One of the most important functions of the family is its educational function. Being a parent means taking responsibility for a child's proper upbringing. Trends regulating the boundaries between family privacy and the state's interest are currently leaning toward the theory of responsibility for the exercise of parental rights and obligations. If the parent naturally performs this function properly, the state provides help and support, both in respect of privacy and social care. However, if the proper upbringing of a child is endangered or disrupted, the Family Act gives the court the right to take measures to remedy this situation without a proposal. For this reason, too, Art. 3 of the Basic Principles was supplemented in 2016 by a second sentence stating that the society recognizes that a stable family environment formed by the child's father and mother is the most suitable for the all-round and harmonious development of the child. This formulation clearly favors the traditional family union of a man and a woman and their children over other forms of cohabitation.

> All family members have a duty to help each other and, according to their abilities and possibilities, to ensure the increase of the material and cultural level of the family. Parents have the right to raise their children in accordance with their own religious and philosophical beliefs and the obligation to provide the family with a peaceful and safe environment. Parental rights and responsibilities belong to both parents (Art. 4).

Family solidarity is the basis for fulfilling the family's socioeconomic function. It concerns all members of the family without distinction, and its understanding reflects the morals of society. The moral and ethical principle of this provision is further detailed in the provisions of §18 and §19 of the Family Act, according to

which all family members (children included) are obliged to help each other according to their abilities and possibilities.

> Art. 5: The best interest of the minor shall be the primary consideration in all matters affecting them. In determining and assessing the best interests of the minor, particular account shall be taken of:
> a) the level of childcare,
> b) the safety of the child as well as the safety and stability of the environment in which the child resides,
> c) the protection of the dignity as well as of the child's mental, physical, and emotional development,
> d) the circumstances related to the child's state of health or disability,
> e) endangering the child's development by interfering with their dignity and endangering the child's development by interfering with the mental, physical, and emotional integrity of a person who is close to the child,
> f) the conditions for the preservation of the child's identity and for the development of the child's abilities and characteristics,
> g) the child's opinion and their possible exposure to a conflict of loyalty and subsequent guilt,
> h) the conditions for the establishment and development of relationships with both parents, siblings, and other close persons,
> i) the use of possible means to preserve the child's family environment if interference with parental rights and responsibilities is considered.

The principle of the best interest of the child is the guiding principle of all family law. Some authors even consider it to be the very basis of family law.[12] This is not only based on domestic law, but it also follows from sources of international law—in particular the Convention on the Rights of the Child,[13] in which it is mentioned repeatedly. Although several provisions of the normative part of the Family Act referred to the best interests of the child (e.g., Arts. 23, 24, 54, 59), as well as the provisions of special regulations (e.g., Act No. 305/2005 Coll. on the social legal protection of children and on guardianship, Act No. 176/2015 Coll., on the Commissioner for Children and the Commissioner for Persons with Disabilities, etc.), this term was not defined for a long time, and its determining criteria were never established. By supplementing Art. 5 in the Family Act by an amendment to Act no. 175/2015 Coll., this important principle of the Convention on the Rights of the Child has gained its appropriate place in Slovak family law, namely by establishing it as a basic principle of the Family Act.

12 Králičková, 2015, p. 22

13 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at https://www.refworld.org/docid/3ae6b38f0.html (Accessed: May 1, 2021)

The Slovak Republic has acceded to—and is therefore bound by—several international treaties and documents that may, to a certain extent, influence the standard-setting and application of law. First, the Universal Declaration of Human Rights of 1948 should be pointed out, which is associated with a new view of human rights despite being only recommendatory in nature. The UN Charter, which came into force in 1945, made it obligatory for the Commission on Human Rights (which was replaced in 1996 by the UN Human Rights Council) to draft something resembling an international human rights constitution, of which the Declaration is the first part. The second part includes the three major documents of 1966, namely the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the Optional Protocol to the International Covenant on Civil and Political Rights.

The most important and indispensable document in this area is the 1989 Convention on the Rights of the Child emphasizing the best interests of the minor child. It is clear from the preamble that the Convention takes account of the special concern enshrined in the Geneva Declaration of the Rights of the Child in 1924 and in the Declaration of the Rights of the Child adopted by the United Nations in 1959 and recognized in the Universal Declaration of Human Rights; the International Covenant on Economic, Social, and Cultural Rights; the International Covenant on Civil and Political Rights; and in the statutes and relevant documents of professional and international organizations concerned with the care of children.

The institutionalization of family law in Europe has long been resisted, and family law has maintained a national character. However, in 2001, the Commission for European Family Law (CEFL) was created with the aim of harmonizing family law. The effort to harmonize family law was reflected in the document Principles of European Family Law Regarding Parental Responsibilities.

While some developments in the internationalization of family law can certainly be observed, it clearly remains largely a domain of national legislation. In the following pages, we will explore the topic of parental responsibility and its place in the Slovak legal order, highlighting the unique features of this concept specific to the Slovak Republic.

## 3. Parental responsibility in Slovak family law

Under the Slovak Family Act and relevant case law, parental responsibility represents a relatively complex set of rights and obligations, which include, in particular,

a) the constant and consistent care for the upbringing, maintenance, and all-round development of the minor child,
b) the representation of the minor child,
c) the administration of the minor child's property.

It is important to note that the Slovak legislation does not use the term "parental responsibility," but it operates with the phrase "parental rights and obligations," which are primarily derived from Section 28 of the Family Act.[14] We conclude that despite the legislative inclusion of maintenance obligations in the content of parental rights and obligations in the Slovak Family Act, maintenance obligations do not and should not belong to parental rights and obligations owing to their specific characteristics, which is consistent with the legislator's intention to exclude these from parental rights and obligations. The specificity lies in the fact that, while the exercise of care for a young child is linked to the parent's full legal capacity, the maintenance obligation continues even if the parent lacks full legal capacity.[15] Similarly, the limitation, deprivation, and suspension of parental rights and obligations does not relieve a parent of the obligation to support their child.[16] Last, a specific feature of the maintenance obligation as opposed to parental rights and obligations is the moment of its termination. Parental rights and obligations with regard to the care and upbringing of the child, the representation of the child, and the administration of the child's property cease *ex lege* when the child reaches the age of majority. On the other hand, the maintenance obligation does not cease on reaching the age of majority but continues until the child can support themselves.[17]

It is noteworthy that the English term "responsibility" does not mean responsibility alone, but rather a burden of responsibility, a function, a duty, an obligation, a commitment and a task. The Slovak translation of this term has not been adopted in our family law. The unified institute has remained atomised into individual rights and obligations within Slovak family law. Most modern democratic legislations preserve this institute in its unity, unlike Slovak family law. Currently, Slovak family law operates with the term "Parental Rights and Obligations", which on the surface sounds like an acceptable alternative to parental authority or parental responsibility – if not for the fact, that the current Family Act divides rights that belong under "Parental Rights and Obligations" and rights that it labels "Other Rights and Obligations of Parents and Children" without any rhyme or reason for this distinction. This fragmentation of the parental responsibility has given rise to further legislative confusions, particularly with regard to the different categories of interference with parental rights and the distinction between the different nature of the rights previously understood as part of the parental authority as opposed to other rights that are outside it.[18]

Parents become the bearers of parental rights and obligations by the mere fact that a child is born to them and adoptive parents by the validity of the adoption judgment. Care must be taken to make a clear distinction between whether a person

14 Section 28, Act No. 36/2005 on Family and on the amendment of some other acts.
15 Section 62, Act No. 36/2005 on Family and on the amendment of some other acts.
16 Section 39, Act No. 36/2005 on Family and on the amendment of some other acts.
17 Section 62, Act No. 36/2005 on Family and on the amendment of some other acts.
18 Haderka, 1994, p. 516.

is entitled to exercise them or not. Parents may exercise parental responsibility only if they have full legal capacity.

A special provision is made for the status of a minor parent, a parent who is a child over 16 years of age and who may be granted parental rights and obligations by the court in respect of the personal care of a minor child if they satisfy the conditions by which they will ensure the exercise of that right in the interests of the minor child.

The legislation is based on the thesis that parental rights and obligations are exercised by both parents.[19] The exceptions, which break the principle of both parents exercising parental rights and obligations Simultaneously, are the following:

1) one of the parents is not living,
2) one of the parents is unknown (there has been no determination of parentage),
3) one of the parents lacks full legal capacity,
4) one of the parents has been deprived of parental responsibility,
5) one of the parents has been suspended from exercising parental rights and obligations.

### *3.1. Care of a minor child*

The constitutional legal basis for the protection of the family and parenthood is contained in the Charter of Fundamental Rights and Freedoms. In particular, Art. 32 of the Charter of Fundamental Rights and Freedoms guarantees the parents the right to care for and raise the child and, conversely, guarantees the child the right to parental upbringing and care, as it states that

> it is the parents' right to care for and bring up their children; children have the right to parental upbringing and care. Parental rights may be limited and minor children may be removed from their parents' custody against the latters' will only by the decision of a court on the basis of the law.[20]

The systematic inclusion of this right in the category of economic and social rights must then necessarily be reflected in the interpretation of this right, not only because the right of the parents and the child is not to be interfered with by the state but also because of the specific protection afforded to such care by the state.

The content of parental rights and obligations includes, among other things, constant and consistent care for the upbringing, maintenance, and all-round development of the minor child.[21] It cannot be disputed that caring for a child means assuming re-

19 Section 28, Act No. 36/2005 on Family and on the amendment of some other acts.

20 Article 32, Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Slovak Republic, Constitutional act No. 2/1993 Coll. as amended by constitutional act No. 162/1998 Coll.

21 Section 28, Act No. 36/2005 on Family and on the amendment of some other acts.

sponsibility for them in a very broad sense. Care and upbringing imply the provision of material and non-material (emotional, psychosocial, cultural) conditions, so that the child can develop all their personal abilities and capacities in a natural family environment, which will result in the child's adequate socialization.[22]

Although the legislator operates with the concepts of care and upbringing, it does not define them. Upbringing is to be interpreted in the broadest sense as care for the comprehensive development of the child's individual physical, physical, moral, emotional, health, and intellectual capacities.

The Explanatory Memorandum to the Family Act states that

> upbringing is understood in its broadest sense as care for the person of the child, in which substantial decisions are also made. It includes care for the education, for the development of the child's individual physical and mental faculties. In contrast to personal care, which can also be provided by persons who are not the child's legal representatives. Even if a child is placed in one of the forms of foster care, the parents or guardian remain responsible for the child's proper upbringing.[23]

The upbringing of a minor child remains with both parents, who remain the bearers of parental rights and obligations, even when the child is entrusted to the personal care of one of the parents. The concept of the upbringing of a minor child implies decision-making in respect of the minor child, to the extent that the minor child cannot make decisions for themselves.

Upbringing means the process of deliberate, systematic, and organized action on an individual, shaping his mental and—to a certain extent—physical development. Parents are entitled to raise their children in conformity with their own religious and philosophical convictions.[24] Section 30 of the Family Act explicitly states that "*parents have the right to raise their children in accordance with their own religious and philosophical beliefs.*"[25] This provision fully corresponds with the freedom of religion granted by the Constitution of the Slovak Republic ("*Freedom of thought, conscience, religion and belief shall be guaranteed. This right shall include the right to change religion or belief and the right to refrain from a religious affiliation.*")[26]

Therefore, care for the upbringing of a minor child in the Slovak legal order includes religious upbringing. Based on Art. 3 of the Act on the Freedom of Religious Faith and the Position of Churches and Religious Societies, the legal representatives (primarily the parents) of a minor child of up to 15 years of age decide on their religious education.[27] By comparison, the legislation in the Czech Republic is based

22 Finding of the Constitutional Court of the Czech Republic Case No. IV. ÚS 257/05 of 01.26.2006
23 Explanatory memorandum to Act No. 36/2005 Coll. on the Family.
24 Section 28, Act No. 36/2005 on Family and on the amendment of some other acts.
25 Section 30, Act No. 36/2005 on Family and on the amendment of some other acts.
26 Article 24 (1) Constitution of the Slovak Republic 460/1992 Coll.
27 Article 3, Act No. 308/1991 on the Freedom of Religious Faith and the Position of Churches and Religious Societies.

on guidance, taking into account the developing abilities of the minor child,[28] while in Slovakia, it is the legal representatives who absolutely decide on the religious upbringing of the minor child. Czech legislation, contrary to the Slovak provision highlighted above, states that

> the right of minor children to freedom of religion or to be free from religion is guaranteed. The legal representatives of minor children may direct the exercise of this right in a manner appropriate to the developing capacities of the minor children.[29]

The legislation of the Czech Republic is fully consistent with Article 14 of the Convention on the Rights of the Child, according to which

> States Parties shall respect the right of the child to freedom of thought, conscience and religion. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.[30]

The aims of education are expressed in Article 29 of the Convention on the Rights of the Child. This article is of far-reaching importance as the aims of education that it sets out, which have been agreed to by all states parties, promote, support, and protect the core value of the Convention: the human dignity innate in every child and their equal and inalienable rights. These aims, set out in the five subparagraphs of Art. 29, are all linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities. The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture that is infused by appropriate human rights values. The goal is to empower the child by developing their skills, learning, and other capacities, human dignity, self-esteem, and self-confidence. "Education" in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes enabling children—individually and collectively—to develop their personalities, talents, and abilities and to live a full and satisfying life within society.[31]

> States Parties agree that the education of the child shall be directed to
> (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

28 Act No. 3/2002 Coll. on Freedom of Religion and the Status of Churches and Religious Societies and on Amendments to Certain Acts.

29 Ibid.

30 UN General Assembly, Convention on the Rights of the Child, November 20, 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at https://www.refworld.org/docid/3ae6b38f0.html (Accessed: May 1, 2022)

31 OHCHR: General Comment No. 1: The Aims of Education (Article 29) (2001)

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child's parents, their own cultural identity, language, and values, for the national values of the country in which the child is living, the country from which they may originate, and for civilizations different from their own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups, and persons of indigenous origin;
(e) The development of respect for the natural environment.[32]

Achieving this goal through the upbringing of the minor child and influencing them is the task of the parents. The state limits them, in this respect, only in terms of the prohibition to use educational means that would endanger the child's health, dignity, mental, physical, and emotional development.[33]

The violation of these rights (by using inadequate educational means) is sanctioned by family law norms in the form of interference with parental rights and obligations and *de facto* modification of their exercise (educational measures, interference in the exercise of parental rights and obligations, substitute care, restriction or prohibition of contact); civil law provisions (restriction or exclusion from the right of use of the dwelling); or even criminal law standards (the offense of abuse of a person close to or entrusted to a person, endangering the moral upbringing of young persons).[34]

The upbringing of a minor child is not only a private matter completely isolated from society outside the family; although society is obliged to respect the private nature of family relations, in certain circumstances regulated by law, it is the duty of the state to influence and interfere in these family relations (the so-called principle of minimizing interference in the family).

The statutory regulation does not preclude parents from entrusting another person with the right of personal care of a minor child or from handing over the care of the child to a specialized institution. The foregoing does not necessarily imply that the exercise of parental rights would be contrary to the interests of the minor child, particularly in the case of a disabled parent who cannot provide for the exercise of personal care but is interested in their child, is emotionally attached to them, and has contact with them and has an educational influence on them in the course of that contact.[35]

The right of custody of a minor child encompasses several sub-powers: the right to have the child with oneself; the right to determine the place of residence of the

32 Ibid.
33 Section 30, Act No. 36/2005 on Family and on the amendment of some other acts.
34 Act No. 300/2005 Criminal Code.
35 Rais, 1999, pp. 17–19.

minor child (including the transfer of the exercise of personal care to a third person or specialized institutions); the right to have contact with the minor child; the right to make decisions about the minor child and to exercise supervision over them within the limits of their intellectual and moral maturity, taking into account their age, intellectual maturity, temperament, and other psychological factors; and the right to determine the child's occupation in accordance with their best interests.[36]

The right to have a child with oneself includes, in particular, the provision of food, clothing, accommodation, hygiene, and medical care—activities that provide for the basic needs of the minor child.[37] The stepparent of a minor child is not granted parental rights or responsibilities by law; however, if they live in the same household with the parent of the minor child, they have the right and the obligation to participate in the minor child's upbringing. Section 30 of the Family Act states that "*the spouse who is not the child's parent also participates in the upbringing of the child if he or she lives in the household with the child's parent.*"[38]

The above is related to Sections 18 and 19 of the Family Act, according to which both spouses are obliged to provide for the needs of the family, which includes the care of the children and the household. In the event of negligence, the liability of the stepparent for damage caused to the minor child is not excluded.[39]

### *3.2. Representation of the minor child*

Civil law theory and practice distinguish between direct and indirect representation. Both types of representation have a common feature, namely that the subject in the position of the representative makes an expression of will, which is a legal act. The difference between a direct and an indirect representative is that a direct representative makes an expression of will in the name and on behalf of the represented person, while an indirect representative makes a legal act—albeit on behalf of the represented person—but through themselves. This difference means that the rights and obligations arising from the direct representation arise directly for the represented person. The indirect representative acquires the rights and obligations themselves, and the indirect agency relationship subsequently gives rise to an obligation to transfer the acquired rights and obligations to the represented party (in the manner specified in the contract, such as by assignment of the claim).

In the conditions of the Slovak Republic, the Civil Code only regulates direct representation. Indirect representation is not excluded (e.g., a contract for the acquisition of the sale of a thing within the context of Article 733 of the Civil Code).

36 Vlček and Hrubešová, 2006, p, 254.
37 Lazar, 2018, p. 698.
38 Section 30, Act No. 36/2005 on Family and on the amendment of some other acts.
39 Opinion from the evaluation of the decision-making of the courts of the Slovak Socialist Republic discussed and approved by the plenum of the Supreme Court of the SSR 25.11.1976, Pls 2/76.

The legal relationship between the agent and the represented party may arise from various facts—either directly from the law, from a contract, or from a decision of a court or other public authority. According to the reason for its creation, legal theory then divides the representation into

1) statutory representation, arising by operation of law or by decision of a court or other state authority,
2) contractual representation, arising on the basis of a contract (the existence of this legal relationship can be proved against third parties by a power of attorney).[40]

The civil law regulation of representation allows for someone other than a representative to act on behalf of the represented person to pursue both the social interests of those who must be represented because they themselves are incapable of legal acts and the interests of persons who, although they have legal capacity, do not perform the legal act or acts themselves for certain reasons, but can be represented by a representative (attorney) chosen by them.[41]

Legal norms not only regulate rights and obligations within a certain legal relationship, but naturally, they also determine who can be their bearer (i.e., the subject of the legal relationship). A party to a legal relationship is a subject who is the bearer of subjective rights and obligations; thus, it is any person who is recognized by the law as a person in the legal sense of the word, and this recognition is linked to the attribution of legal characteristics, which we call both the capacity for rights and obligations and the capacity to perform legal acts.

Capacity to have rights and obligations is understood as the capacity to have rights and obligations in legal relations within the limits of the legal order. It follows from international law that "*everyone has the right to recognition everywhere as a person before the law.*"[42]

The capacity to have rights and obligations is constituted by the status of the natural person, which forms one part of it, namely the passive component. Another component of this passive status includes the fundamental rights and freedoms that are conferred on the person by the mere fact of their existence.[43]

The active component of the status of the natural person, on the other hand, is based on the concept of individual autonomy. It makes it possible to bring into being what is contained in the concept of the passive component of the natural person's status.

