ZSUZSA WOPERA, ADRIENN NAGY (EDS.):

BEST PRACTICES IN THE REGULATION OF ADOPTION IN A COMPARATIVE LEGAL CONTEXT

FERENC MÁDL
INSTITUTE OF COMPARATIVE LAW

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ZSUZSA WOPERA – ADRIENN NAGY (EDS.)

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Zsuzsa Wopera – Adrienn Nagy (eds.)

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The best interests of the child in adoption in a comparative approach

Zsuzsa Wopera* – Adrienn Nagy**

1. Introduction

The regulation of the substantive legal institution of adoption and the elaboration of the most effective procedural rules of adoption that consider the best interests of the child have always been the subject of heated debates during the development of law. In modern legal systems, the best interests of the child, the rights of biological parents, adoptive parents, and secrecy and transparency are typically at the heart of regulation, and the legislator must find the appropriate balance along the balancing of these interests. In Hungary, for example, the initial regulation of the Civil Code of 1959 still maintained the inheritance relationship with biological relatives in respect of the adopted child, while the amendment of the Civil Code in 1977 introduced the legal institution of secret adoption, which abolished the possibility of inheritance of the adopted child in the event of the death of the biological parents.[1]

The precedent judgment of the Hungarian Curia in 2024 drew attention to the need for a comparative legal examination of the rules of adoption[2], which highlights the problems of legal interpretation that national differ-

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1 Sections 617–618 of Act IV of 1959; Act IV of 1977.

2 Curia Pfv.V.20.145/2024/14.

ences in the rules of adoption can lead to. According to the facts of the case, the plaintiff, who was a biological child of the testator, was adopted by his stepfather in France, because his mother moved to France and remarried in 1977. At the same time, the testator remarried in Hungary, and then he and his wife adopted the defendant in 1983. The testator died in 2020 without a will, after which both the plaintiff and the defendant claimed the high-value estate. The central issue of the dispute was whether the 'simple adoption' under French law terminated the inheritance relationship between the applicant and his biological father, and which temporal state of the Hungarian law rules apply. The applicant claimed that French adoption fell within the category of simple adoption, which did not preclude an inheritance relationship with a biological father. The defendant, on the other hand, argued that under Hungarian law, the adoption was considered secret, which excluded the plaintiff's right to inherit. The court therefore had to clarify whether the secrecy of the adoption and its consequences should be assessed according to the Hungarian law in force at the time of the testator's death, and to what extent the relevant rules of French law could be considered. The importance of the case is that the clash of different national regulations creates legal uncertainty, especially if the adoption took place abroad, but its effects must be assessed based on Hungarian law. It should be noted that, although issues relating to adoption are excluded from the scope of the Brussels IIb Regulation[3], the European Succession Regulation has helped to determine the law applicable to the dispute in the present case[4].

It can be seen from the legal case described that the comparative analysis of adoption rules is of paramount importance for several reasons. On the one hand, it explores the different regulatory models – open, secret, international adoption – and on the other hand, it points out how the different systems protect the rights of the child. Thirdly, it helps to identify good practices that can also guide Hungarian law. In the last decade, the rules on

3 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction Article 1 (4) b) point.

4 Regulation (EU) No 650/2012 of the European Parliament and the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession Article 21.

adoption have been renewed in several European countries, so it is justified to review and compare the individual European models.[5]

The aim of this book is to examine the regulation of adoption in a comparative legal context, including the best international practices. The importance of the relevant national regulations is also increased by the fact that there is no uniform European Union regulation in this area. In this way, the book creates a scientific basis from which Hungarian legislation and legal practice can also draw. The volume can contribute not only from a legal and technical point of view, but also from a socio-political and child protection point of view to the fact that the institution of adoption really serves the best interests of the child.

The regulatory solutions presented in this book have a common legal historical background. All countries used centralized, state-centered family law regulations during the socialist period, which later transformed into a child-centered model. These states had to face similar social challenges, among which demographic problems, the overload of state child protection and the issue of children (elderly, disabled, siblings) who are difficult to adopt. All of them are parties to the UN Convention on the Rights of the Child and the Hague Convention, so their regulations are characterized by common international standards. Central and Eastern European countries have followed a similar political, legal and cultural development path, so the aim of the book is to draw generalizable conclusions and good practices to be followed through the examples of these states. We can already foreshadow here in the introductory chapter that the regulation of the states examined in the volume follows common principles (the best interests of the child, compliance with international conventions), but they differ to a greater or lesser extent in the legal solutions applied.