In regulating the legal representation of a minor child, the Civil Code refers to the special regulation of the family law, which defines who the legal representative of a minor child is. In particular, the legal representative of a minor child shall be

40 Lazar, 2018, p. 698.
41 Plank, 1996.
42 UN General Assembly, Universal Declaration of Human Rights, December 10, 1948, 217 A (III), available at https://www.refworld.org/docid/3ae6b3712c.html (Accessed: May 2, 2022).
43 Švestka et al., 2009, pp. 97–98.

their parents, who have full legal capacity and who have not been deprived of their parental rights and obligations or had their exercise of parental rights and obligations suspended.[44]

The legal regulation of the legal capacity of minor children has never been something immutable; in any event, however, legal capacity always depended and depends on the minor's age and the attainment of a certain degree of intellectual and moral maturity.

The obligation to represent a minor child applies only to those legal acts that the minor child cannot perform independently. The current concept of legal capacity of a minor child is that the minor child either has legal capacity and then acts on their own behalf or does not have legal capacity and is represented by a legal representative.[45]

Under Art. 9 of the Civil Code, minors have legal capacity only for legal acts suitable in their nature to the maturity of mind and will appropriate to their age. Legal capacity is not assessed individually but corresponds to the generally recognized stage of individual development at a certain age.[46]

The exercise of parental responsibility for the representation of a minor child depends on the age of the minor child, since the exercise of that right depends on the degree of legal capacity of the minor child, which in turn depends on the minor child's overall maturity of mind and will appropriate to their age. The right and duty to represent a minor child is most intensely manifested at the earliest age of the minor child.[47]

As the minor child grows older and therefore more mature, the right and duty to represent them gradually loses its necessity. If, when all the circumstances of the case are considered, the maturity of mind and will appropriate to the age of the minor child is inadequate in relation to the particular legal act performed, the legal act is absolutely null and void. This fact cannot be altered even by the additional consent of the legal representative. This legal act cannot be validated in any way, since the Slovak legal system does not recognize the so-called *negotium claudicans*. The court may also not, in another proceeding, declare a legal act valid if the law establishes special conditions for its validity (e.g., court approval of the legal act).

When a minor child reaches a certain age, especially in matters of purely personal or labor law, they may act on their own behalf (e.g., the filing of a petition for marriage by a minor over 16 years of age, the making of a will in the form of a notarial deed by a minor over 15 years of age, and the capacity to acquire rights and assume obligations in labor law relations by their own legal acts, which arises on the date on which the natural person reaches the age of 15 years).

In principle, a minor child may be represented by either parent. Whether it is sufficient for a minor child to be represented by one or both parents in a legal act depends

44 Svoboda and Ficová, 2005, p. 728.
45 Ibid.
46 Act No. 40/1964 Coll. Civil Code.
47 Planková, 1964, p. 204.

on whether the matter is ordinary or not. In the case of ordinary matters, the minor child may be represented by either parent; however, if the proceedings for the representation of a parent go beyond ordinary matters, it is essential that the minor child be represented by both parents.[48] In practice, the above is reflected in the fact that, where one parent represents the minor child in ordinary matters, the other parent's statement is not necessary. In the case of a substantive matter, it is necessary to seek the other parent's opinion as to whether they agree with the other parent's representation. The power of attorney fulfills the character of a grant of such consent. In addition to the power of attorney, other types of documents can serve as proof of the parent's consent.

When representing a minor child, it is thus necessary to distinguish between representation in ordinary and substantive matters. The question of whether a matter is ordinary or substantial must be assessed according to the particular circumstances and the nature of the case. The legislator enumerates, in a demonstrative manner, which matters in the exercise of parental responsibility are substantial matters in the event of a disagreement between the parents, and the court decides to pursue the best interests of the minor child. The notion of ordinary matter and substantial matter is further developed by the instructive case law of the courts.[49]

If the court concludes that a petition for adjudication is filed in a case of parental disagreement in an ordinary matter, the court must stay the proceedings on the ground that there is an insurmountable obstacle to the conditions of the proceedings.[50] Commonly, an ordinary matter is defined as regular payments and receipts, such as payment of collections, taxes, and receipt of proceeds of property in the form of rents, dividends, interest.[51]

Contractual relationships represent a wide range of legal relationships to which a minor child may be a party. In many cases, the minor child must be represented by a legal representative, not only in the formation of separate contracts but also subsequently in the legal acts relating to them. The transfer of immovable property (and of an interest therein), whether in the form of acquisition or loss of ownership, must always be regarded as a material matter. Ownership of immovable property is regularly associated with a number of legal relationships, whether of a private law nature (e.g., related to its maintenance or use) or of a public law nature (e.g., taxes). The conclusion of a contract for the transfer of ownership of immovable property, therefore, concerns the administration of a minor child's property and cannot be regarded as an ordinary matter, since it does not concern the ordinary management of a minor child's property.

The same conclusion can be drawn in the case of rights relating to immovable property (e.g., liens, rights corresponding to easements[52]) or the dissolution and

48 Dvořáková Závodská et al., 2002, p. 104.
49 Judgment of the Supreme Court of the Czech Republic Case No. 33 Cdo 2912/2008 of 02.23.2011.
50 Pavelková, Kubíčková, and Čečotová, 2005.
51 Judgment of the Supreme Court of the Czech Republic Case No. 28 Cdo 1506/2006 of 06.4.2008.
52 Judgment of the District Court of Rimavska Sobota Case No 1P 284/2013 of 01.7.2014.

settlement of the joint ownership of immovable property. Legal acts relating to the lease of a dwelling also do not fall within the category of legal acts that could be performed by a minor child. The case law of the courts also considers the conclusion of a construction savings agreement by a minor child to be a substantial matter as well as a legal act aimed at the early termination of this legal relationship, the conclusion of a contract on the transfer of bonds, the assignment of a claim, or the recognition of a debt to be a substantial matter. However, in relation to gifts, the case law has held that if the minor child is capable of understanding the substance of the gift contract and if it also involves a financial benefit for them, they are competent to perform the act in question, even if it involves the acceptance of a gift of a higher value.[53] In other cases of gifts, the minor child must be represented by a legal representative. In the case of a gift of immovable property, the representation of the minor child by a legal representative is essential.

The court's case law also considers the conclusion of a future contract to be a substantial matter, stating that, although the property is not directly disposed of at the time of the conclusion of the future contract, the conclusion of such a contract gives rise to rights and obligations to which the parties to the contract are bound in the future disposition of the property.[54]

The case law is also extensive in matters of succession. The conclusion of a succession agreement, the refusal of inheritance, a declaration that a minor child will not plead the relative invalidity of a will for contravention, as well as the pleading of a will's invalidity are considered to be substantial matters.

The legal representative of a minor child may not perform all legal acts for which the minor child lacks capacity.

The limitation of the legal representative is twofold:

1. Under Article 28 of the Civil Code, if the legal representatives are also obliged to administer the property of those they represent and it is not an ordinary matter, the court's approval is required for the disposal of the property.[55]

The purpose of the legislation in question, which closely links the representation of a minor child to the administration of their property, is to protect the interests of the minor child. The court authoritatively confirms that the legal act performed on their behalf by their legal representative is in the interests of the minor child. The decision of the court approving a legal act on behalf of a minor child is not constitutive but declaratory in nature and operates *ex tunc*, (i.e., from the moment the legal act is performed by the legal representative).

In deciding whether to approve a legal transaction, the court shall consider, in particular, the interests of the minor child by examining the circumstances of the particular legal transaction. For example, in deciding whether the inheritance

53 Judgment of the Supreme Court of the Czech Republic Case No. 25 Cdo 1005/1999 of 09.13.2001.
54 Judgment of the County Court of Banska Bystrica Case No 16 Co 345/2011 of 03.1.2012.
55 Act No. 40/1964 Coll. Civil Code.

agreement is in the interests of the minor child, it is necessary to consider the possibility of using the things acquired in the inheritance and what the costs of maintaining them would be, if any, and whether it would be reasonable and socially desirable to create a co-ownership of the inheritance by way of a small share.[56] When it comes to the refusal of the inheritance, the court deciding whether authorizing that act has sufficient information as to the nature, type, and value of the testator's property and the amount of their debts and may then proceed to assess whether it is in the interests of the minor child.[57]

It is clear from the legislation that if a legal act that is clearly outside the scope of ordinary matters (and constitutes a substantial matter) in the administration of a minor child's property, it requires the court's approval for its validity. Without such approval, the legal act is absolutely void for being contrary to law, and as such, it cannot produce the intended legal consequences.[58]

A legal act (i.e., contract of sale) that has not been approved by the court does not give rise to an obligation to pay the purchase price or to a right to take over the purchase price, and the legal relationship, if the performance under an absolutely void contract is an unjust enrichment. Similarly, unless the legal act of concluding the agreement made by the legal representative of the minor heir has been validly approved by the court, the notary cannot proceed to approve the agreement of the heirs, much less to issue a certificate of the acquisition of the inheritance pursuant to the agreement of the heirs.[59] It is incorrect to conclude that the application for registration of the title must be rejected if the minor child is a party to the contract for the transfer of the title, and the act has not been approved by the court on the date on which the registration proceedings are opened. If the application for registration of the title is not accompanied by a court decision approving the deed, the registration procedure shall be suspended, and the parties shall be invited to submit the court decision on the registration of ownership. The *ex tunc* confirmation of the correctness of the disposal of the property already at the time of the legal transaction is decisive; therefore, it also applies to the filing of the application for registration. A condition for the registration of a property right concerning a minor child is that the legal act must be approved by the court; if the court did not approve the legal act, the conditions for rejecting the application for registration would be fulfilled.

The approval of a legal act for a minor child may occur in advance (before it is executed) or afterward (i.e., at the time when it had already been executed). However, it is always necessary that the act to be approved be identified in a sufficiently definite manner so that the court's decision leaves no doubt as to which act has been approved. There is no time limit on the subsequent approval of the act. However,

56 Judgment of the Supreme Court of the Czechoslovak Republic Case No. 4 Cz 71/1969 of 01.30.1970.
57 Judgment of the Supreme Court of the Czechoslovak Republic Case No. 1 Cz 12/1976 of 02.19.1976.
58 Judgment of the Supreme Court of the Czech Republic Case No. 33 Cdo 2912/2008 of 02.23.2011.
59 Judgment of the Supreme Court of the Czechoslovak Republic Case No. 4 Cz 71/1969 of 01.30.1970.

once the minor has reached the age of majority, it is up to them whether to approve the legal act performed.

A court decision approving a legal act on behalf of a minor child is not a means of resolving a conflict of interest between the parent and the minor child, nor is it a means of removing the conflict of interest or validating it.

Problematic concepts of opinion appear to be the approval by the juvenile court of the filing of an action by a guardian *ad litem* for a minor child and its consequences.

The first conception of opinion is based on the conclusion that the filing of an action is, in principle, a procedural act that requires the court's approval, with the exception of cases in which the approval of this procedural act will not be required, particularly in the case of disputes of minor value or over claims the merits of which are uncontested. That conclusion considers the consequences, in particular, of the obligation to pay costs in the event of unsuccessful proceedings.[60] The consequences of a failure to approve a procedural act may be reflected on two levels. The first view, in the absence of the court's approval of the procedural act, would constitute the absence of any legal consequence, which, in practice, would mean that the court should not take the claim into account. The second legal opinion is held by the case law of the Czech courts. The absence of approval of a procedural act is regarded as a remediable defect in the conditions under which the court may act (procedural condition).[61] It will therefore be necessary for the court to take appropriate measures to remedy the defect, namely by initiating proceedings for the approval of a legal, actionable claim on behalf of the minor child. Only if the order dismissing the petition becomes final, will it be possible to stay the proceedings.

The practice of the Slovak courts does not reflect the above decision-making practice of the Czech courts or the opinion of legal science. General courts hear actions brought by the parents as legal representatives on behalf of a minor child (e.g., actions for protection of personality, for damages in the form of pain and suffering, and other damages) without requiring the court's approval for the filing of the action. The court hears the case on the finding that all the conditions under which it may act are met. The concept that the bringing of an action by a legal representative on behalf of a minor child arises directly from the exercise of their parental rights and obligations is followed. We are in full agreement with this approach. The legal representatives of a minor child are obliged to administer the minor child's property with due care.[62] Proper care is care that protects the property interests of the minor child to the greatest extent possible, reflected in action aimed at preserving existing values and their possible reproduction.[63]

Failure to manage the property of a minor child in a proper manner is also a failure to bring an apparently unsuccessful action on their behalf. In the case of

60 Kerecman, 2008, pp. 3–28.
61 Judgment of the Supreme Court of the Czech Republic Case No. 21 Cdo 856/2011 of 12.15.2011.
62 Section 32, Act No. 36/2005 on Family and on the amendment of some other acts.
63 Pavelková, 2011.

disregard of the above obligation, the parents, as legal representatives, are liable to their minor child for the damage caused by their actions.[64] The aforementioned may also apply to damages in the form of compensation for the costs of legal proceedings.

Arguments about the necessity of the court's approval of the procedural act of filing a lawsuit for minors are primarily justified by the lawsuit's possible failure and the necessity of bearing its costs. If the court is required to examine the minor's interests, it will be incumbent on the juvenile court to express a legal conclusion as to whether the procedural act in question will adversely affect the minor child's financial situation. Thus, at the time of the court's decision on whether to approve the bringing of the action, it should take into account the minor child's possible obligation to pay the costs of the proceedings and thereby prejudge the court's decision on the merits (i.e., on the action whose bringing should be subject to the court's approval) or at least conclude that the bringing of the action does not constitute an obvious failure to exercise a right. The examination of the minor child's interest in the bringing of the action by the legal representative should, therefore, with reference to the possible obligation to pay the costs of the successful defendant, include, in the margin, a conclusion relating to the substance of the case.

There is no justification for the requirement to approve the procedural act of conciliation in proceedings in which a minor child represented by a legal representative is a party. The court hearing the merits of the case is required, when approving a court settlement, to examine whether the court settlement is in accordance with the law. Therefore, it also has the task of assessing whether the interests of the minor child justify the approval of the court settlement. Under Art. 3(1) of the Convention on the Rights of the Child, "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"[65] Approval of a judicial settlement by the juvenile court and, consequently, by the court hearing the case itself would entail duplication of decision-making, which would be contrary to the statutory requirement of judicial efficiency.

A special feature is the capacity of the minor child to be represented by a lawyer in the proceedings. The courts approach this by first examining the minor's maturity of mind and will; to that end, they shall question the minor child and ascertain what has led them to be represented by a lawyer in the proceedings and from what means the costs of legal representation are paid. As a general rule, a minor child, after reaching the age of 15 years, shall have the maturity of mind and will rendering them competent for the legal act in question, in which case the court shall admit the minor to be represented by a lawyer in the proceedings.

64 Article 420, Act No. 40/1964 Coll. Civil Code.

65 UN General Assembly, Convention on the Rights of the Child, November 20, 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at https://www.refworld.org/docid/3ae6b38f0.html (Accessed: May 1, 2022).

2. Pursuant to Article 22 of the Civil Code, owing to the conflict of interest of the attorney with the represented, which is supplemented by the provision of Section 31 of the Family Act, in the event of a conflict of interest between the parents and the minor child, the representation of the child by the parents is excluded pursuant to Section 31(2) of the Family Act.

This second limitation of the minor child's representation is based on the conflict of interests between parents and a minor child. It is not limited to cases when a conflict of interests between the representative and the represented person exists and is established in the proceedings, but the Family Act extends the protection of the minor child to cases where a conflict of interests is only imminent (it has not yet occurred). From the point of view of the conclusion of a conflict of interest, it is sufficient only that a conflict of interest is likely to arise, which is always the case when a parent of a minor child asserts claims, in civil court proceedings, the mutually contingent basis or amount.

Judicial practice has concluded that parents may not represent a minor child in any proceedings against the other parent (e.g., proceedings to modify the exercise of parental rights and responsibilities,[66] proceedings for the denial of parenthood,[67] and proceedings for the determination of the name[68]).

There is no conflict of interests where a donation is made, and the donors are the parents exercising parental rights and obligations and the recipient is a minor child incapable of assessing the content of the act. Parents as donors are Simultaneously the legal representatives who are entitled to accept the gift on behalf of the minor child. This is the case if there is no conflict of interests between the parents and the minor child in the representation.

A conflict of interests between the legal representative and the minor child precludes representation to the extent of the conflicting interests of the parties to the legal proceeding. The interests of the person who is to be appointed as a conflict guardian must not conflict with those of the minor child, and as a rule, the conflict guardian is the authority for the social protection of children and social guardianship.

The court is always obliged to define the scope of the rights and obligations of the conflict guardian according to the purpose for which the guardian has been appointed. To the extent established by the court, the guardian *ad litem* becomes the legal representative of the minor child instead of the parent and may, therefore, *inter alia*, authorize another person to represent the minor child to the extent that they are authorize to act for the minor child.

Legal acts performed by a parent on behalf of a minor child, if a conflict of interest between their interests is given or threatened, are absolutely null and void legal acts, and procedural acts are ineffective or are considered to be pleadings filed by unauthorized persons.

66 Judgment of the Supreme Court of the Slovak Republic Case No. 5 Cdo 92/2009 of 05.19.2009.
67 Judgment of the Supreme Court of the Slovak Republic Case No. 3 Cdo 96/2008 of 02.04.2009.
68 Judgment of the Supreme Court of the Czechoslovak Republic Case No. Cz 498/1953 of 02.04.1954.

### *3.3. Administration of the minor child's property*

In most cases, a minor child has no possessions of their own apart from personal items that they receive from their parents (e.g., school supplies). It is not uncommon for a minor child to acquire property during their lifetime. In situations where a minor child has personal property acquired, such as by inheritance, by gift, or through employment (e.g., acting job in a commercial) or sporting activities, the issue of the management of that property must be addressed. It is the parents' duty and right to administer the property of a minor child only to the extent that the minor child is incapable of acquiring rights and assuming obligations by their own legal acts, depending on the mental and volitional maturity appropriate for their age. Article 9 of the Civil Code states that "*Minors shall have capacity only to perform legal acts which by their nature are appropriate to the maturity of mind and will appropriate to their age*."[69]

The Explanatory Memorandum to the Family Act, in relation to the regulation of the administration of a minor child's property, indicates the legislator's intention:

> Following the legislative intention of the Civil Code and the changes in the economic system of society, a specific legal regulation of the administration of the property of a minor child appears necessary to fill the existing gap. The current legislation only contains the obligation of parents to manage the child's property. However, it does not speak of any rules for such management, unlike the Act on Family Law No. 265/1949 Sb, which also addressed the management of the child's property. Thus, the proposed provision is a certain reminiscence of the provisions of the Act on Family Law from 1949. So far, legal theory and jurisprudence have relied only on Article 28 of the Civil Code.[70]

The legislator has also regulated the rules in relation to the administration of a minor child's property. First, it has explicitly stated that parents are obliged to manage the property of a minor child with due care[71]; this is an objective measure of the manner in which the property is managed. We share the view of legal scholarship that such care must be exercised by a proper steward, not only to preserve property values but also, where possible, to increase those values. Ultimately, the aim of asset management is not only to preserve already acquired assets but also to reproduce them and increase their value.

One can distinguish due care for objects (use of the object, its maintenance and repair, insurance, provision of services procured and provided in this connection), property rights, and other property values. Due diligence should also be understood to include not entering into unnecessary loans and credits, contracts for the transfer

69 Article 9, Act No. 40/1964 Coll. Civil Code.
70 Explanatory memorandum to Act No. 36/2005 Coll. on the Family.
71 Section 32, Act No. 36/2005 on Family and on the amendment of some other acts.

of property (purchase, gift), as well as the conclusion of disadvantageous lease or pledge contracts.

A careful distinction must be made between the minor child's property and the proceeds thereof. The proceeds of the minor child's property may be dealt with under different conditions. As the Explanatory Memorandum to the Family Law shows, "*The proposed provision is based on the principle that a child's basic property may not be touched*."[72]

The parents' maintenance obligation toward the minor child is not extinguished even if the minor child's property generates income (e.g., in the form of dividends, interest, rent payments)[73]; however, the parents of a solvent minor child may use such proceeds. In the first instance, the use of the proceeds of the property should be directed toward the preservation of the minor's assets and then also be used to meet the family's needs. In this case, the legislator also regulates another legal requirement, namely the use of the proceeds to a reasonable extent (in relation to the amount of the proceeds, the proportion of assets of the minor child, the proportion of assets of the family as a whole, considering the family's overall economic and social situation).

As mentioned above, in principle, the assets cannot be diminished. In the parents' no-fault state, a gross disproportion between their assets and those of the minor child may arise, in which case that part of the assets may also be called upon to meet the needs of the minor child and the family. This is the case where the parents have become disabled or have been granted a partial disablement benefits or pension; where they have reached retirement age, which has caused a loss of income; and also where they have lost their jobs through no fault of their own and, despite their best efforts, have not been able to find employment and are registered with the employment office.[74]

The provision of Article 28 of the Civil Code limits the parent who manages the property of a minor child in the sense that, if it is not an ordinary matter, the court's approval is required to dispose of the property. Nor can situations where a conflict of interest arises between the parents and the minor children in the administration of their property be overlooked—for example, in the situation of a transfer of ownership from the parents to the minor child. In such a conflict, it is necessary to appoint a conflict guardian for the minor child.

The exercise of parental rights and obligations in relation to the administration of the minor child's property ends when the child reaches the age of majority and the parents are obliged to hand over the property they have administered as well as the documents relating thereto within 30 days.

The legislator has introduced another obligation toward the child, namely, to submit a statement concerning the management of the property. The obligation to

72 Explanatory memorandum to Act No. 36/2005 Coll. on the Family.

73 Section 32, Act No. 36/2005 on Family and on the amendment of some other acts.

74 Hrušková, 2005, p. 436.

provide accounting is not imposed on the parents by mandatory provisions but is bound to the child's request within a statutory period of 3 years after the end of the property's administration. It is interesting to note that owing to incorrect wording, the Family Act states that

> a minor child shall have the right to request an account of the administration of his or her property from his or her parents or the persons administering his or her property; this right shall be extinguished if it has not been invoked before the court within three years after the administration of the property has ended.[75]

The provision uses the term "minor child" when this right clearly pertains to a child after reaching adulthood. Irrespective of whether the child requests the provision of the accounting in question, they retain the right to claim liability against the parent for damages or unjust enrichment.

The family law also provides for the institute of a property guardian, which the court may appoint for a minor child if their interests in the management of their property are endangered and the parents themselves have not taken or are unable to take appropriate measures to protect the child's property.

The law cannot be so casuistic as to cover all the circumstances that may arise in a family's life. The cases that would justify the conclusion that the property interests of a minor child are at risk may be varied—for example, where both parents or the sole surviving parent are unable, for objective reasons (illness, ignorance, inability to manage a particular type of property), to provide for the management of the minor child's property in relation to the extent of that property.

## 4. Exercising parental rights and obligations

### *4.1. Exercising parental responsibility by parents who are married*

In relation to the exercise of parental responsibility, the ideal situation is a complete intact family. In such a case, it is presumed that parental responsibility is exercised by the parents of the minor child by mutual agreement, protecting the latter's interests.[76]

We conclude that the need to involve both parents in these activities stems from the irreplaceability of the mother and father's roles in the minor child's life. Each of the parents, by their personal approach—and consequently, the aforementioned approaches in their interaction with each other—completes the unique and inimitable

75 Section 32, Act No. 36/2005 on Family and on the amendment of some other acts.
76 Section 28, Act No. 36/2005 on Family and on the amendment of some other acts.

personality of the minor child. This provides the optimum conditions for the child's healthy development and rest, which requires a cooperative, loving relationship between their parents. The fluid parental environment contributes to the best biopsychosocial nourishment, inner stability, integrity, and self-confidence of the minor child. This is not to say, however, that there are no disagreements to be resolved between the spouses or parents of a minor child who live together.

The parents of a minor child who are married are a mother and father who have entered into a marriage together. The law does not establish the conditions under which the parents of a minor child may be found to be living together. In view of the above, it is necessary to refer to case law that gives real meaning to the expression "parents of a minor child." First, it should be borne in mind that cohabitation and shared household are not identical concepts, and that shared household does not preclude the application of Section 36 of the Family Act. Factual separation as a result of work (occupation) outside the family's area of residence is not in itself sufficient to conclude that the parents of a minor child do not live together; in particular, the degree and extent of personal care of the child corresponding to that circumstance, the manner in which household and family expenses are paid, and the overall functionality of the family during the course of the parents' living situation (mutual visits, spending personal time, holidays, vacations, and so on) must be assessed here.[77]

According to the Slovak case law, parents live together if they share a personal, intimate, and property union that includes, *inter alia*, personally caring for the other spouse, managing finances jointly, sharing of joys and problems, and spending leisure time together.[78]

Parents who are married or live together are presumed to exercise parental rights and obligations in unison, or the very least, to cooperate with each other in the exercise of respective rights, thereby creating the conditions for the minor child's favorable development. They shall jointly take care of the upbringing and all-round development of the minor child, jointly represent them in essential matters, and jointly manage their property.

If there is a disagreement on an essential matter in the exercise of parental rights and obligations and the parents are unable to agree on it, the court shall decide on the matter at the request of one of the parents. Under Section 35 of the Family Act, the substantial matter is, in particular, the question of the minor child's emigration abroad, the administration of the minor child's property, the minor child's nationality, the consent to the provision of healthcare, and the preparation for a future profession (the choice of the school where the minor child will attend compulsory education).

The determination of the child's place of residence is part of parental rights and obligations but only as a partial entitlement arising from the right to care for and raise the child. That right is also given great weight in European Union law and sufficient

77 Judgment of the Supreme Court of the Slovak Republic Case No. 2 Cz 3/1992 of 01.31.1992.
78 Judgment of the Constitutional Court of the Slovak Republic Case No. II ÚS 433/06 of 12.14.2006.

space in the regulation, given the far-reaching consequences for family relations that the free movement of persons within the European Union necessarily entails. Emphasizing, also through an explicit statement of the right to determine residence as a fundamental parental right, would help to raise awareness of its importance.

The change of residence of a minor child by moving within Slovakia (especially in terms of greater education) with a parent and the associated separation from the other parent may affect the life of the broken-up family in a wider context in the future, such as by making it impossible to order alternate custody (owing to the distance of the parents' homes). It is the responsibility of the parents to consider this serious intervention with the best interests of the minor child as the primary consideration, bearing in mind that the role of both parents in the life of the minor child is irreplaceable. Where the change of residence of the minor child was motivated by the other parent's interruption of contact with the minor child (e.g., a form of revenge), such a parent does not meet the moral prerequisites for the minor child to be entrusted to their personal care. Of course, we assume that if no agreement has been reached on the determination of the minor child's residence, an agreement on the exercise of parental rights and obligations is unlikely to be possible.

The abovementioned conclusion on the importance of this right would be matched by explicit legislation, which, in the context of the substantive matters on which a court decision is required for the proposal of one of the parents should an agreement not be reached within the context of Section 35 of the Family Act, would provide for the determination of the place of residence of the minor child, instead of the narrowed heading "on the relocation of the minor child abroad." Since essential—or substantive—matters are defined in the provision in question in a demonstrative manner, it is not excluded to subsume the determination of the place of residence under an essential matter even under the current legislation, and this interpretation is considered to be correct, taking into account the need to ensure the widest possible range of time spent together by a parent and a minor child.

### *4.2. Exercising parental responsibility by parents after divorce or by spouses who do not live together*

The divorce or separation of the parents of a minor child affects the lives of all those involved and necessarily entails a new arrangement of family relationships (Sections 24 and 36 of the Family Act). When we speak of the separation of parents, we refer to those who have never married and are not living together (have not started living together at all or have stopped living together).

When a couple decides to divorce (and eventually also to separate), they have several decisions to make. The most important—and often most painful—ones involve minor children: where should the minor child live? Who will be responsible for them? Which parent will be given custody of the minor child?

This newly created situation in the family (new arrangement of relations) is not a restriction or deprivation of parental rights and obligations of the parent who is

not entrusted with personal custody of the minor child. The *de facto* limitation of the exercise of the rights and obligations of the parents and of the minor child's corresponding rights and obligations results from the plurality of the subjects who are their bearers and, consequently, from the competition between the two parents of the minor child in the exercise of those rights and obligations.[79]

Regarding the issue of exercising the parental rights and obligations of parents after divorce (similarly applies to parents of a minor child who do not live together), we consider it important to point out the ruling of the Constitutional Court of the Slovak Republic, Case No. PL ÚS 26/05, which did not grant the petition of the Brezno District Court to declare the incompatibility of Sections 24 and 25 of the Family Act with Article 41 of the Constitution of the Slovak Republic. The applicant's main argument for the alleged incompatibility is the fact that the court, in the decision dissolving the marriage, without deciding on the suspension, limitation, or deprivation of parental rights, determines who will represent the child and administer their property after the divorce, thereby effectively depriving one of the parents of their parental rights, which belong to both parents. The petitioner believed that such legislation deprives one of the parents of these parental rights without fulfilling the conditions established by the Family Act. However, in the opinion of the Constitutional Court, the legislator did not intend to restrict parental rights, although the way it is worded indicates the possibility of interpreting the application of this provision as a restriction of the parental rights of one of the parents, which must actually occur after the parents' divorce.[80]

One of the most serious issues that partners deal with after the end of the relationship and, if no agreement is reached, shift the burden of decision-making in this area to the guardianship courts is what happens to the child after the divorce. It is important to remember that even though the parents of a minor child have ceased to be life partners, their parenthood has been preserved; the importance of both parents in a minor child's life does not diminish, and they should both be aware of their parental responsibilities. The minor child needs to feel and be aware of their presence, and divorce or separation does not change this situation.

Many emotionally charged forces are associated with divorce, such as love and hate, constructiveness, destructiveness, unbalance, and indifference, and children are forced to take on a certain role in such emotional tension. The most appropriate and prioritized solution for regulating the exercise of parental rights and obligations in cases of divorce is parental agreement.

By consensus, the parents of a minor child may conclude that the best arrangement of the relationship would entail entrusting the minor child to the exclusive custody of one parent or to the alternate personal custody of both parents. A mere agreement without proper specification should be considered insufficient so

79 Dubovský, 2010, pp. 449–466.

80 Judgment of the Constitutional Court of the Slovak Republic Case No. PL ÚS 26/05 of 07.06.2006.

as not to constitute a means of experimentation by the parents on the minor child. Parental agreement cannot be confused with judicial conciliation.

To be enforceable, the parents' agreement on the exercise of parental responsibility must be approved by the court,[81] whose primary consideration in approving the parents' agreement on the exercise of parental responsibility is the best interests of the minor child. It is also necessary for the court to examine the parents' agreement from the point of view that the court would also take into account in its own decision-making. Parents who agree on personal custody of a minor child start their post-divorce life with a distinct advantage, which is also an advantage for their minor child. These parents are more likely to support each other in decisions concerning the minor child, and by reaching a mutual agreement, the parents provide the minor child with a cultivated role model for dealing with conflict situations in the future. Another advantage of such an agreement is that the minor child is relieved of the burden of deciding (expressing an opinion on) which parent they would prefer.

If the parents fail to reach an agreement, or if the conditions for the court to approve the agreement are not met, it is the court's task to authoritatively regulate the exercise of their parental rights and obligations—in particular, to determine to whom the minor child will be entrusted, who will represent them and administer their property.

Opinions on post-divorce family arrangements have changed over time. Influenced by the eminent psychologist René Spitz, who pioneered the psychoanalytic theory ascribing primary importance to the mother–child relationship as a force that can accelerate the development of a child's innate abilities and whose absence leads to the onset of depression, minor children were entrusted to the personal care of the mother. From the mid-1970s onward, the notion that a minor child should be entrusted to the mother's personal care came to be regarded as obsolete. The concept of "what is best for the child," which emphasized the parent's ability to care for the child, began to be promoted; consequently, the popularity of joint parental care of a minor child grew.

A post-divorce family arrangement may look like the following under Section 24 of the Family Act:

1) exclusive personal care of the mother,
2) exclusive personal care of the father,
3) alternate personal care of both parents.

In some countries, such as the Czech Republic, the court may also decide to entrust the minor to the joint custody of the divorced spouses. The Slovak legislation does not provide for such a possibility.

The family life of parents and their child does not end with the parents' divorce; however, where the parents' life together has been practically interrupted or does

81 Section 24, Act No. 36/2005 on Family and on the amendment of some other acts.

not exist, it is necessary for the relationship between the parents and the minor child to be governed by legal rules different from those normally applied in a situation where the family as a whole is functioning properly, with the proviso that neither national nor international legislation gives one or the other parent priority in the custody of a minor child.

In accordance with Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the rights granted by the Convention must be guaranteed without discrimination on any ground such as gender, race, color, language, religion, political or other opinion, national or social origin, membership of a national minority, property, birth, or other status.[82] Parents are equal before the law, and a difference in treatment is discriminatory unless it pursues a legitimate aim. Accordingly, no preference shall be given to a parent based on gender or on the filing of a petition for custody, nor can preference for the mother be inferred from the maternity protection provisions, the purpose of which is to ensure, as far as possible, that the child's mother is not harmed because she exercises maternity. Nor is it possible to give preference to a parent because of their sexual orientation as entrusting a minor child to the personal care of one parent based on sexual orientation would lead to discriminatory treatment.

The national legislation regulates the criteria to be considered by the courts when deciding on the exercise of parental responsibility in a relatively strict manner. They are, however, developed by constructive case law.

The reference to the case law of the Czech courts is justified by the common legal culture and the proximity of the legislation, which is based on historical reciprocity.

The criteria for assessing the quality of the parent's ability to raise a minor child cannot be exhaustively listed. The most important criteria, in the opinion of several authors based on Slovak case law, include the following:

- personality of the parent: indicators are a well-functioning personality, emotional maturity, psychosocial maturity, and productive orientation. The quality of one's personality and their maturity are the parent's guarantee of the quality upbringing of the minor child. A parent's well-functioning personality is linked to the ability to provide adequate care for a minor child,
- the parent's relationship with the minor child: it is one of the main pillars in assessing to whom the child will be entrusted for personal care. In this context, it is necessary to recognize a healthy love focused on the child's development and happiness,
- the character, morality, and structure of the parent's moral standards,
- respect for the right to have contact with the other parent,
- the relationship of the minor child to the parent,
- the continuity of the child's environment,

82 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, November 4, 1950, ETS 5, available at https://www.refworld.org/docid/3ae6b3b04.html (Accessed: May 31, 2022).

- the level of education and intelligence of the parent and the capacity for social and occupational adaptation, and
- the extended family background.

The arrangement of family relationships must always be in the interests of the minor child and never primarily in the interests of their parents.[83] A fair balance must be struck between the interests of the minor child and those of their parents. The European Court of Human Rights (ECHR) has attached particular importance to the sovereign interest of the minor child, which, by its nature and gravity, may, in accordance with the foregoing, outweigh that of the parent.[84]

The concept of the child's best interests must be understood in the strongest possible terms. It is in the child's best interests, in particular, that they should grow up in an atmosphere of happiness, love, understanding, stability, tolerance, and harmony, that their upbringing be directed toward the positive development of their personality, talents, intellectual and physical abilities, moral, and spiritual and social development, and that their rights as set out in the Convention on the Rights of the Child and other legislation be respected.[85]

## 5. Conclusion

At last, I believe that it is important to explore the future of parental responsibility in Slovak legislation. Our legislation has not fully developed this concept, and several gaps remain; however, since Slovak family law is at a crossroads, this might change. The forthcoming recodification of the Civil Code is expected: in other words, family law, together with other branches of private law, should be concentrated in the new Civil Code in the near future, and with that, the hope is that the concept of parental responsibility will be emphasized further. As of today, this is still in the realm of the future evolution of Slovak family law.

A major shortcoming of Slovak family law is the terminology used, primarily the division of parental rights into "Parental Rights and Obligations" and labels "Other Rights and Obligations of Parents and Children" without much logic behind the distinction between these two categories. The upcoming recodification of Family law into the new Civil Code would provide a great opportunity to rectify this situation and to come to a sounder terminology. From a linguistic perspective the direct translation of the term parental responsibility might be a little cumbersome, due to the limitations of the Slovak language when it comes to this term. A unified label is

83 Olsson and Olsson v. Sweden, Council of Europe: European Court of Human Rights, March 24, 1988.
84 Johansen v. Norway, Council of Europe: European Court of Human Rights, June 27, 1996.
85 Judgment of the County Court of Prešov, Case No 18 CoP 15/2012 of 03.15.2012.

however definitely needed. If the concept of parental responsibility was introduced into Slovak law under a unified name it would better reflect the current reality of being a parent and emphasise the responsibility of all who are in that position. Reformulating the parents' position in law as one of responsibility rather than rights and obligations would bring Slovak legislation in line with modern family law trends and the with the Recommendations on Parental Responsibility by the Committee of Ministers of the Council of Europe adopted in 1984.

One of the main criticisms of Slovak family law is that it has not kept up with societal changes, that it does not even entertain the idea of new technologies, and that it is inherently traditional; thus, it is still anyone's guess whether the new Civil Code will expand on the current family law concepts or whether it will keep family law in its current state.

Currently, the Slovak Family Act does not define the concepts of parent and child. However, the definition of these terms can be deduced from the provisions on the determination of parenthood (Section 82 of the Family Act states that "*the mother of the child is the woman who gave birth to the child, and there are no exceptions*," and Section 84 of the Family Act regulates the three rebuttable presumptions of paternity). In defining the concept of child for the purpose of exercising parental rights and obligations, it is necessary to look for support in international treaties and the case law of the courts. This is an area where we are anticipating changes in the near future.

Unlike the legislation of most European countries, the Slovak legislation on parental obligations is based on the trichotomy of parental rights and obligations—constant and consistent care for the upbringing and all-round development of the minor child, representation of the minor child, and management of the minor child's property. The constant and consistent care for the upbringing and all-round development of the minor child and the resulting authority over them are not entrusted to the parents for their own benefit but for the benefit of the minor child and their upbringing into a full-fledged member of society. The representation and management of the minor child's property, as well as other components of parental rights and obligations, are regulated in in a framework of the Family Act and Civil Code and are given real form by the case law of the courts and by legal science out of the need to find an equitable solution.