5 For more information on the renewed Irish regulations, see: New adoption legislation coming into force https://byrnewallaceshields.com/news-and-recent-work/publications/new-adoption-legislation-comes-into-force.html
(Accessed: 22.8.2025)

2. The best interests of the child in adoption

In this introductory chapter of the volume, we first shortly summarize the international legal foundations of the above-mentioned child-centered approach, which is followed thematically with a rich case law background in the second chapter of the book.

Since the 1990s, the child-centered approach required by the UN Convention on the Rights of the Child (hereinafter: CRC) and the practice of the ECHR has increasingly been applied in the national laws of European states in the regulation of adoption. Article 3 of the CRC[6] enshrines this principle,[7] which must be taken into account primarily in all official decisions, including decisions on the adoption of a child. According to Article 3(1) 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.'

This international standard is a binding obligation for national legislation. Article 3(1) leaves no doubt about this. According to the General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (hereinafter: General Comment) „The extension of States parties' obligation to their "legislative bodies" shows clearly that article 3, paragraph 1, relates to children in general, not only to children as individuals. The adoption of any law or regulation as well as collective agreements – such as bilateral or multilateral trade or peace treaties which affect children – should be governed by the best interests of the child. The right of the child to have his or her best interests assessed and taken as a primary consideration should be explicitly included in all relevant legislation,

6 See more: Guštin, Matko (2025). The Best Interest of the Child in the Jurisprudence of the European Court of Human Rights in Adoption Cases. *Central European Academy Law Review*, *2*(1). https://doi.org/10.62733/2024.1.69-102

7 See more: Ruggiero, Roberta: Chapter 3 Article 3: The Best Interest of the Child. In: Vaghri, Ziba, Zermatten, Jean, Lansdown, Gerison, Ruggiero, Roberta (Eds.): Monitoring State Compliance with the UN Convention on the Rights of the Child an Analysis of Attributes. Springer 2022. p. 21-29. https://link.springer.com/chapter/10.1007/978-3-030-84647-3_19 (Accessed: 22.8.2025)

not only in laws that specifically concern children. This obligation extends also to the approval of budgets, the preparation and development of which require the adoption of a best-interests-of-the-child perspective for it to be child-rights sensitive."[8]

It can also be clearly seen in the development of Hungarian law that the best interests of the child have become a central element of the regulation.[9]

The Committee on the Rights of the Child (hereinafter: the Committee) has identified article 3, paragraph 1, as *one of the four general principles* of the CRC for interpreting and implementing all the rights of the child (...).[10]

Article 21 of CRC provides for nature and conditions of adoption as an issue of the right of the child; it covers the child's rights in relation to adoption.

According to the Article 21 "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the *paramount consideration* and they shall:

a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

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8 General Comment No. 14 (2013) General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 para 31. (Accessed: 03.08.2025)

9 See more: Benyusz, Márta and Visontai-Szabó, Katalin: A gyermek érdekének biztosítása az örökbefogadás során. Mádl Ferenc Intézet Budapest, 2023. https://mfi.gov.hu/academic_com/a-gyermek-erdekenek-biztositasa-az-orokbefogadas-soran/ (Accessed: 22.8.2025)

10 General Comment No. 14 (2013) General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 (Accessed: 03.08.2025)

c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

It can be see that the Convention explicitly refers to the child's best interests in article 21 on adoption.[11] Below we will analyze the relationship between the best interest of the child in article 3 of the CRC and article 21 of the CRC.

The best interests of a child shall be a primary consideration in the adoption of all measures of implementation. The words "shall be" place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken. The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness.[12]

The General Comment pointed out, that "In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be "*a primary* consideration" but "*the paramount* consideration". Indeed, the best

11 See more: Cantwell, Nigel: The Best Interests of the Child in Intercountry Adoption, Innocenti Insight, Florence, UNICEF Office of Research 2014. https://app-sncu01saas51g0rp001.cms.optimizely.com/globalassets/files/wat-we-doen/opinie/unicef-report---the-best-interests-of-the-child-in-intercountry-adoption.pdf [Accessed: 12.08.2025]

12 General Comment No. 14 (2013) General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 para 38. (Accessed: 03.08.2025)

interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues.[13]

However, for those circumstances where adoption is required, the paramountcy of the best interests of the child must be embedded in all relevant legislation and explicitly frame every dimension of adoption processes, taking precedence over all other considerations. This represents the strongest formulation of the principle in the Convention.[14]