Society has evolved in recent years, and significant changes have also affected the issue of family law relations. The number of divorces and separations of unmarried couples is not negligible. The legislation gives wide scope for parents to exercise their parental rights and obligations at their joint discretion in a situation where they form a family together and also when the family has broken up through divorce. The current legislation reminds parents to pursue the best interests of the minor child in all circumstances. Prioritizing the parents' agreement and, only afterwards, the court's intervention is correct. The parents, knowing the family circumstances and the child's character, are in the best position to find an optimal way to adjust the situation.

From the statistics of the Ministry of Justice of the Slovak Republic, it appears that the number of children entrusted to alternate personal care is slightly increasing. Most cases in which a minor child is entrusted to the alternate personal custody of the parents are approved by the court by the parents' agreement. However, still less than 10% of children in Slovakia are entrusted to the alternate personal care of both parents, which is why the contact between a parent and a minor child should be regulated more thoroughly. Appropriate and reasonably chosen contact arrangements require a deep knowledge of the minor child's personality, their regime, and the working arrangements of both parents. Again, it is the parents who know all the relevant facts and, in cooperation with each other, can use them to the advantage of their minor child so that both parents, in their own particular way, contribute as much as possible to the best development of the minor child. If they are unable to do so, the court must find a solution that does not restrict the right guaranteed by Art. 32(4) of the Charter of Fundamental Rights and Freedoms and Art. 41(4) of the Constitution of the Slovak Republic.

Undoubtedly, the best interests of the minor child require that not only one of the parents should participate in their upbringing. The right of contact is a reciprocal right; just as parents have the right to have contact with a minor child, so does a minor child have the right to be cared for by both parents. The above is to be reflected in an agreement between the parents on the modification of the parent's contact with the minor child or a court decision. It is the court's task to regulate the parent's contact with the minor child and not to restrict or even exclude it.

It also seems desirable to regulate assisted contact, which is currently sorely lacking in our legislation. Parent–child contact is such an important factor in the healthy development of a minor child that it requires sensitive regulation. It is precisely the form of assisted contact—or contact subject to the imposition of conditions—that can facilitate this right, also with reference to its subsequent real reflection in the life of the minor child. If the need for assisted contact has already arisen in the main proceedings, the involvement of a third party, such as the Office of Labor, Social Affairs, and the Family, could prevent the enforcement proceeding itself precisely through the active approach of social workers. This would eliminate the problem of contact on a wider scale. It is often difficult to reverse an unfavorable situation in the context of enforcement proceedings, especially if a long period of time has elapsed since the court decision and the minor child vehemently refuses contact with one of the parents.

Equally interesting is the possibility of legislative improvement of the post-divorce arrangement of family relations by means of a probationary period of custody. We see this as a preferable alternative to subsequent proceedings for a change in the child-rearing environment if it becomes apparent that, for whatever reason, alternating personal care has failed after a certain period.

In terms of process, new legislation might incentivize parents to agree on the exercise of parental rights and responsibilities, and I would suggest that expert evidence be prepared by two independent expert witnesses (a man and a woman),

which would inevitably involve a higher cost. However, this would remove any doubt of gender bias against the person of the expert witness, which is currently a very common complaint. Avoiding the incurrence of considerable costs that might otherwise be invested in another sphere could provide an incentive to try to improve communication between the parents with a view to reaching an agreement, which would be in the best interests of the minor child.

The Slovak legal order currently lacks the determination of the goal of proper upbringing of a minor. I think it is important that the aims of education are clearly defined, which would help simplify the text of the law as well as the courts in their application by unifying their positions. However, it would also help parents navigate society's expectations of the mission of parenting. Positive results could be achieved by strictly defining the roles of parents in upbringing—at least in as much detail as, for example, the Czech legislator has done in Article 884 of the Civil Code: "*Parents have a decisive role in the upbringing of a child. Parents are to be all-round role models for their children, especially when it comes to the way of life and behavior in the family.*"

A further positive step would clearly be a substantive definition of the concept of "upbringing of a minor" to provide a clear legal framework for the rights and obligations of parents. Under the current law, Slovak parents do not have a strict legal obligation to consistently protect the child's interests, nor do they have an obligation to guide the child's actions or supervise the child. Consequently, no link exists to the provisions of the Civil Code governing liability for damage caused by those who are unable to assess the consequences of their actions. Inspiration could again be taken from the Czech regulation, which, in the new Civil Code in Art. 858, defines parental responsibility as

> parental responsibility includes the duties and rights of parents, which consist in taking care of the child, including in particular taking care of the child's health, physical, emotional, intellectual and moral development, protecting the child, maintaining personal contact with the child, ensuring the child's upbringing and education, determining the child's place of residence, representing the child and managing the child's property; it arises from the birth of the child and ceases when the child acquires full legal capacity. The duration and extent of parental responsibility may be changed only by the court.

The Slovak legislation lacks a more detailed enumeration, and even the draft of the new legislation includes, in the framework of care for the person of the child, only that the parents have the right to have the child with them, to take care of them personally, and to protect them. However, this wording is not exhaustive and should be changed to include "*to have the child with them, to determine his/her place of residence, to care for him/her personally, to protect the child's interests, to direct and guide his/her actions and to supervise him/her.*"

The remarkable growth of reproductive technology is steadily unhinging a Pandora's box of questions and difficulties regarding the essential nature of human

procreation. Moral and legal dilemmas regarding parental rights and regarding defining who is the bearer of these rights and responsibilities are increasingly common; this area is another one for potential changes in the upcoming recodification.

Every culture has certain assumptions about what parents can or cannot do with their progeny. In our own culture, these ideas are given constitutional protection. As discussed above, parents have several rights and responsibilities with regards to their child, which we can derive from our legislation and case law. However, are these laws immutable or unchanging? No. As guidelines on parental responsibility are ever evolving with the changing dynamics of family structures, it is paramount that legislation reflects these changes. Slovak family law is on the threshold of some very exciting changes; it is our responsibility as lawyers and researchers to ensure that these changes preserve the best interest of the child and the protection of human dignity and consider societal changes, all the while remaining true to our cultural and legal heritage and respecting our national specifics.

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Chapter IX

# Conclusions

Paweł Sobczyk

## 1. General remarks

In the "Introduction" of this publication, it was noted that modern European legal culture is based on the triad of Judeo-Christian religion, Greek philosophy, and Roman law. Detailed analyses were carried out on the content of the right to "parental responsibility," allowing to note several factors common to Central European countries that have influenced their legal systems *in genere* and legal solutions in the field of parental responsibility *in specie*.

The contemporary legal systems of Croatia, the Czech Republic, Hungary, Slovakia, Slovenia, Serbia, and Poland were shaped after the Second World War in the realities of a totalitarian state, which had a significant impact on the state–family relations but also on school–children, school–parents, and, finally—what is fundamental from the point of view of this monograph—parents–children. At that time, general guarantees regarding parenthood and motherhood were entered into the constitution, and fragments of civil codes or separate legal acts referred to as codes/statutes were devoted to them (for example, in Poland, the Act of February 25, 1964—Family and Guardianship Code).

In 1989, the period of systemic transformation began, which also covered broadly understood issues concerning the family and family relations, especially between parents and children. The national systems in this area were much more influenced by acts of international law of a universal and regional character. The enactment of new constitutions (as basic laws in Central European states) did not always result in the adoption of new laws on family matters. It did, however, contribute to the revision of the existing regulations in line with the modernization concept and, above

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all, to adapting them to new standards of human rights protection and a democratic state ruled by law. Recent years have seen an intensified impact of Western legal culture—both in its legal sphere and, above all, in jurisprudence—on the legal systems and jurisprudence in Central European countries. From a legal point of view, it might seem that the basic institutions and values for humans, nations, and states, such as family, parenthood, motherhood, fatherhood, and parental authority/responsibility are properly and sufficiently protected. From a social or formal and legal perspective, they probably are, but many new cultural and social tendencies each year are increasingly questioning the natural order of things protected by law. Interestingly, such questioning of natural legal values is conducted under the slogan of protecting other noble values, such as equality or the prohibition of discrimination and the prohibition of violence against women. Promotion of gender and equality takes place, on the one hand, at the level of—for instance—communications and strategies of the European Commission and the activities of the European Parliament and, on the other hand, in the case law of the ECHR and the Court of Justice of the European Union (cf. "Pancharevo"). It is an extremely "intelligent and media-oriented" action because, in the name of the implementation of universally protected values and principles, including the principle of equality, it is postulated, for example, to recognize same-sex parenthood and to prohibit discrimination of a child based on the parents' gender. Another area of potential threats to the traditionally understood values of marriage and family is opened by the process of the European Union's accession to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the related legal consequences for states parties to the Convention and member states of the European Union.

Scientific research on parental responsibility has initiated an extremely interesting discussion on the conceptual grid present in the legal acts and scientific publications of Central European countries. It turned out that "parental responsibility" is not an adequate term in all countries and with regard to not all legal solutions.

The analyses show that the legal systems of individual countries include the following concepts: in Croatia, parental responsibility, parental care, and parental rights; in Czech Republic, parental responsibility and parental responsibilities; in Hungary, parental responsibility, parental care, parental liability, and parent–child relationship; in Poland, parental responsibility, parental care, and parental authority; in Slovenia, parental rights and parental care; and in Serbia, parental right and parental care, wherein "parental responsibility" is not accepted in the Family Act of the Republic of Serbia of 2005 as it could be confused with liability for damage (in the Serbian language, both are indicated with the term "*odgovornost*"). The Slovak legislation does not use the term "parental responsibility," but it operates with the phrase "parental rights and obligations," which are primarily derived from Section 28 of the Family Act of the Slovak Republic of 2005.

In turn, the jurisprudence of the ECHR includes parental responsibility, parental authority, parental rights, and parental care. Sometimes, the Court uses these terms in the same case or, pointing to these concepts in the legal order of a given state,

moves on to its own legal argumentation without even referring to these concepts. In the case law of the Court, the nomenclature in this respect is not uniform.

Appearing relatively commonly in family codes or other equivalent legal acts containing provisions on the subject matter, the concept of "parental responsibility" seems to undergo an extremely interesting evolution toward "parental care."

This part of the monograph contains a synthetic elaboration of the subject matter, according to the scheme indicated in the introduction: (2) axiological and constitutional foundations for the protection of parental responsibility; (3) protection of parental authority in the system of legal sources; (4) the concept of a parent; (5) the concept of a child; (6) principles of parental responsibility; (7) the rights and obligations of parents and children resulting from parental responsibility; (8) sexual education children and parental responsibility; (9) detailed issues related to parental responsibility; (10) parental authority in case of divorce; (11) the status of a child not subject to parental responsibility; and (12) *De lege ferenda* conclusions.

## 2. Axiological and constitutional foundations for the protection of parental authority

The legal systems of modern states—including Central Europe—are based on the concept of the hierarchy of individual sources of law. At the head of the system is the constitution as the basic law, the provisions of which should be consistent with other legal acts. Therefore, despite the increasingly common multicentric nature of legal systems, the provisions of the constitution regarding the protection of the family and the basic values that are associated with it are extremely important.

Constitutional axiology, as confirmed by the jurisprudence and doctrine of law, should be considered when creating law (obligation of the legislature) and when applying the law (obligation of the executive and judiciary). These elements should not be separated from each other but should be implemented by the various bodies in conjunction with each other.

### *2.1. Croatia*

The Constitution of the Republic of Croatia of 1990 is part of the process of developing the family law system, considering international standards of family protection and human rights in general.

One of the freedoms and personal and political rights of citizens is that "*all citizens are guaranteed respect for and legal protection of personal and family life, dignity, reputation, and honor*"[1]. As the possibility of parental care is part of the right to

1 Art. 35 of the Constitution.

respect for family life, this provision guarantees legal protection in the event of unjustified restriction of parental care. It should be noted that the Constitution does not contain a definition of parental authority (i.e., who may be entitled to this right); thus, it is left to the legislator to determine the content and scope of these concepts.

From the point of view of the analyzed issues, Art. 62 of the Constitution of 1990 seems to be of great importance: "*The Republic protects maternity, children, and young people, and creates social, cultural, educational, material, and other conditions conducive to the realization of the right to a decent life*." The constitutional right of parents to independently decide about the upbringing of their children is a *novum*, but it indirectly limits their responsibility for ensuring their children the right to the full and harmonious development of their personality and by ensuring that children have the right to compulsory and free primary school education.

### *2.2. Czech Republic*

Following the adoption of the new Constitution of the Czech Republic of 1992, and especially thanks to the Charter of Fundamental Rights and Freedoms of 1991, the "old" law of the 1960s began to be interpreted and applied anew. The Charter is fully compatible with the broad concept of family life guaranteed by international instruments and European human rights standards. It can be said that the Charter is the "basic pillar" of the creation, interpretation, and application of individual family law norms.

The card provides an overall value through the following wording in the art. 32. sec. 1 of the Charter: "*Parenthood and the family are under protection of the law. Special protection of children and adolescents is guaranteed*". The Charter also contains many articles devoted to children, among which, from the point of view of this research, these are of particular importance: "*Children born in as well as out of wedlock have equal rights*,"[2] without any discrimination, as well as "*Parents who are raising children are entitled to assistance from the State*"[3].

The Civil Code of the Czech Republic of 2012 respects the "traditional" values of European Christian-Jewish culture and develops "new" ideas anchored in the Charter. It is also worth emphasizing the empowerment of parents of incapacitated children or minors, especially with regard to personal care or contact with the child.

### *2.3. Hungary*

Hungary guards the institution of the family, which is the foundation of the nation's survival. The bases of the family relationship are marriage and the parent–child relationship. The mother is a woman, and the father is a man. The constitution-maker emphasized the role of the mother as a woman and the father as a man and

2 Art. 32 sec. 3 of the Charter.
3 Art. 32 sec. 5 of the Charter.

defined the basic guarantees aimed at protecting children and the rights of future generations. Accordingly, the Basic Law of Hungary of 2011 provides that Hungary protects the right of children to be identified according to the gender assigned to them at birth and ensures their education in accordance with values based on Hungarian constitutional identity and Christian culture.

Hungary promotes the obligation to have and raise children at the constitutional level, and the protection of families is regulated by an executive act.

### *2.4. Poland*

The Constitution of the Republic of Poland of 1997 is the basis for the protection of the family and such aspects of family life as motherhood, fatherhood, parenthood, satisfaction of economic and educational needs, sense of security, and other needs. The principle of protection and care of marriage and family has been included in the basic principles of the political system of the Republic of Poland[4] and developed in a number of specific guarantees, including equal legal status of women and men in family life[5], the privacy of family life[6], the primacy of parents in raising a child[7], the judicial protection of children in their relations with their parents[8], help for the mother before and after childbirth[9], and the child's welfare.[10]

Constitutional guarantees in this respect reflect the ideas previously expressed in international documents defining the standards of human rights protection.

### *2.5. Serbia*

Constitution of the Republic of Serbia of 2006 contains several provisions that relate to broadly understood family law. First, the principle of gender equality is guaranteed in Article 15, substantiated through the guarantees of the equality of the mother and father as parents in Art. 65 sec.1, the equality of male and female children and of children out of wedlock and from married couples in Art. 64 sec. 4, and the equality of adoption and parenthood in Art. 6 sec. 5 of the Family Act of the Republic of Serbia of 2005.

The principle of special protection of the family, mother, single parent, and child is set out in Art. 66 of the Constitution, while Art. 63 states the principle of a free decision to give birth and an express prohibition on the cloning of human beings.

The principle of children's rights was first introduced into the Constitution in 2006. A child enjoys human rights appropriate to their age and mental maturity, has

4 Art. 18.
5 Art. 33 sec. 1.
6 Art. 47.
7 Art. 48.
8 Art. 48 sec. 2.
9 Art. 71.
10 Art. 72.

the right to a name and surname and entry in the birth book, the right to know their origin, and the right to retain their own identity. According to Article 64 child shall be protected from psychological, physical, economic, and any other form of exploitation or abuse. The right to education is guaranteed in Article 71.

Parents shall have the right and duty to support and provide upbringing and education to their children, in which they shall be equal. All or individual rights may be revoked from one or both parents only by the ruling of the court if this is in the best interests of the child, in accordance with the law.[11]

With regard to the upbringing and education of children, Art. 48 of the Constitution is of great importance, which implies respect for diversity.

### *2.6. Slovakia*

As Art. 1 sec. 1 of the Constitution of the Slovak Republic of 1992 states, "*The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion*."

Article 41 of the Constitution of the Slovak Republic, pursuant to which marriage, parentage, and family are legally protected, is the basis of national legislation. Simultaneously, special protection is provided for children and young people. The protection and interest of minors is a priority throughout the legislation. It states that

> (1) Matrimony, parenthood, and family shall be protected by the law. Special protection of children and minors shall be guaranteed. (2) A pregnant woman shall be guaranteed a special treatment, protection in employment, and adequate working conditions. (3) Equal rights shall be guaranteed to h children born both in a legitimate matrimony and those born out of lawful wedlock. (4) Childcare shall be the right of parents; children shall have the right to parental upbringing and care. The rights of parents may be limited, and minor children may be separated from their parents against the parents' will only by a court decision, based on the law. (5) Parents taking care of their children shall have the right to assistance provided by the State. (6) Details on the rights pursuant to paragraphs 1 to 5 shall be laid down by a law.

The Slovak Republic has acceded to many international agreements—also concerning the family and relations between parents and children—which may, to some extent, influence the setting of norms and the application of the law, as confirmed in Art. 1 clause 2 of the Constitution: "*The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations*."

In the future, the regulation of family relations is to be transferred to the Civil Code of the Slovak Republic of 1964 as a separate part of it as part of the upcoming codification of general private law in Slovakia.

11 Art. 65.

### *2.7. Slovenia*

The Constitution of the Republic of Slovenia of 1991 (hereinafter, the CRS) makes reference to children's rights in several articles. Article 14 of the Constitution provides the constitutional legal basis for the equality of children, who are guaranteed the same rights and fundamental freedoms as adults, depending on their age and maturity, regardless of their national origin, race, gender, language, religion, political or other beliefs, material status, birth, education, social status, disability, or any other personal circumstance. Children born out of wedlock have the same rights as children born to it.

Based on Art. 41 sec. 3 of the Constitution, parents have the right to provide their children with religious and moral education in accordance with their convictions. Children's religious and moral direction must be appropriate to their age and maturity and be consistent with their free conscience and religious and other beliefs and beliefs. A child aged 15 or over has the right to make their own decisions regarding religious freedom. The Constitution also provides for the priority of parents as holders of the right and obligation to maintain, educate, and raise children[12].

In turn, Art. 52 sec. 2 of the Constitution guarantees physically or mentally disabled children the right to education and training enabling active life in society, which is related to the principle of equality formulated in Art. 14 of the Basic Law (disability cannot be the basis for differentiated treatment).

Pursuant to the Constitution, children enjoy special protection and care as well as human rights and fundamental freedoms in accordance with their age and maturity.[13] Concern for the safety and upbringing of their children is a constitutional value.

### *2.8. The European Court of Human Rights*

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 protects certain values as fundamental, including respect for family life and the right to found a family. In the Court's view, the Convention must also be interpreted with due regard to the values it protects. The fundamental values protected under the Convention include the right to respect for private and family life, referred to in Art. 8 of the Convention.

The countries of Central Europe have a similar axiology, which results mainly from their similar history and cultural heritage, including legal heritage. As a consequence, the contemporary axiological and constitutional foundations of family protection and the relations between parents and children are similar, with particular emphasis on the values of the family.

12 Art. 54 sec.1 of the CRS.
13 Art. 56 sec. 1.

# 3. Protection of parental authority in the system of legal sources

## *3.1. Croatia*

In addition to the constitutional protection of the fundamental freedoms and rights of citizens, the Republic of Croatia is bound as a contracting state by certain treaties providing for the protection of human rights (e.g., the International Covenant on Civil and Political Rights of 1966, the United Nations Convention on the Rights of the Child (UNCRC) of 1989 and its protocols, and the European Convention on the Exercise of the Rights of the Child of 1996). In the case of bilateral agreements, mention should be made of the agreement with the Holy See on cooperation in the field of education and culture, under which teaching religion in schools was introduced as an optional subject.

The Constitutional Court of the Republic of Croatia frequently refers to the provisions of international agreements, while ordinary courts do so very rarely.

The basic source of the law on parental care is the Family Act of 2015, but the way of exercising specific parental care content is also influenced by many other regulations (i.e., the Act on Education in Primary and Secondary Schools of 2012, the Act on Social Welfare of 2013, the Penal Code of 2011, the Act on Protection against Domestic Violence of 2017, the Hospitality and Catering Industry Law of 2015, and others). For some of these pieces of legislation, there are also relevant implementing regulations as well as recommendations issued by the competent authorities to help parents with parental care. In 2016, for example, the Electronic Media Council has issued recommendations on the protection of children and the safe use of electronic media.

## *3.2. Czech Republic*

The legal provisions on parental responsibility, anchored in the Civil Code of the Czech Republic of 2012, protect not only minor children but also their parents. Anyone may be in the position of the weaker party—especially underage or underage parents, single mothers, alleged fathers, left-behind parents in the event of a child abduction or illegal transfer of a child abroad, and so on. Therefore, vulnerability in the broadest sense is reflected in the Civil Code. The general protection of the family and family life in accordance with the wishes, choices, preferences, and special needs of family members is guaranteed based on constitutional law and European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

## *3.3. Hungary*

In addition to emphasizing the importance of upbringing in the family, marriage is seen as a solid foundation of the family that fulfills its role when a lasting and

solid relationship between the mother and father is fulfilled in the responsibility for the children. Without the birth of children and the development of families, there is no lawful sustainable development and economic growth. The Family Protection Act of 2011 (hereinafter, the FPA) states that intergenerational relations—including those between grandparents and grandchildren—are of great importance in the life of families.

The state encourages the presentation of media programs and content that promote the value of the family and the upbringing of children. It has also been declared as a rule that, to protect children, no one under the age of 18 may be shared for any pornographic or self-centered content or that promotes deviation from the assigned gender identity at birth, gender identity, gender reassignment, and homosexuality. Pursuant to the Family Protection Act, the parent is not only obliged but is also entitled to care for a minor child in the family and to provide the child with the conditions necessary for their physical, mental, spiritual, and moral development as well as access to education and health care. The FPA sets out in a separate chapter the obligations and parental rights in respect of which mother and father are equal.

A parent raising a minor child is entitled to benefits in accordance with the provisions of a separate act and benefits ensuring the coordination of the parental role and work. An important legal act in this respect is the Government Decree 149/1997 (IX. 10.) on guardianship authorities and on the protection of children and guardianship proceedings. This decree contains provisions relating to matters relating to the exercise of parental responsibility in cases where guardianship authorities have jurisdiction over disputes between parents.

The Criminal Code of the Republic of Hungary of 2012 provides for the punishment of crimes against the interests of children and the family in several offenses.

### *3.4. Poland*

Among the national regulations concerning the protection of parental responsibility, apart from the Constitution of the Republic of Poland of 1997, the most important are the provisions of the Act of February 25, 1964 of the Family and Guardianship Code—in particular Arts. 87-127.

### *3.5. Serbia*

The main source of law regarding family law in Serbia is the Family Act of 2005, which regulates parental rights and all legal relations between parents and children. According to the Family Act, matters of significant impact are, in particular, considered to be the child's education, important medical procedures for the child, a change in the child's place of residence, and the disposal of the child's property of significant value.[14]

14 Art. 78 sec. 3 and 4 of the Family Act.

Other laws, which primarily regulate other areas of law, contain provisions aimed at protecting the family. By way of example, the following should be mentioned: the Labor Law of Republic of Serbia of 2005, which defines the right to maternity and parental leave and stimulates the birth of the third and fourth child, as the maternity and childcare leave is 2 years instead of the 1 year for the first and second child; the Biomedical Assisted Fertilization Act of 2017, which defines the different procedures (technologies) available to men and women to help them become parents (not including surrogacy); the Law on Financial Support for Families with Children of 2017, which provides for various allowances such as childcare allowance and child allowance (i.e., the amount that each parent receives as financial assistance after childbirth, which is progressive depending on the number of children) and also stipulates payments for maternity and childcare leave in accordance with the Labor Act; the Old-age and Disability Insurance Act of 2003, which favors the birth of a third child, providing that the length of service of the insured—in this case, the woman who gave birth to the third child—is to be calculated during the 2-year maternity leave as a special type of service[15]; and the Act on Prevention of Domestic Violence of 2016, which stipulates that state authorities and institutions are obliged to act in a timely manner and to provide legal, psychosocial, and other assistance in the recovery, empowerment, and independence of each victim.

International law is of great importance for the protection of parental responsibility at the Serbian national level. According to the Serbian constitution, the treaties are an integral part of the legal system of the Republic of Serbia and are directly applicable. Ratified international agreements must comply with the Constitution.[16]

### *3.6. Slovakia*

In Art. 41 of the Constitution of the Slovak Republic of 1992, the framework for regulating family law has been defined. The importance of the fundamental principles is that they serve as common rules for interpreting family law. These basic principles are contained in Art. 1–5 of the Constitution and represent the values and principles of family law in Slovakia.

Owing to the title issue, the key provisions include the following:

> Marriage is a relationship between a man and a woman. Society comprehensively protects this unique relationship and contributes to its well-being. Husband and wife are equal in their rights and responsibilities. The main goal of marriage is to start a family and raise children properly. (Art. 1)

15 Art. 60.
16 Art. 16 sec. 2 of the Constitution.

> The family established by marriage is the basic unit of society. Society comprehensively protects all forms of the family. (Art. 2)
> Parenthood is a socially recognized mission for men and women. Society recognizes that a stable family environment created by the child's father and mother is the most appropriate for the comprehensive and harmonious development of the child. (Art. 3)

Article 3 was supplemented in 2016 with a second sentence, according to which society recognizes that a stable family environment created by the child's father and mother is the most appropriate for the comprehensive and harmonious development of the child.

> All family members have a duty to help each other and, in accordance with their abilities and possibilities, ensure the growth of the material and cultural level of the family. Parents have the right to raise their children in accordance with their own religious and philosophical beliefs and the obligation to provide a peaceful and safe environment for the family. Parental rights and responsibilities belong to both parents. (Art. 4)

In all matters that concern them, the best interests of the minor should be considered.

### *3.7. Slovenia*

The measures taken by the state are based on the Constitution of the Republic of Slovenia of 1991 and the new Family Code of the Republic of Slovenia of 2017 as the basic legal act in the field of family law. Slovenia has also ratified the relevant international treaties: Article 8 of the Constitution states that ratified and published international treaties are directly applicable in Slovenia is a party to the following international agreements, the content of which also affects the area of parental care and the content of the new Family Code.

The case law of the ECHR has also contributed to a better understanding of parental custody in Slovenia and has penetrated into Slovenian case law, which is particularly evident in the principle of proportionality derived from the international law binding the Republic of Slovenia.

The principle of proportionality is the basis for establishing the positive obligations of active state action in terms of the balance between the interests of society and those of the individual. The state has a duty to intervene and protect the child's interests.[17]The intervention must always be proportionate; otherwise, the rights of the child and parents may be violated.

17 Art. 9 the UNCRC of 1989.

### *3.8. The European Court of Human Rights*

The ECtHR operates based on an international agreement concluded by individual states in the form of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950. The conclusion of this agreement precedes the jurisprudence of the Tribunal arising from the operation of the Convention; therefore, the jurisprudence of the ECtHR is, by its nature, applied by individual states based on voluntary international acceptance of the *pacta sunt servanda* principle.

It is not easy to establish that, for example, if a solution exists in most European countries, it is already a standard. This is particularly true for sensitive issues such as the national regulation of parental responsibility, which has many components. In fact, this type of assessment comes down to prudence and is generally aimed at protecting the individual in the light of the norms of the Convention.

The jurisprudence of the ECtHR to the legal system of states can be assessed from the perspective of the legal system of a given state (*ad intra*) and from that of the jurisprudence of the Tribunal (*ad extra*). These two perspectives should not be isolated from each other. Both the state and the Court take into account the jurisprudence of the Tribunal and the legal system of the state (including axiology), so that, on the one hand, the jurisprudence of the Tribunal, *de facto* and *de jure*, does not replace or limit the role of state authority without a legal basis, and on the other hand, the state authority protects rights guaranteed by a Convention which they have voluntarily agreed to respect.

As part of the jurisprudence of the ECtHR, the key of a given line of jurisprudence is often to define the scope of the so-called margin of appreciation. Depending on the determination of the scope of this freedom, the judgment of the Tribunal is more or less related to the legal system of a given state, guided by the principle that the less freedom, the greater the intervention of the Tribunal. Simultaneously, it should be noted that the jurisprudence of the ECtHR is not uniform, and individual judgments may or even have to be critically analyzed.

The case law of the Tribunal in the field of parental responsibility is not permanent, uniform, and variable; however, owing to the lack of pan-European standards, the Tribunal leaves a margin of appreciation to individual states in the field of parental responsibility, which leads to the maintenance of the current pluralism of legal solutions in this area. Within this margin, in line with the Tribunal's case law, states have both negative obligations to protect family life against unjustified interference and also positive obligations to protect that life.

# 4. The concept of parent

## *4.1. Croatia*

According to family law, a "parent" is a person from whom a child inherited their origin or a person entered as a parent of a child in the birth book, based on a decision on adoption issued by a competent authority (social welfare office). The Family Act of the Republic of Croatia of 2015 contains provisions concerning the parentage of a child and, pursuant to these provisions, maternity is presumed or established based on a presumption or a court decision.

Pursuant to Art. 58 of the Family Act, "*the mother of a child means the woman who gave birth to the child*." If maternity cannot be established based on presumptions, court proceedings may be conducted to establish maternity when the claim cannot be upheld, but the court must take evidence.

Paternity can be established by presumption, recognition, or a court decision. The presumption applies to children born in a marriage or within 300 days after marriage annulment, divorce, or death, as a declaration of the death of the deceased spouse.[18] If a person contracts another marriage within 300 days from the termination of the marriage due to death, the father of the child is considered the mother's husband from the last marriage.[19]

This presumption does not apply if the previous marriage is terminated by a court order divorce or annulment of the marriage. In this case, the father of the child is considered the mother's husband from the previous marriage, unless the mother's second husband (if the child was born in the mother's second marriage and no more than 300 days have passed since the first marriage) of paternity with the consent of the mother and her first husband.[20]

Recognition of paternity is the least credible from the point of view of the truthfulness of the determination of the child's parentage as the verification of the truthfulness of recognition is entrusted to persons who consent to the recognition of paternity, and these are the mother, child, and/or their guardian, with the prior consent of the social welfare center[21] on the basis of statutory premises.

In the case of establishing paternity, when the sperm of another man has been used, a similar rule applies: if the child's father and the man who is in a marriage or extramarital relationship of the mother have consented to medically assisted procreation with the sperm of another man, and the mother's extramarital partner has

18 Art. 61 of the Family Act.
19 Art. 61 sec. 2 of the Family Act.
20 Art. 61 sec. 3 of the Family Act.
21 Art. 64 of the Family Act.

consented to the recognition of paternity in advance, then the child's father is the mother's marriage or an extramarital partner.[22]

It has always been clear in legal theory that the legal position of parents is determined by parentage or adoption. Only parents can be holders of the parental custody right. The legislator is consistent in stating in the Act on the family: "*Paternal care includes the duties and rights and obligations of parents*".[23]

### *4.2. Czech Republic*

The Civil Code of the Czech Republic of 2012 regulates the determination of a child's parentage and defines who the child's parents are on absolutely binding principles. According to Art. 775 of the Civil Code, the mother of a child is a woman who gives birth to the child. Under Art. 776 of the Civil Code, the child's father is a man whose paternity is based on one of the three legal presumptions of paternity. The law also protects the so-called the alleged parents in Art. 783 and 830 of the Civil Code.

Adoptive parents will become subjects of parental authority in accordance with the doctrine of full adoption or of imitation of an adoptive nature.

### *4.3. Hungary*

In the case of a child born in marriage, parental responsibility and paternity and maternity status are determined by birth—*ipso iure*, by law. With the exception of specific provisions relating to adoption, parental responsibility may not be waived, and parental responsibility over a minor child may be terminated only by a court in the cases provided for by law. If, for any reason, the child does not have a single parent with parental responsibility, immediate action should be taken with the guardianship authority regarding the future fate of the child and, if necessary, taking them into care.

### *4.4. Poland*

Under Art. $61^9$ of the Family and Guardianship Code of 1964 the mother is a woman who gave birth to a child. An action for the determination of maternity may be brought in the event of a birth certificate of a child born of unknown parents or a refusal of motherhood of a woman entered in the child's birth certificate as their mother[24]. However, if a woman who did not give birth to a child is entered in the child's birth certificate as the child's mother, the woman's motherhood may

22 Art. 83 sec. 1 and 2 of the Family Act.
23 Art. 91 sec. 1 of the Family Act.
24 Art.$61^{10}$ §2 of the Family and Guardianship Code.

be denied.[25] The woman who adopted the child is also the mother; upon adoption, a woman who previously enjoyed this status ceases to be a mother (in a formal sense).

The father of the child is identified by the woman who gives birth to the child. Thus, in situations where a woman who is married to a man gives birth to a child, her husband is presumed to be the father.[26] If a child is born to an unmarried woman, paternity is established based on paternity recognition when the child's parents agree as to the father's identity and want the child's legal situation to reflect the biological reality or the basis for the judicial determination of paternity. Recognition of paternity is made when the biological father of the child declares, to the head of the registry office, that he is the child's father, and the child's mother confirms it.[27] The paternity of a conceived but unborn child may be recognized[28]; however, paternity cannot be recognized after the child has reached the age of majority.[29]

After the child's death, the declaration of ineffectiveness of paternity recognition is admissible in the event of the child's death after the initiation of the procedure.[30]

The recognition of paternity of a child born as a result of medically assisted procreation takes place on the day of their birth, when the man declares that he will become the father of a child conceived in this way and born within 2 years of making this declaration.

### *4.5. Serbia*

Definitions of a parent (mother and father) in jurisprudence and doctrine have a legal basis in the Family Act of the Republic of Serbia of 2005 and are consistent with them. In modern Serbian family law, statutory provisions often establish or define motherhood. This is the case in Serbian family law; the Family Act contains a provision explicitly stipulating that the woman who gave birth to the child should be considered their mother in Art. 42. If a woman who gave birth to a child is not entered in the birth register as the child's mother, her motherhood may be determined by a final court judgment.

The general rule governing who is considered to be the father of a child born into marriage is that the father is the husband of the child's mother. Under Serbian law, the husband of the child's mother is considered to be the father if the child was born within 300 days after the end of the marriage, but only if the marriage was dissolved due to the husband's death and if the mother does not remarry during this period. The husband of the new marriage of the child's mother is considered to be the father

25 Art.$61^{12}$ §1 of the Family and Guardianship Code.
26 Art. 62 of the Family and Guardianship Code.
27 Art. 73 of the Family and Guardianship Code.
28 Art. 75 of the Family and Guardianship Code.
29 Art. 75 § 2 of the Family and Guardianship Code.
30 Art. 83 of the Family and Guardianship Code.

of the child born in that marriage, regardless of how short the time may have elapsed between the dissolution of one marriage and the conclusion of the other.[31]

According to Art. 45 sec. 4. if the child was born out of wedlock, paternity must be established by recognition or by court decision. Paternity may be recognized by a person who has reached the age of 16.[32] Paternity can only be recognized if the child is alive at the time of recognition; paternity recognition before childbirth is effective but only if the child is born alive.[33] The confirmation is only effective if the mother and, under certain circumstances, the child consent to the confirmation by the father. Mother and child may give consent if they are 16 years old.[34]

A man claiming to be the child's father may bring an action for paternity within 1 year from the date on which he learned that the child's mother or guardian did not consent to his paternity being recognized and not later than 10 years after the child's birth.[35]

The paternity of a man considered to be the father of the child may not be questioned, except where the child was not conceived as a result of biomedically assisted fertilization. Under Art. 58 if a child has been conceived with the use of biomedical assistance from donated sperm cells, the paternity of the man who donated the sperm cells cannot be established.

### *4.6. Slovakia*

The Family Act of the Slovak Republic of 2005 does not define the concept of a parent or a child; however, the definition of these terms can be derived from the provisions on the determination of parentage. Art. 82 of the Family Act states that the mother of the child is the woman who gave birth to the child, and Art. 84 of the Family Act regulates three rebuttable presumptions of paternity. When defining the concept of a child to fulfill parental rights and obligations, one should seek support in international treaties and the jurisprudence of courts.

### *4.7. Slovenia*

Starting from Art. 112 of the Family Code of the Republic of Slovenia of 2017, the mother of the child is the woman who gave birth to the child, and this is a basic (mandatory) rule that does not allow for autonomy in determining who will be the child's mother.

The presumption of motherhood is distinguished from that of paternity, and it makes no distinction as to whether a child is born within or outside of marriage. The

31 Art. 45 sec. 1–3.
32 Art. 46.
33 Art. 47.
34 Art. 48 sec. 1, Art. 49 sec. 1.
35 Art. 251.

meaning of motherhood is enshrined in the Constitution of the Republic of Slovenia of 1991 because Art. 53 sec. 3 states that the state protects motherhood and creates the necessary conditions for it. Supplement to this constitutional provision on maternity is Art. 55 of the Constitution.

Article 55 of the Constitution states that parents are free to choose whether or not to give birth to their children. The provisions of the Infertility Treatment and Procedures of Medically Assisted Reproduction Act and the Health Measures in Exercising Freedom of Choice in Childbearing Act are significant.

The father of a child born within a marriage is considered the husband of the child's mother.[36] The legal presumption of paternity of a child born within marriage is based on two assumptions: (a) positive presumption—the husband of the child's mother had sexual relations with the wife, the mother of the child, at a critical moment, namely when conception presumably took place; and (b) negative presumption—the wife, mother of the child, did not have sexual relations with another man (i.e., a man who is not married to her) at the critical moment of conception. The novelty is Art. 113, second paragraph of the Family Code.

Under Art. 113 sec. 1 of the Family Code, it should also be pointed out that paternity cannot be recognized as long as there is a legal presumption of paternity.

A priority rule favors a legal presumption; accordingly, the recognition of paternity is subsidiary as it may be granted in the absence of a legal presumption of paternity.

### *4.8. The European Court of Human Rights*

Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ("*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*") It refers to the family model traditional in European legal culture, consisting of a man and a woman and a child or children. This article appeared in the original text of the Convention in 1950; nevertheless, in the current jurisprudence of the Tribunal, the interpretation of the text of the Convention is so dynamic that the above notions—albeit lexically unambiguous—may be understood differently by the Tribunal itself. For example, in some cases, the Tribunal has found that the right to consent to same-sex marriages rests with individual countries that are parties to the Convention. It should be noted that Art. 12 of the Convention does not only apply to citizens; thus, parental responsibility also applies to persons who do not have the citizenship of a given state. The protection of the Convention is therefore broad in this respect.