Adoption cannot, therefore, be considered as a general approach to children without care, but rather, decisions must be made on a case-by-case basis. Furthermore, regulations such as rigid rules on age of adopters, or time limits before an adoption can take place, could serve to fetter, and thereby breach this principle (Hodgkin et al., 2007, p. 295; UN Committee on the Rights of the Child, 2002, para. 36, 2005c, para. 48). (...) However, any assessment of the child's best interests must be determined with reference to the rights and principles of the Convention and not according to vague or subjective criteria (Hague Conference on Private International Law, 2008, para. 44).[15]

Adoption must only be considered when parents are unwilling or unable to care for their child. The wording of paragraph 1, which refers to permissibility in respect of parents, relatives, and legal guardians, testifies to the fact that if the parents are unable, consideration must be given to the wider family and only if they too are unable to provide care, should adoption be considered. Consent to the adoption must be sought, if required by the state. In other words, the wording in Article 21 allows that individual states can determine whether to provide for this obligation. However, failure to make

13 General Comment No. 14 (2013) General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 paras. 36-37. (Accessed: 03.08.2025)

14 Lansdown, Gerison: Chapter:7 Article 21. In: Vaghri, Ziba, Zermatten, Jean, Lansdown, Gerison, Ruggiero, Roberta (Eds.): Monitoring State Compliance with the UN Convention on the Rights of the Child An Analysis of Attributes. Springer 2022. p. 174. https://link.springer.com/chapter/10.1007/978-3-030-84647-3_19 (Accessed: 03.08.2025)

15 Lansdown, Gerison: Chapter:7 Article 21. In: Vaghri, Ziba, Zermatten, Jean, Lansdown, Gerison, Ruggiero, Roberta (Eds.): Monitoring State Compliance with the UN Convention on the Rights of the Child An Analysis of Attributes. Springer 2022. p. 174. https://link.springer.com/chapter/10.1007/978-3-030-84647-3_19 (Accessed: 03.08.2025)

such provision, either in respect of parents or the child, could constitute a violation of other rights, for example, in respect of Articles 7, 9, or 12, and should therefore be seen to be the exception rather than the rule to accommodate situations where consent is not possible or its pursuit would run counter to the child's best interests (Alston et al., 2019, p. 792). States Parties should always provide parents with appropriate information and counselling prior to them giving consent to an adoption (Hague Conference on Private International Law, 1995, para. 4(c)). Furthermore, the Committee has stressed that parents should never be pressured to give consent before or immediately after a child is born (2004e, para. 41, 2006a, para. 34).[16]

3. The child's right to express views in adoption proceedings

In her cited study, *Gerison Langsdown* analyses in detail the connection between Article 21 of the CRC and other articles of the Convention. From the procedural point of view and due to the high relevance of the topic[17], the relationship between Article 21 and Article 12 is worth analyzing. We note that Article 21 itself does not mention the obligation to hear the child during adoption proceedings, but Article 12(2) of the CRC states that the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting him or her. Adoption proceedings are undoubtedly such a procedure. Therefore, without Article 21 of the CRC specifically stating so, the child's views must be sought in the proceedings. This is an important question because adoption typically takes place in the case of a child at a young age, and therefore it is very important to analyze the jurisprudence on Article 12 of the CRC. First of all, it must be examined how the term "child capable of forming views" should be interpreted.

16 Lansdown, Gerison: Chapter:7 Article 21. In: Vaghri, Ziba, Zermatten, Jean, Lansdown, Gerison, Ruggiero, Roberta (Eds.): Monitoring State Compliance with the UN Convention on the Rights of the Child An Analysis of Attributes. Springer 2022. p. 174. https://link.springer.com/chapter/10.1007/978-3-030-84647-3_19 (Accessed: 03.08.2025)

17 See more: Wopera, Zsuzsa: Strengthening the right of children to express their views in family law procedures. In: European Integration Studies Volume 19. No. 1. p. 4. https://ojs.uni-miskolc.hu/index.php/eis/article/view/2771/1922 (Accessed: 03.08.2025)

Although no reference is explicitly made to children's views in Article 21, the provision of Article 12, that children have the right to express views on all matters of concern to them, and to have them given due weight in accordance with age and maturity, clearly extends to adoption (UN Committee on the Rights of the Child, 2009b, para. 55). The Committee has consistently emphasised that the ascertainable views of children must be into account (1994, para. 18, 1995a, para. 29, 2016a, para. 29(c)). The first paragraph of Article 21 indicates that adoption can only take place where, if required, 'persons' concerned' have given their informed consent. The Committee has interpreted 'persons concerned' to include children, and, accordingly, has recommended that States Parties introduce age limits below the age of 18 years when children can give consent to an adoption.[18]