Traditionally, parents are essential to starting a family. The Convention also indicates in Art. 12 that two people are needed to start a family. It is worth noting that assumption is one thing and family functioning is another. In the latter case, the

36 Art. 113 (1) of the Family Code.

family may, in some cases, only consist of one parent and a child or children; after all, it is not controversial to name a widow with children as a family. The concept of parents in the traditional sense also did not raise any doubts.

In the jurisprudence of the Tribunal, one can find a position according to which states can settle the issue of the so-called foster parenting. Less controversial is the argumentation line of the ECtHR jurisprudence, in which, apart from the classic notion of family, there is a tendency to broadly understand the family as such (e.g., single mother with a child, large families, etc.).

## 5. Concept of a child

### *5.1. Croatia*

Croatian family legislation does not define a "child," but it only states that a person acquires full legal capacity at the age of 18 or through marriage.[37] Under Art. 117 sec. 3 of the Family Act a person who has reached 18 years of age becomes an adult.

The current Criminal Code of the Republic of Croatia of 2013 recognizes a person under the age of 18 as a "child" according to the definition contained in the UNCRC of 1989 but provides for criminal liability only in the case of children over the age of 14. Children under the age of 14 may commit only a part of the criminal offense. The Croatian Criminal Code applies to all juvenile offenders and to serious perpetrators under 21—either the Criminal Code or the Law on Juvenile Courts, namely the juvenile criminal justice system.

### *5.2. Czech Republic*

Unlike the UNCRC of 1989, the Civil Code of the Czech Republic of 2012 (hereinafter, the CC) does not define who a child is; however, the concept of a child can be decoded from the rules on the determination of kinship. The law states that it is a relationship based on blood or adoption, which is constructed as a change of status.[38]. The child is then a descendant in a straight line of the first degree[39]. A minor child should be understood as a child who has not reached the age of 18[40]. A minor child who is completely incapable of legal acts is a child who has not attained the age of

37 Art. 117 sec. 2 of the Family Act of the Republic of Croatia of 2015.
38 Arts. 771 and 794 CC.
39 See Arts 772 and 773 CC.
40 Art. 30 (1) of the Civil Code.

18 and has not achieved full legal capacity pursuant to a court decision[41] or entering into a marriage[42].

### *5.3. Hungary*

According to the Civil Code of the Republic of Hungary of 2013—as in the UNCRC of 1989—persons under the age of 18 are considered to be minors; nevertheless, married minors are considered to be of legal age. In cases provided for by law, the guardianship authority may permit a marriage of a minor with limited legal capacity who has reached 16 years of age. If the marriage was annulled by a court decision owing to incapacity or without the consent of the guardianship authority, if it is required owing to minority, the legal age acquired by the marriage ceases to apply. The dissolution of this marriage does not affect the adulthood acquired through the marriage.

### *5.4. Poland*

The legal meaning of being a child is not limited to being under parental authority. The child is a first-degree relative of their parents. The child's origin is determined by their birth certificate. The court may play an important role in the child's marital status in decisions concerning, for example, the determination (denial) of paternity, adoption (dissolution of adoption), and recognition of paternity as well as in decisions declaring such recognition invalid. When a child reaches the age of majority, parental responsibility over them expires. According to Art. 10 § 1 of the Family and Guardianship Code of 1964 the status of an adult is also acquired by a woman who, after reaching the age of 16, marries with the permission of the guardianship court. Upon reaching the age of 13, the child acquires limited legal capacity, and upon reaching the age of 18, full legal capacity and the status of an adult, which results in the expiry of their parents' parental authority.

The age of 13 marks the beginning of the child's legal liability under the Act of October 26, 1982 on proceedings in juvenile cases for every act that constitutes a criminal offense, and not only for manifestations of crime.

Art. 10 § 2 of the Criminal Code of 1997 states at the age of 15, a minor may not only conclude an employment contract but also be criminally liable for the most serious crimes in adulthood, if this is supported by a negative assessment of their personality based on a psychological opinion.

When a woman turns 16, she may marry in line with Art. 10 §1 of the Family and Guardianship Code. A minor, after reaching the age of 16, may consent to medical treatment on their person (except for the consent of the parents; any disputes are resolved by the guardianship court). After reaching the age of 17, the minor is treated

41 See Art. 37 of the Civil Code.
42 Art. 30 (2) of the Civil Code.

under the criminal law as an adult, bearing full responsibility for the commission of the crime.

### *5.5. Serbia*

Serbian family law does not explicitly define the term "child"; thus, the jurisprudence and doctrine adopt the definition of the UNCRC of 1989.

In Serbian family law, most rights are achieved at the age of 18, which corresponds to the definition above.[43] In turn, most of them obtain full legal capacity. Full legal capacity may also be obtained before the age of 18 (emancipation) in two ways; both paths are related to family relationships and are limited to the age of 16—the first is marriage, the second is parentage.[44]

### *5.6. Slovenia*

Article 1 of the UNCRC of 1989 (hereinafter, CRC) provides that, for the CRC, a child means every human being under the age of 18, unless most of them attend the law that applies to the child. The previous law did not define a child; however, according to Art. 8 of the Constitution, ratified and published international treaties are directly applicable in the Republic of Slovenia.

Despite the direct application of the CRC, the new Family Code of the Republic of Slovenia of 2017 still expressly provides, in Art. 5, that a child is a person who is under 18 years of age.

Pursuant to the Non-Contentious Civil Procedure Act of 2019 (hereinafter, NCCPA-1), the emancipation of a child before the age of 18 may take place only based on a judgment of a court in non-contentious proceedings. The first exception is the marriage of a child over the age of 15. The court will authorize a marriage if the child has reached such physical and mental maturity that they can understand the meaning and consequences of the rights and obligations arising from marriage.[45]

The second exception occurs when a minor becomes a parent, and the court grants them full legal capacity in non-contentious proceedings on the basis of a filed claim (Art. 152 of the Family Code and Art. 71-75 of Non-Contentious Civil Procedure Act of 2019). Proceedings for full legal capacity may be initiated at the request of a child who has become a parent or with the consent of the child, upon a request submitted by a social welfare center (Art. 71 NCCPA-1).

43 Art. 11 of the Family Act of the Republic of Serbia of 2005.
44 Art. 11(2),(3).
45 Art. 24 of the Family Code in conjunction with Art. 152 of the Family Code

### *5.7. The European Court of Human Rights*

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 does not define a child, but definitions can be found elsewhere in international law. Adopting the concept of a child as a person who has not yet reached the age of majority means that the parental responsibility itself lasts, as a rule, until the child reaches the age of majority.

In the jurisprudence of the Strasbourg Court and the legal doctrine, it is emphasized that the concept of a child is defined in accordance with Art. 1 of the UNCRC of 1989: "*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*"

An analysis of international law, of which the Convention is an element, and the Tribunal's case law itself leads to the conclusion that the protection of the best interests of the child is of fundamental nature; this is owing to the basic nature of the child. Children have fewer opportunities to defend their rights or perform their duties than their parents. This does not mean, however, that the protection of the child's best interests takes precedence *ex lege* over the parents.

## 6. Principles of parental authority

### *6.1. Croatia*

The rules on parental care are set out in the introductory part of the Family Act of the Republic of Croatia of 2015 and include the principles of equality, solidarity as the fundamental right of family life, mutual respect and assistance of all family members, primary protection of the welfare and rights of the child, primary parental right to care for the child and the obligation to provide them with assistance by the competent authorities, proportionate and minimal interference in their family life,[46] voluntary dissolution of family relationships,[47] and the urgent resolution of family law cases involving children.[48]

The legislator's goal was to balance all these principles so that they correspond to the contemporary system of family relations. Some of them are used in the family (the principle of equality, the principle of solidarity, the principle of mutual respect and assistance, the principle of voluntary dissolution of family relations). Some others concern the relationship between individual family members and the parties—in

46 Art. 7.
47 Art. 9.
48 Art. 10.

particular, state authorities (the principle of superior parental right to care for the child and the positive obligation of state authorities to provide them with assistance, the principle of proportional interference in family life, and the principle of urgent settlement of family proceedings).

### *6.2. Czech Republic*

The concept of parental authority in the Civil Code of the Czech Republic of 2012 is based on the principles of parental responsibility—not only in terms of terminology but, above all, as a broadly understood set of "rights and obligations" aimed at "promoting and protecting the child's welfare"—in particular, care, protection and child upbringing, maintaining personal relationships, determination of the place of residence, property management, and legal representation.

The Civil Code defines the most important issues in which the consent of both the child's parents is required. The list of important matters of the child is illustrative and includes, in particular, non-routine medical and similar interventions, the determination of the child's place of residence, and the choice of education and employment by the child.[49] It should be added that the obligation and the right to decide in these matters "extends" the content of parental authority.

### *6.3. Hungary*

Hungary's 2013 Book of Family Law of the Civil Code sets out the principles governing the exercise of parental responsibility that are important to the parent–child relationship, in line with the minor's best interests. The obligation of parents to cooperate is an essential requirement, which means that parental responsibility is exercised by the parents in cooperation with each other in the interests of the child's physical, intellectual, and moral development, regardless of whether the parents live together or separately. Where parental responsibility over a minor is exercised jointly by the parents together or separately, it is accompanied by a shared decision-making right. However, the obligation to cooperate does not always and in all respects constitute the right to consent or joint decision if, after the parents' separation, only one of the parents exercises parental responsibility over the joint minor child (children). In this case, the separated parent has the right to jointly decide only on important matters relating to the child's best interests; otherwise, the parent raising the child is only required to inform the separated parent about the child's development, health, and education. It should be emphasized that in addition to the general obligation of parents to cooperate, the Book of Family Law emphasizes the obligation of the parent who exercises parental authority and the separated parent to cooperate to ensure respect for each other's family life and peace.

49 Art. 877 (2) of the Civil Code.

Neither parent has greater "authority" over the matters relating to the child than the other, who also has parental custody.

Limiting parental supervision to protect the child (children) should only be undertaken in exceptional cases and should always be proportionate to the seriousness of the threat or harm. Therefore, the Act provides that the court or other competent authority may limit or withdraw the parental right to custody in exceptional and justified cases specified in the Act if it deems it necessary to protect the child's best interests. Ultimately, the Civil Code allows the court to cease parental responsibility if the parent has adopted any unlawful behavior causing serious injury or threatening the child's interests—including the their bodily integrity, mental, or moral development—or if the parent has been sentenced by a court judgment to imprisonment for an intentional offense committed against any of their children.

### *6.4. Poland*

The primacy of parents in raising a child results from the Constitution of the Republic of Poland of 1997 and acts of international law, the most important of which is the UNCRC of 1989, with its preamble affirming the family.

When it comes to norms, the rank of parents and their paramount importance for the child's development has been expressed in several of the abovementioned constitutional provisions, with the best interests of the child being a key principle of family law.

The Family and Guardianship Code of 1964 provides that the parents jointly adjudicate on important matters relating to the child,[50] and in the event of a dispute, a court may be called upon to resolve such a matter.

The principles important from the point of view of the subject matter also include a child's principle of subsidiarity and judicial protection in relation to its parents and guardians, which is manifested, *inter alia*, in in the prerogative of courts to adjudicate in cases of limitation and termination of parental rights[51] and the obligation to focus on the child in divorce and separation cases, so that no decision is contrary to the best interests of the child.[52] Moreover, the child's best interests were the criterion for decisions on parental responsibility, contact, and maintenance.

### *6.5. Serbia*

The Family Act of the Republic of Serbia of 2005 establishes rules concerning the family, adopting constitutional rules but also pointing to other rules. One of the most important principles is that of the best interests of the child.[53] However,

50 Art. 97 §2.
51 48 (2) of the Constitution.
52 Art. 56 § 2 of the Family and Guardianship Code.
53 Art. 6 (1).

statutory texts—including the 2005 Family Act—do not contain a definition of this principle (legal norm), according to which the content is subject to interpretation in the jurisprudence.

Another principle is that of the special protection of the family, which has the right to special protection by the state.[54] It is also the duty of the state to protect the child from neglect and from physical, sexual, and emotional abuse and all forms of exploitation[55] and to ensure the principle of equating illegitimate children with children born into marriage.[56] As explained earlier, children out of wedlock have the same rights and obligations as children born within marriage under modern Serbian family law. Under Art. 6 (6) the state is obliged to ensure the protection of children deprived of parental care in the family environment whenever possible. The principle of identifying adoption with origin is sanctioned in Art. 7 sec. 4; the Family Act fully equalizes the rights and obligations of children, regardless of adoption, providing for only one form of adoption, as opposed to the earlier Act on Marriage and Family Relationships of 1980, which recognized two forms of adoption—full and partial.

The Serbian Family Act contains a provision on respect for family life in Art. 2 (2) "Everyone has the right to respect for his family life"

Pursuant to Art. 67 of the Family Act, parental rights are derived from the obligations of parents and exist only to the extent necessary to protect the child's personality, rights, and interests.

### *6.6. Slovakia*

The principle of the child's best interests is the guiding principle of all family law, and some authors even consider it to be the very basis of such law. This is based not only on domestic law but also on sources of international law—in particular, the UNCRC of 1989.

### *6.7. Slovenia*

The Civil Code defines parental care in Art. 6, which is further elaborated on in subsequent regulations; therefore, parental care constitutes all the obligations and rights of parents to create, according to their abilities, the conditions to ensure the child's full development. Parental care belongs to both parents, and this definition is derived from a constitutional provision that grants parents the right to support, educate, and raise their children.[57]

The principle of the best interests of the child is a fundamental principle of children's rights: it orders that parents, in all their activities relating to a child, take care

54 Art. 2.
55 Art. 6 (2) and (3).
56 Art. 6 (4).
57 Art. 54, p. 1, point 1 of the Constitution of the Republic of Slovenia of 1991.

of the child's welfare and raise them with respect for their person, individuality, and dignity.[58]

The principle of the primacy of parental care entitles parents to take precedence over all others in their care and responsibility for the best interests of the child,[59] while Art. 135 of the Family Code shows that parents have primary and equal responsibility for the child's care, upbringing, and development.

The principle of parental equality gives parents primary and equal responsibility for the care, education, and development of their child, whose best interests must be their most important concern. The parents have equal civil rights and bear the consequences for their children, both during and after marriage.

The principle of joint parenting/guardianship is the starting point for implementing parental care under the new Family Code. Parental care is shared by both parents. Art. 6 (2) of the Family Code, reflecting the principle of equality of parents, and in line with the principle of equality, parents agree to perform the duties and rights that constitute their parental care.

### *6.8. The European Court of Human Rights*

Different rules of parental responsibility in Europe should protect the pluralism of legal solutions. A position in the case law of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 provides that, since social changes occur in different countries, this could lead to the setting of European standards for parental responsibility. However, in the same case law, the family in its traditional sense is repeatedly challenged; nevertheless, there is no Europe-wide standard for the exclusive determination of parental responsibility.

## 7. Rights and obligations of parents and children resulting from parental authority

### *7.1. Croatia*

In the Croatian family law, the right and obligation to protect a child's personal rights to health, development, care and protection, upbringing, and education, establishing personal relationships and determining the place of residence, are included in the content of parental care. The same applies to the right and obligation to manage

58 Art. 7 (1) of the Family Code of the Republic of Slovenia of 2017.
59 Art. 7 (2) of the Family Code.

the child's property and the right and obligation to represent the child's personal and property rights and interests.[60]

According to Art. 86 of the Family Act when exercising parental care, parents must consider the rights of the child. In contemporary legislation, the parents' obligation to respect the child's opinion according to their age and maturity is particularly important. The child's obligations are guided by the general principle of solidarity, according to Art. 4 (1) of the Family Act "*all family members must … respect each other and help each other*". Pursuant to Art. 89, "*the child must respect his parents and help them perform tasks in the family according to his age and maturity and pay attention to all family members*."

In relation to employed and earning children, they must pay for their own maintenance and education.[61] The most recent family law did not explicitly include alimony in the content of parental care (we consider this to be an unintentional omission by the legislator), although the family law tradition has always interpreted it as part of parental care.

### *7.2. Czech Republic*

The consent and cooperation of both parents are key words of the Civil Code of the Czech Republic of 2012—whether they live together or are *de facto* separated or divorced. When it comes to making decisions, special rules apply for everyday matters, important matters, and urgent decisions about the child. If the parents are unable to reach an agreement on important matters relating to the child (e.g., in matters relating to the child's residence, representation, property matters, education, health care, personal care [custody] and alimony, and contact with the child)—in particular, in the case of actual separation—the court decides. Thanks to the UNCRC of 1989, a child is not treated as a subject of decision-making but as an active person: their autonomy, the right to participate, and the right to self-representation in court proceedings concerning them are respected. The law confirms that parents play a key role in the care, protection, and upbringing of a child and that they should be versatile role models for their children, especially with regard to family lifestyle and behavior.[62]

Under Art 31 of the Civil Code Parents jointly represent their minor child in those legal actions to which the child is not entitled, but each of them may act independently.[63]

According to the Charter, the Civil Code states that parents have the right to decide on the child's education or career path in the exercise of parental responsibility.

60 Art. 92 of the Family Act of the Republic of Croatia of 2015.
61 Art. 90 of the Family Act.
62 Art. 884 of the Civil Code.
63 Art 892 (2) and (3) of the Civil Code.

The right of the child to freedom of religion or to not follow a religion is guaranteed in relation to human rights standards.[64] Parents may regulate the exercise of the child's rights in a manner appropriate to the development of their children's abilities in accordance with the Freedom of Religion Act of 2002, Art. 2 (2).

Other provisions indicate that parents have the obligation and the right to represent the child in legal actions for which the child has no legal capacity (§ 31, § 892 to 895 of the Civil Code); accordingly, a parent cannot represent a child if a conflict of interest may arise between them and the child or between the children of the same parents.

Pursuant to the Civil Code, the protection and management of a child's property belongs to parental authority. With regard to this matter, the law contains many general and specific provisions (§ 896 to 905 of the Civil Code) that should always be interpreted and applied in accordance with the principle of the best interests of the child and their welfare.

### *7.3. Hungary*

The Hungarian legislator indicated the following rights and obligations resulting from parental authority: choosing a minor's name; taking care of a minor; determining a child's place of residence; and managing a child's financial affairs, including the right and obligation to represent the child in legal forums and the right to exclude custody and other forms of social care.

In the family, the mother and father have the same rights and obligations resulting from parental responsibility, except for those specified in a separate act. A parent is obliged and entitled also to care for a minor child in the family, to raise them responsibly, and to provide them with the conditions necessary for physical, mental, and moral development and access to education and healthcare.

### *7.4. Poland*

According to Art. 87 of the Family and Guardianship Code of 1964 parents and children have a duty to respect and support each other. Decisions should, as far as possible, consider the child's justified wishes.[65] However, in cases where the child can independently make decisions and declarations of will, they should listen to the opinions and recommendations of parents formulated for the good of the child.[66] Parental authority may be exercised only through behavior aimed at protecting the child's best interests.[67] Behavior should be characterized by care for the child's dignity and rights,[68] and therefore, it should be an expression of concern for the

64 Art. 15 of the Charter.

65 Art. 95 § 4 of the Family and Guardianship Code; compare Art. 72 of the Constitution of the Republic of Poland of 1997 and Art. 12 of the UNCRC of 1989.

66 Art. 95 § 2 of the Family and Guardianship Code.

67 Art. 95 § 3 of the Family and Guardianship Code.

68 Art. 95 § 1 of the Family and Guardianship Code.

child's physical and spiritual development. Its ultimate goal is to properly prepare the child for adulthood.[69] A dependent child who lives with their parents also has a duty to help them in their household.[70]

The provisions of the Family and Guardianship Code regulate several issues related to the rights and obligations arising from parental authority.

### *7.5. Serbia*

The content of parental rights covers the rights and obligations of the parent caring for the child and includes the child's protection, upbringing, upbringing, representation, and maintenance as well as the management and disposal of their property.[71] The Family Act of the Republic of Serbia of 2005 expressly states that parents have the right to receive all information about their child from educational and healthcare institutions[72].

The Family Act directly restricts parental autonomy in the area of raising a child, forbidding parents from leaving a preschool child unattended[73] and forbidding parents from entrusting a child—even temporarily—to a person who does not meet the requirements to be a guardian.[74] Parental autonomy in the field of child upbringing is limited by the provision prohibiting degrading actions and punishments that offend the child's human dignity, and parents are obliged to protect the child against such actions of other people.[75]

The legal status of a child is regulated in accordance with international documents and modern standards. The Family Act regulates the child's following rights: the right of the child to know who their parents are, to live with them, and to maintain personal relations with them and other persons; the right to a proper and full development; and the right to education, opinion, and duties. The main responsibility of the child is to help parents according to their age and maturity. In addition, a child earning or receiving an income from assets is obliged to partially support themselves as well as the parent and the minor brother or sister.[76]

### *7.6. Slovakia*

In accordance with the Family Act of the Slovak Republic of 2005 and the relevant jurisprudence, parental responsibility is a relatively complex set of rights and obligations that include, in particular, the constant and consistent care for the upbringing,

69 Art. 95 § 2 of the Family and Guardianship Code.
70 Art. 91 of the Family and Guardianship Code.
71 Arts. 67–74.
72 Art. 68 (3).
73 Art. 69 (3).
74 Art. 69 (4).
75 Art. 69 (2).
76 Arts. 59–66.

maintenance, and comprehensive development of a minor child; the representation of a minor child; and management of a minor's property.

The specificity is that, while caring for a small child is related to the parent's full legal capacity, the maintenance obligation continues even when the parent does not have full legal capacity.

Likewise, the limitation, deprivation, and suspension of parental rights and obligations does not release the parent from the obligation to maintain the child.

Parental rights and obligations with regard to the child's care and upbringing, the representation of the child, and the management of the child's property expire *ex lege* when the child reaches the age of majority.

The content of parental rights and obligations includes, *inter alia*, constant and consistent care for the upbringing, maintenance, and comprehensive development of a minor child.

### *7.7. Slovenia*

Under Art. 6 the Family Code of the Republic of Slovenia of 2017 both parents share responsibility for parental care. Parents have the right and duty to look after and educate their children. Children's rights correlate with the responsibilities of parents. Art. 136 sec. 1 of the Family Code stipulates that parental care includes the following obligations and rights of parents: taking care of the child's life and health, upbringing, protection, and care; child supervision; care for the child's education; representation for and maintenance of the child; and management of the child's property. Parents have autonomy in the exercise of parental care, but the best interests of the child limit this. Accordingly, state authorities, public service providers, public authorities, local authorities, and other natural and legal persons have a duty to promote the best interests of the child in all activities and proceedings relating to them.

### *7.8. The European Court of Human Rights*

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 does not contain an extensive catalog of the rights and obligations of parents or children; therefore, it is important to analyze the jurisprudence of the ECtHR as an entity interpreting the norms of the Convention—for example, the right to found a family. In the case law of the Tribunal, there is also a reference to the so-called basic elements of family life, one of which is the mutual relationship between parents and children.

Parental responsibility extends throughout the child's life; an example is the Tribunal's judgments on the parents' decisions to provide medical assistance to a child.

## 8. Sexual education of children and parental responsibility

### *8.1. Croatia*

In 2012, the Ministry of Education tried to introduce a new content into the school curriculum, namely health education—not as a separate subject but as teaching content to be taught in different school subjects.

The protection of children against sexually explicit content is provided for in the Electronic Media Act of 2021 and in the Ordinance on the Protection of Minors in Electronic Media of 2015. The Electronic Media Act contains a general rule in Art. 5 (1) by which "*it is prohibited to physically, mentally or morally harm minors by means of audio-visual commercial communications*"; however, it provides no explanation as to what this actually means. The regulation only clarifies that "*programs that may harm the physical, mental or moral development of a minor are all kinds of programs containing scenes of … sex and sexual abuse*" unless "*in an appropriate manner*" and "*through reasoned content, they illustrate or analyse topics in the programs educational, documentary, scientific and informative*."

### *8.2. Slovenia*

Experts point out that in Slovenia, sexuality education in primary education is not properly regulated, and no laws govern who can provide formal or informal sex education in educational settings. In practice, this is mainly done by biology teachers in the field of biology. Some schools employ external providers—most often nurses or other professionals (such as the VIRUS Society). As these sex education programs are voluntary, few schools are involved in them as they are not systematically regulated.

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## 9. Detailed issues related to parental authority

### *9.1. Croatia*

Pursuant to Art. 86 (1) and (2) of the Family Act of the Republic of Croatia of 2015, parents and other persons caring for children must respect their opinion depending on their age and maturity. This provision has the significance of a recommendation in everyday family and community life, although this significance is strong and imperative. The right of the child to get to know the most important circumstances of the case, receive advice, express its opinion, and be informed about the possible consequences of respecting their opinion in proceedings where it is

decided on their rights or interests is stipulated in the Act with more details, even at the level of principle. Indeed, in the event of a conflict of interest between the child and their parents, the child will not be represented in the proceedings by the parent(s) but by a special guardian.

The child can and is required by law to make statements on particular status issues for themselves.

In accordance with family law, a child over the age of 16, who, in the opinion of a doctor, has sufficient information to be able to form their own opinion on a specific case and who is mature enough to make a decision on preventive, diagnostic, or therapeutic treatment in health or therapy may independently express consent to a medical examination, examination, or intervention (informed consent in Art. 88 [1]). The Family Act does not decide whether termination of pregnancy is a medical intervention involving serious risks, but in practice, medical regulations do, according to which a minor over 16 years of age may voluntarily consent to the termination of pregnancy. If she is under the age of 16, the consent of her parents or guardian will be required.[77] The legislator distinguishes the management of the child's income or property.

### *9.2. Czech Republic*

In accordance with Art. 38 (4) of the Act on Health Services of the Czech Republic of 2011, "*a minor patient … may be in emergency care without consent*" in the event of "*emergency or emergency childcare*" or "*health services necessary to save life or prevent serious damage to health*". The right of a minor patient to the continuous presence of their parent during healthcare or hospitalization is also expressly guaranteed.[78]

Abortion is relatively liberally regulated in the Abortion Act of 1986, and the decisive age limit is 16 years.

According to the School Code, a child may attend two primary schools, which can be accessed with an alternating parental care system; however, the question arises as to whether it is always in the best interests of the child to visit two schools—for example at weekly intervals. Accordingly, a parent cannot represent a child if a conflict of interest may arise between them and the child or between the children of the same parents.

It should be emphasized that, in 2021, the Civil Code of the Czech Republic underwent a significant change aimed at protecting "children of debtors" and "correcting bad practices."

If a parent has committed an intentional criminal offense against their child not only directly but also indirectly, or if the parent has used their child who is not criminally responsible for the crime, or if the parent has committed the crime as an

77 Art. 18 (2) of the Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth of 2017.

78 See Art. 28 (e).

associate, guide, assistant or organizer of the crime committed by their child, the court assesses whether there are grounds for depriving a parent of their parental responsibility.[79]

### *9.3. Hungary*

Hungary's 2013 Book of Family Law of the Civil Code sets out—in the absence of joint parental supervision—the rights and obligations of a parent living in separation from a child in a separate section. In this context, the parent decides together with the parent caring for the child about important issues concerning the child's fate, which is also the responsibility of the parent (defining and changing the child's name, the place of residence outside the parent's place of residence, the child's stay abroad, the change of a child's citizenship, and the child's school and career).

Pursuant to the provisions of the applicable act on health protection, a parent (statutory representative) has a much narrower decision on the treatment of a minor than on their own. The exercise of the right to consent is limited to two areas.

The Primary Health Care Act of 2015—albeit to an extremely limited extent—provides a broader right to self-determination for people over 16 years of age. An important rule, however, is that this law does not apply to abortion because Art. 8 of the Act LXXIX of 1992 on the protection of fetal life states that a declaration of a legal representative of a person with limited legal competence is required to recognize an abortion application for the validity of a declaration of a person with limited legal capacity, and the application for termination of pregnancy in a legally incapacitated person is filed in her legal representative.

The Book of Family Law also guarantees that the alleged father, who has been raising the child as his own in the family for a long time, may be entitled to contact the child in justified cases. If the intimate relationship between a child and the man he loves as a father is broken overnight, it can seriously harm the child's mental development and emotional security.

From 2020, in the event of a breach of a visitation order, the district court may be ordered to execute a visitation order.

### *9.4. Poland*

Parental authority may be limited if the child's best interests are at stake. The measures of limiting parental responsibility are listed in Art. 109 §2, 3 and 4 of the Family and Guardianship Code of 1964; however, this is not an exhaustive catalog. It begins with the mildest persuasive measures—such as, for example, obliging the parents and the minor to work with a family assistant or sending the child to a nursery—and includes the most severe limitation of parental authority, namely placing the minor in foster care (foster family, family home, or care and education center).

79 Section 871 (2) Civil Code.

The corrective mechanism adopted in Art. 109 of the Family and Guardianship Code can be seen as a kind of preventive measure to avoid abuse and neglect that may lead to the cessation of parental responsibility. According to Art. 572 of the Code of Civil Procedure of 1964 anyone who knows about the event justifying the initiation of proceedings is obliged to notify the guardianship court. The court may decide to suspend parental responsibility in case of a short-term obstacle to its exercise, in line with Art. 110 of the Family and Guardianship Code.

### *9.5. Serbia*

If the property was acquired by employing a child, the child has the right to manage and dispose of it independently if they are over 15 years of age.[80] If the property was acquired, for example, by a gift or inheritance, then the parents have the right to manage and dispose of it. Under Art. 72/3 of the Family Act parents have the right to take legal action to manage and dispose of the income earned by a child under the age of 15 from participation in theatrical performances, films, the media, and so on. As a child under the age of 15 cannot enter into an employment relationship as such cases are governed by the relevant contracts.

Parents have the right and duty to develop relationships with their children based on love, trust, and mutual respect and to guide the child to accept and respect the emotional, ethical, and national identity of their family and society.[81]

According to Art. 71 of Serbia's Constitution provides for compulsory primary education. The 2005 Family Act of Serbia provides that a child has the right to education in accordance with their abilities, wishes, and inclinations. Under Art. 71 of the Family Act the child has the right to decide about their education, and parents have the right to educate their child in accordance with their religious and ethical convictions.

In line with Art. 62/2 of the Family Act a 15-year-old child who can reason may consent to any medical intervention. Pursuant to the Act on Termination of Pregnancy in a Healthcare Institution of 1995, a pregnant woman over 16 years of age has the right to apply for termination of pregnancy on her own. Moreover, a child of 15 years of age who is able to reason has the right to the confidentiality of the data contained in their medical records[82].

### *9.6. Slovakia*

The Civil Code of the Slovak Republic of 1964 regulates only direct representation. Indirect representation is possible (e.g., a contract for the sale of goods in the context of Art. 733 of the Civil Code). In particular, a minor child's legal representative is

80 Art. 192/1, Art. 193/1, Art. 64/3 of the Family Act of the Republic of Serbia of 2005.
81 Art. 70 of the Constitution of the Republic of Serbia of 2006.
82 Art. 24/1.

their parents who have full legal capacity and who have not been deprived of parental rights and obligations or have been suspended from exercising parental rights and obligations. The obligation to represent a minor child applies only to those legal acts that a minor child cannot perform independently.

When a minor child reaches a certain age, they may act on their own behalf, especially in purely personal matters or in employment law (e.g., submitting an application for marriage by a minor over 16 years of age, drawing up a will in the form of a notarial deed by a minor over 15 years of age, and acquiring rights and incurring obligations in employment relationships through own legal acts, an ability acquired on the day that a natural person turns 15).

The parents' obligation and right is to manage the property of a minor child only to the extent that the minor child is not capable of acquiring rights and incurring obligations through their own legal acts, depending on their mental and volitional maturity to their age. Article 9 of the Civil Code states that "*minors have the capacity only to perform legal acts which by their nature are appropriate to maturity of mind and will be appropriate for their age*." The maintenance obligation of parents toward a minor child does not expire, even if the minor's property brings income (e.g., in the form of dividends, interest, or rent).

### *9.7. Slovenia*

The provisions of Slovenian law contain several legal solutions concerning the broadly understood exercise of parental authority. As an example, some legal solutions concern the following issues: the parents are the legal representatives of their children;[83] marriage registration;[84] the obligation to enroll the child in school; consent to medical intervention; free decision to conceive a child; and the right to protect their privacy and personal rights. Consent of the person exercising parental responsibility should not be necessary in the context of preventive or advisory services offered directly to the child (paragraph 8 of the Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

Regarding offering information society services directly to a child, the processing of a child's personal data is lawful when the child is 16 or older. If the child is under the age of 16, such processing is only lawful if and to the extent that the person with parental care has consented to it.

### *9.8. The European Court of Human Rights*

In the subjective aspect of parental responsibility, public institutions should be mentioned, which in some cases may intervene and thus be, indirectly, the subject of

83 Art. 145 of the Family Code of the Republic of Slovenia of 2017.
84 Art. 30 (1) of the Family Code.

these relations. The essence of the intervention may be, for example, the withdrawal of parental authority in the event of a threat to the child's life. However, arbitrary or disproportionate interventions may be the basis for finding a violation of the Convention by the Tribunal.

Many of the rulings of the ECHR concern the protection of family ties and of children from deportation (even children who have committed a crime).

It can be noted that in the jurisprudence of the Tribunal, in relation to some Western European countries, a position regarding the interpretation of legal provisions is concerned with parental responsibility and the right to custody, irrespective of the parents' sexual orientation and the interests of the child.

## 10. Parental authority in the event of divorce

### *10.1. Croatia*

The first and fundamental principle in all proceedings, as well as in divorce proceedings, is that of the protection of the child's best interests. Accordingly, the competent authorities are obliged to take legal action and make decisions, always suggesting and considering the protection of such best interests. The second important principle is the principle of the amicable resolution of family matters, while the third principle relates to the proportionate and weakest interference in family life.

To implement the above principles, prior to divorce, counseling is compulsory for parents[85] who have minor children together. A custody agreement or decision always includes a contact arrangement.

Both the parents' shared parental care plan and the court's decision may be changed owing to the application of the *rebus sic stantibus* clause of Art. 107 para. 2 and others. It is enough to know that there has been a significant change. Any parent or child can apply to the court for a new parental custody ruling or agree on a new shared parental custody plan, which must be approved by the court in a non-contentious procedure to become enforceable.

### *10.2. Czech Republic*

According to the Book of Family Law, divorce does not abolish shared parental authority and responsibility for the child's fate. If the child's parents are *de facto* separated, or their marriage is about to dissolve, the court will determine how each parent will care for the child and support them in the future, taking into account the

85 Art. 7 of the Family Act of the Republic of Croatia of 2015.

child's best interests.[86] The law prefers parental consent, which must be approved by the court, especially in the event of divorce. The criteria for putting a child in personal care (custody) are defined in the Act in a very general manner.[87]

In the case of alternating (serial) personal childcare (custody), both the mother and father look after their child at intervals that may or may not be the same length. The Act clearly states in Art. 907 (1) that "if a child is to be entrusted to joint care, the parents must agree to it".

### *10.3. Hungary*

Parents should establish, for their child, such a system and lifestyle as they consider appropriate with regard to the care provided, be it with express consent or by presumption. However, the law sets two important limits to the parental agreement: on the one hand, if the parents separate, they exercise joint parental supervision to ensure that the child's life is balanced; on the other hand, in matters requiring immediate attention, in the case of joint custody, the parent has the right to decide for themselves in the best interests of the child, which must be immediately communicated to the other parent. In addition to the joint exercise of parental responsibility, the agreement between separate parents may have several contents.

In a case for parental responsibility, the parents' agreement on joint parental responsibility or on its division may be approved by the court by taking into account the best interests of the child, but it may also be resolved by a judgment of a joint application of one of the parties or parties. From January 1, 2022, in the event of a disagreement between parents living separately and at the request of one of the parents, the court may decide to award joint parental responsibility if it considers it to be in the minor's best interests.

Hungary's 2013 Book of Family Law of the Civil Code provides that parents may initiate mediation to settle their relationship before or during the resolution proceedings and the settlement of disputes related to divorce by mutual consent.

### *10.4. Poland*

In the divorce judgment, the court is obliged to adjudicate on parental authority over the minor child of the parties involved, on the child's contacts with the parent who will live away from the child after the divorce, and on how the parents will support the child.[88] To create the best possible situation for the child despite their parents' divorce, institutions of mediation and parental agreement were created. Their task is to deal with matters related to the situation after divorce. When adjudicating a divorce, the court is obliged to consider what the parties have jointly agreed

86 Arts. 906 et seq. of the Civil Code of the Czech Republic of 2012.
87 Art. 907 of the Civil Code.
88 Art. 58 § 1 of the Family and Guardianship Code of 1964.

in the form of a written agreement between the spouses regarding the exercise of parental responsibility, as well as contact with the child after divorce and alimony if such arrangements are in accordance with the best interests of the child.

The law is evolving toward strengthening the tendency to grant foster care, providing it directly in the provisions of the Code of Civil Procedure of 1964. In addition to deciding on foster care, a formula often used is to grant both parents full parental authority but to entrust direct care to one of the parents. The latter is obliged to inform the other about important matters concerning the child (upbringing, education, health) in which parents should be jointly involved.

All matters relating to the child to be decided in the divorce decree may be modified according to the criterion that everything should be done in the child's best interests.

### *10.5. Serbia*

Parents may continue to exercise parental rights jointly even after divorce, provided that they conclude an agreement on the joint exercise of parental rights and if the court decides that this agreement is in the child's best interests.[89]

In Serbian family law, a special solution is concerned with the parents' right to jointly and unanimously decide on matters that significantly affect the child's life if the parents do not live together (child education, greater medical interventions on the child, change of the child's place of residence, and disposal of the child's property of significant value)—(Art. 78 sec. 4 of the Family Act).

The Serbian Family Act states that a child has the right to maintain a personal relationship with the parent with whom they do not live; thus, the child is expressly entitled to this right. A child who has reached the age of 15 and can reason has the right to decide whether to maintain a personal relationship with the parent with whom they do not live.[90]

It should be noted that preventing the enforcement of the decision to maintain a minor's personal relationship with a parent is an offense under Art. 191 (2) of the Criminal Code of the Republic of Serbia of 2005.

### *10.6. Slovakia*

The divorce or separation of the parents of a minor child affects the lives of all those involved and necessarily entails a new arrangement of family relationships.[91]

Regarding the issue of exercising parental rights and obligations of parents after divorce (similarly applies to parents of a minor child who do not live together), we consider it important to point out the ruling of the Constitutional Court of the Slovak

89 Art. 75–76 of the Family Act of the Republic of Serbia of 2005.
90 Art. 61.
91 Sections 24 and 36 of the Family Act.

Republic, Case No. PL ÚS 26/05, which did not grant the petition of the Brezno District Court to declare the incompatibility of Sections 24 and 25 of the Family Act with Article 41 of the Constitution of the Slovak Republic. The applicant's main argument for the alleged incompatibility is the fact that the court, in the decision dissolving the marriage, determines who will represent the child and administer their property after the divorce without deciding on the suspension, limitation, or deprivation of parental rights, thereby effectively depriving one of the parents of their parental rights, which belong to both parents. The petitioner believed such legislation deprives one of the parents of these parental rights without fulfilling the conditions established by the Family Act; however, in the opinion of the Constitutional Court, the legislator did not intend to restrict parental rights, although the way it is worded indicates the possibility of interpreting the application of this provision as a restriction of the parental rights of one of the parents, which must actually occur after the parents' divorce.

The national legislation regulates the criteria to be considered by the courts when deciding on the exercise of parental responsibility in a relatively strict manner; these are, however, developed by constructive case law. The reference to the case law of the Czech courts is justified by the common legal culture and the proximity of the legislation, which is based on historical reciprocity.

### *10.7. Slovenia*

If the court finds that the agreement is not in the children's best interests, it will not be bound by the claims made in the divorce petition and may even rule without making a claim. It can therefore order *ultra et extra petitum*, which it cannot do in the event of divorce by mutual consent.

Pursuant to the Residence Registration Act, one of the parents may declare the child's habitual residence with the consent of the other parent. However, the consent of the other parent is not required when declaring the child's permanent residence, if the child's place of permanent residence is determined by the agreement on guardianship, upbringing, and maintenance of joint children or by a decision of the competent court.[92]

If the parents do not live together and the child does not live in the care of both parents, the parent with whom the child lives in care decides on matters concerning the child's everyday life. In contrast, both parents decide on matters critical to the child's development by mutual consent and in the best interests of the child (e.g., decisions regarding the child's education, profession, serious medical interventions, religious education, vacations outside the country, origin, change in surname, disposal of property of significant value, and action for contesting paternity—Art. 151 (4) of the Family Code of the Republic of Slovenia of 2017). These matters require the consent and common regulation of both parents.

92 Art. 5(5)(5) of the Residence Registration Act.

Parents are free to reach an agreement by using the help of a social welfare center or mediators. If the parents still disagree on an issue that significantly affects their child's life, they can go to a court that will have the child's best interests in mind.

According to Art. 141 of the Family Code the child has the right to contact both parents, and both parents have the right to contact the child, whose best interests are ensured through contact. The right of access includes the right to visit the child, the right to participate in the child's upbringing, the right to take the child on vacation, and so on. The parent entrusted with the care and upbringing of the child, or another person with whom the child has been placed, must refrain from anything that obstructs or prevents contact.

## 11. The status of a child not subject to parental authority

### *11.1. Croatia*

From 2014, Croatian family law introduced the concept of "dormant parental care," according to which parents temporarily—but not permanently—lose parental care rights, although this situation can be extended until the child reaches the age of majority.

Under Art. 114 of the Family Act of the Republic of Croatia of 2015 Art. 114 of the Family Act of the Republic of Croatia of 2015 dormant parental care caused by existing legal obstacles takes place when the child's parent is a minor (minor) or a person deprived of legal capacity and incapable of parental care.

There is another group of reasons for dormant parental care, when the parent is absent or their temporary stay is unknown or, for objective reasons, they cannot provide parental care for a long time.[93] The court must make a ruling in uncontested proceedings, and the parent cannot exercise parental custody until the court has established that the circumstances (for which dormant parental custody has been awarded) have ceased (regardless of whether the parent has returned in the meantime and wants to take over direct parental custody of the child).

Custody may be interrupted if the parents have regained parental custody, if their right to parental custody has been restored, if their legal capacity to exercise parental custody has been (re) established, and if the child's minor parents have reached the age of majority or have entered into marriage, thus becoming eligible legal actions. Custody also ceases in the event of adopting a child or when a life partner of the same sex has taken over custody of the partner pursuant to Art. 44 of the Same-Sex Life Partnership Act on partnerships of people of the same sex.

93 Art. 115 of the Family Act.

### *11.2. Czech Republic*

If the situation is serious and the child is in danger, their health and life are at risk, and the courts must change the scope of parental authority as well as parents' contacts with the child. In extreme cases, the courts deprive parents of parental authority or remove the child from the family of origin and place them in foster care.

From the date of entry into force of the decision on adoption, parental responsibility is vested in the adopter of a child because the adoption of a minor who is not fully capable is always a "full adoption," respecting the doctrine of adoption *natura imitatur*.[94]

### *11.3. Hungary*

The law provides for placement of a child with a third party—usually a close relative—under two conditions that must occur cumulatively: the exercise of parental authority by either parent jeopardizes the child's welfare, and the third party themselves requests that the child be placed with them. If neither parent is suitable for the child's custody and there is no third party with whom the child can be placed, and the custody of the child seems justified in the interests of the minor, the court shall immediately request the guardianship authority to take the necessary measures.

### *11.4. Poland*

The guardianship court is obliged to appoint a legal guardian for a child over whom neither parent has parental authority.[95]

Legal guardianship is a substitute for parental authority (i.e., the guardian appointed by the court takes care of the child and property) and is also their legal representative.

The most important difference between custody and parental authority is that the guardian is supervised by the court, which may call the guardian to clarify matters relating to the child, and the guardian must also obtain the court's consent when deciding on all relevant matters concerning the child and their property.

### *11.5. Serbia*

The Family Act of the Republic of Serbia of 2005 provides that a child without parental care who can be adopted is a child who has no living parents, a child whose parents are unknown or where their place of residence is unknown, a child whose parents are completely deprived of parental rights, a child whose parents

94 Art. 794 of the Civil Code of the Czech Republic of 2012.
95 Arts. 145 et seq. of the Family and Guardianship Code of 1964.

are completely deprived of legal capacity, or a child whose parents consented to adoption.[96]

The scope of care and protection of adoptive parents is in line with the rights and obligations of the child and their parents.[97]

Foster care can also be established if the child is under parental care but has a developmental impairment or behavioral disorder. The scope of care and protection of a foster parent includes the right and obligation to protect and raise a child, and the foster parent is obliged to take special care to prepare the child for independent life and work.[98]

The parents of a child placed in foster care have the right and obligation to represent the child, manage and dispose of the child's property, maintain the child, maintain personal relations with the child, and decide on matters significantly affecting the child's life, jointly and with the consent of the foster parent, unless the parents are fully or partially deprived of parental rights or legal capacity or do not care for the child or care for them improperly.[99] The guardianship body will first try to accommodate the child in the family of a relative.[100]

### *11.6. Slovakia*

The violation of rights by inadequate educational means is sanctioned by family law norms in the form of interference with parental rights and obligations and *de facto* modification of their exercise (educational measures, interference in the exercise of parental rights and obligations, substitute care, restriction, or prohibition of contact).

The Explanatory Memorandum to the Family Act states that "upbringing is understood in its broadest sense as care for the person of the child, in which substantial decisions are also made. It includes care for the education and for the development of the child's individual, physical, and mental faculties, in contrast to personal care, which can also be provided by persons who are not the child's legal representatives. Even if a child is placed in one of the forms of foster care, the parents or guardian remain responsible for the child's proper upbringing.

The statutory regulation does not preclude parents from entrusting another person with the right of personal care of a minor child or from handing over the care of the child to a specialized institution. The foregoing does not necessarily imply that the exercise of parental rights would be contrary to the interests of the minor child—particularly in the case of a disabled parent who is unable to provide for the exercise of personal care but is interested in their child, is emotionally attached to

96 Art. 91.
97 Art. 104.
98 Art. 119.
99 Art. 120.
100 Art. 124.

them, and has contact with them and has an educational influence on them in the course of that contact.

### *11.7. Slovenia*

The new the Family Code of the Republic of Slovenia of 2017 introduced a new institution, the so-called "Giving parental care to a relative." Pursuant to Art. 231 para. 1 of the Family Code, the court may grant parental custody to a relative of a child whose parents are no longer alive if this is in the best interests of the child and the relative is ready to take over the custody and meets the conditions for adopting the child.

Under Art. 231 (2) of the Family Code the court may grant joint parental care only to married or cohabiting relatives who meet the necessary conditions. A relative who is granted parental care will receive the same rights and obligations as the child's parents and will become the child's legal representative.

According to Art. 218 (2) of the Family Code child whose parents are unknown or whose place of residence has not been known for a year can also be placed for adoption.

If parental care is withdrawn, the court also decides whether the child should be placed with another person, in foster care or in an institution, and whether they should be cared for.[101]

## 12. *De lege ferenda* conclusions

### *12.1. Croatia*

It would be a good idea to closely observe the social changes taking place in society and to strengthen the rights of parents, as long as these promote the welfare of children in pluralistic societies. Simultaneously, adequate support should always be provided to parents as they are torn between private life and business responsibilities.

### *12.2. Czech Republic*

Currently, the Parliament of the Czech Republic has made no official proposals on parental responsibility legislation as such, although much is being discussed informally, especially regarding the previous pending draft submitted before the last elections in 2021, equating—or at least bringing on a more even level—the situation of divorcing parents of a minor child and that of unmarried parents of a minor child who split up without state intervention by mutual informal agreement.

101 Art. 176 (4) of the Family Code.

The pending project was based on the opinion that parents of a minor child know their child very well and try to act in their best interests even during the separation. If enacted, the divorce of the husband and wife, who can agree on the divorce and the property and housing consequences of the divorce, as well as the divorce relating to their minor children, would be amicable, efficient, and speedy. The divorcing couple would only have to submit to the judge a joint application for divorce, a property and housing contract, and an agreement for a minor child in terms of custody, maintenance, and, if necessary, visiting rights. The divorce judge would not have to approve either the property agreement or the guardianship and alimony agreements for minor children.

### *12.3. Hungary*

Defining and emphasizing the rules governing the exercise of parental responsibility is a very good solution in national legislation as it can support the courts in cases where specific legal rules governing the dispute cannot be clearly defined.

The legislator should place greater emphasis on the principle of the best interests of the child and the child's right to self-determination, even if elevated to the rank of a general principle of the Civil Code of Hungary.

The law does not require any specialization in family or child protection law, which should be an important requirement in this case. A similar problem occurs in courts where family law cases are heard by judges of general civil law, even though family law cases differ both in number and nature from traditional civil proceedings. Additionally, the creation of child-friendly courtrooms in courts does not change this trend as judges cannot use the courtroom without special training.

A related and particularly important aspect is to jointly obtain the opinion of a minor child as the decision may have a decisive impact and affect the child's life. For this reason, the decision on foster care should always be taken by the parents or the court, considering the views, points of view, and conclusions of the child—and, if the child does not yet have the capacity to adjudicate, their opinion, not only in justified cases or at the request of the child reaching the age of 14 years.

The Book of Family Law defines, in a separate chapter, the rights and obligations of the parent who is separated from the child in the absence of joint parental authority. Thus, the separated parent decides jointly with the parent exercising parental responsibility over the child on important matters concerning their fate, but it is also the responsibility of the parent. The law lists these cases in an exclusive list; however, this does not include exercising the right to self-determination with regard to child healthcare, including the right to consent to invasive medical procedures. The law only requires the parent with parental responsibility to inform the other parent about the development, health, and education of the minor child, which does not even allow the parent to obtain information directly from the teacher or doctor about the child's learning progress, health and upbringing, or possible diseases. This legislation unnecessarily and disproportionately restricts the rights of the separated parent who does not exercise parental responsibility.

### *12.4. Poland*

The analyses conducted with regard to the Polish law in the field of parental authority allow for the formulation of the following postulates.

In court proceedings about family matters, it is necessary to move away from the adversarial approach (antagonizing the parties or participants) in favor of conciliatory solutions. This is important for divorce, separation, and the establishment of alimony.

The legitimacy of deciding on foster care should be considered after the period of parental cooperation following the divorce decree (minimum 6 months). During the divorce proceedings, the parties should prove that their relationship has completely and permanently broken down, including in the spiritual (emotional) sphere, which is incompatible with the parental educational community.

Any child court hearing should always be held in the presence of a psychologist. When deciding to replace custody over a child, it should be obligatory to obtain a psychological opinion.

There are grounds to support the postulates of child protection in divorce proceedings (by proxy) as the parents involved in the dispute may not recognize the child's needs and may provide them with inadequate protection.

In case of parents who make it difficult for a child to contact their relatives—especially with a parent who lives away from the child or threatens the child's welfare—the courts should consider limiting their parental authority (requiring participation in therapy or supervision by a probation officer) and the possibility of the child living with the other parent. A foster family that makes it difficult or impossible for parents and other close relatives of the child to contact them is the basis for terminating the foster relationship.

Training for family judges should include learning to cooperate with institutions operating in the social environment to support families (local government, nongovernmental, churches, and religious associations).

The guardianship court should be entitled to grant the status of a pregnant minor if, according to the psychological and pedagogical opinion, she is mature enough to exercise parental authority over the child after childbirth.

### *12.5. Serbia*

Even though the Serbian term "parental responsibility" emphasizes the personality, rights, and interests of the child, *de lege ferenda* seems appropriate to change it and replace it with the term "parental care" ("*roditeljska briga*") as a term more in line with contemporary trends in family law.

In terms of solving the parents' conflict, *de lege ferenda* is proposed. The competent authority should be a court, which has jurisdiction to rule on the most important matters relating to the child as the judges acting in family law should be particularly specialized in the field of family law and children's rights. The court

should have different options for resolving the conflict. First, when trying to reconcile parents, the court should be able to use family mediation conducted by competent authorities (court, guardianship authority, marriage or family counseling center, or other institution specialized in mediating family relations). In addition, the court should be able to authorize one of the parents to act independently with regard to one or more specific decisions. Finally, the court should be empowered to make its own decisions. The court should be free to choose the options that it deems most appropriate for the present situation in the child's best interests. This will depend on various circumstances, such as whether the matter is urgent, whether the parental conflict is exceptional or frequent, and others. *De lege ferenda*, it would be critical to pass a law on child abduction.

### *12.6. Slovakia*

Family law, together with other branches of private law, should be concentrated in the new Civil Code in the near future, and with that, our hope is that the concept of parental responsibility will be emphasized a lot more.

The Slovak Family Act currently does not define the concept of parent nor that of child. However, the definition of these terms can be deduced from the provisions on the determination of parenthood.

In defining the concept of child for the purpose of exercising parental rights and obligations, it is necessary to look for support in international treaties and the case law of the courts. This is an area where we are anticipating changes in the near future.

It also seems desirable to regulate assisted contact, which is currently sorely lacking in our legislation. Parent–child contact is such an important factor in the healthy development of a minor child that it requires sensitive regulation.

If the need for assisted contact has already arisen in the main proceedings, the involvement of a third party, such as the Office of Labor, Social Affairs, and the Family, could prevent the enforcement proceeding itself precisely through the active approach of social workers. This would eliminate the problem of contact on a wider scale.

Equally interesting is the possibility of legislative improvement of the post-divorce arrangement of family relations by means of a probationary period of custody. This is considered a preferable alternative to subsequent proceedings for a change in the child-rearing environment if it becomes apparent that, for whatever reason, alternate care by both parents has failed after a certain period of time.

In terms of process and new legislation that might incentivize parents to agree on the exercise of parental rights and responsibilities, I suggest that expert evidence be prepared by two independent expert witnesses (a man and a woman), which would inevitably involve a higher cost; however, this would remove any doubt of gender bias against the person by the expert witness, which is currently a common complaint.

The Slovak legal order currently lacks the determination of the goal of a minor's proper upbringing. Thus, I believe that it is important for the aims of education to be clearly defined.

Positive results could be achieved by strictly defining the roles of parents in upbringing, at least in as much detail as, for example, the Czech legislator has done in Art. 884 of the Civil Code: "*Parents have a decisive role in the upbringing of a child. Parents are to be all-round role models for their children, especially when it comes to the way of life and behavior in the family.*"

A further positive step would clearly be a substantive definition of the concept of "upbringing of a minor" to provide a clear legal framework for the rights and obligations of parents. Inspiration could again be taken from the Czech regulation, which, in the new Civil Code in Art. 858, defines parental responsibility as

> Parental responsibility includes the duties and rights of parents, which consist in taking care of the child, including in particular taking care of the child's health, physical, emotional, intellectual and moral development, protecting the child, maintaining personal contact with the child, ensuring the child's upbringing and education, determining the child's place of residence, representing the child and managing the child's property; it arises from the birth of the child and ceases when the child acquires full legal capacity. The duration and extent of parental responsibility may be changed only by the court.

The Slovak legislation lacks a more detailed enumeration, and even the draft of the new legislation includes, in the framework of a person's care for the child—only that the parents have the right to have the child with them, to take care of them personally, and to protect them. However, this wording is not exhaustive and should be changed to include "*to have the child with them, to determine his/her place of residence, to care for him/her personally, to protect the child's interests, to direct and guide his/her actions and to supervise him/her.*"

### *12.7. Slovenia*

Slovenia has left open the possibility of a more modern definition of motherhood and fatherhood, continuing the traditional approach. It should be borne in mind that the development of medicine meant that the traditional presumption of motherhood did not always correspond to the realities of the situation. This will be given for surrogate motherhood and donor gametes; nor should we ignore the possibility that a person who is legally and medically male may give birth to a child.

Indeed, although very few cases of this kind deviate from the traditional definition of motherhood, the unification of legal regimes should also be considered.

It should also be remembered that all countries deal with multiple secondary families in which the stepfather or stepmother also plays a role. Here, too, some countries have taken a step forward and discussed the subject. An appeal should

also be made to other countries to encourage them to tackle this issue more actively at the legislative and judicial level. It should not be forgotten that, here too, party autonomy and consensual resolutions come to the fore.

### *12.8. The European Court of Human Rights*

In the context of the jurisprudence of the ECHR, it can be postulated that the constitutional axiology of a given state (or, in a comparative aspect, a group of axiologically similar countries) should be analyzed each time before the judgment is issued by the ECtHR, with particular attention being paid to the guidelines for linguistic, systemic, and functional interpretation. Especially in matters of parental responsibility, decisions issued under the legal order of states operating under a different axiology should not be cited without reflection.

Since individual concepts are not independent in the context of parental responsibility, they should be interpreted in relation to other concepts of a subjective nature, with particular regard to the directives of systemic and functional interpretation.

## 13. One final conclusion

The main task of the international research team was, *inter alia*, to find an answer to the question about the content and limits of parental responsibility/authority, the role of the state and the EU, the scope of rights and obligations of family members, sexual education, and the reaction of individual countries' legal systems to new pan-European programs and strategies as well as policies in the field of equality promotion and non-discrimination.

The first research results indicated in this summary, as well as in individual chapters of the book, indicate the need to intensify the legal protection of the existing traditional values on which the identity of states with a similar constitutional axiology is based.[102]

102 Thank you, Mrs. Jowita Sosnowska for help in developing materials for this study.

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