According to the Article 12 of Child Convention (1) "States Parties shall assure to *the child who is capable of forming his or her own views* the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

The Committee has consistently emphasized that the child must *be regarded as an active subject of rights* (active participant) and that a key purpose of the Convention is to emphasize that human rights extend to children. The rights of the child set out in the two paragraphs of Article 12 do not provide a right to self-determination but *concern involvement in decision-making.* The significance of Article 12 of the Child Convention is that it not only requires that children should be assured the right to express their views freely, but also that they should be heard and that their views be given "due weight". The Committee has rejected what it termed "the charity mentality and pa-

18 Lansdown, Gerison: Chapter:7 Article 21. In: Vaghri, Ziba, Zermatten, Jean, Lansdown, Gerison, Ruggiero, Roberta (Eds.): Monitoring State Compliance with the UN Convention on the Rights of the Child An Analysis of Attributes. Springer 2022. p. 174. https://link.springer.com/chapter/10.1007/978-3-030-84647-3_19 (Accessed: 03.08.2025)

ternalistic approaches" to children's issues.[19] ("the parent knows what is good for the child")

The Committee emphasizes that it is not enough that legislation should establish children's right to be heard and to have their views given due weight: *children must be made aware of their right. The right to information is a prerequisite for participation.*[20]

It's important to highlight that Article 12 of CRC provides the right to express freely the views for child who is "*capable of forming his or her own views*". Article 12 *does not set any lower age limit on children's right to express views freely*. Some countries reported that they had set a minimum age on the right of the child to be heard, for example in custody proceedings following separation or divorce of parents, but the *Convention provides no support for this,* and States cannot quote the best interests principle to prevent children having an opportunity to express their views.[21]

According to the General Comment No. 12 (2009), the States parties shall assure the right to be heard to every child "capable of forming his or her own views". This phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity. The Committee emphasizes that Article 12 imposes no age limit on the right of the child to express her or his views and discourages States

19 Implementation Handbook for the Convention on the Rights of the Child, Fully Revised Third Edition, United Nations Children's Fund 2007. Geneva p. 149-150. https://www.unicef.org/media/96496/file/Implementation%20Handbook%20for%20the%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf (Accessed: 15.8.2025)

20 Implementation Handbook for the Convention on the Rights of the Child, Fully Revised Third Edition, United Nations Children's Fund 2007. Geneva p. 152. and p. 159. https://www.unicef.org/media/96496/file/Implementation%20Handbook%20for%20the%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf (Accessed: 15.8.2025)

21 Implementation Handbook for the Convention on the Rights of the Child, Fully Revised Third Edition, United Nations Children's Fund 2007. Geneva p. 153. https://www.unicef.org/media/96496/file/Implementation%20Handbook%20for%20the%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf (Accessed: 15.8.2025)

parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him.[22]

Article 12, paragraph 2, specifies that opportunities to be heard have to be provided in particular "in any judicial and administrative proceedings affecting the child". The Committee emphasizes that this provision *applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption* (...).[23]

The link between the paragraphs of Article 12 indicates that the second paragraph of Article 12 applies to children "capable of forming views", again emphasizing that *very young children should have the formal right to be heard*. As already noted, the Convention provides no support for a set minimum age. For the child to be "provided the opportunity" implies an active obligation on the State to offer the child the opportunity to be heard, although, again, it is important to emphasize that *there is no requirement that the child express views*.[24]

The General Comment pointed out, that "Assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child. This is clearly set out in the Committee's general comment No. 12 which also highlights the inextricable links between articles 3, paragraph 1, and 12. The two articles have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests. Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3, paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions af-

22 UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12. paras. 20-21. available at: https://www.refworld.org/docid/4ae562c52.html (Accessed: 5.1.2023)

23 UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12. para 32. available at: https://www.refworld.org/docid/4ae562c52.html (Accessed: 5.1.2023)

24 See more: Wopera, Zsuzsa: Strengthening the right of children to express their views in family law procedures. In: *European Integration Studies* Volume 19. No. 1. p. 4. https://ojs.uni-miskolc.hu/index.php/eis/article/view/2771/1922 (Accessed: 10.8.2025)

fecting their lives. The evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake. The Committee has already established that the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing. Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests. *Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children.* States must ensure appropriate arrangements, including representation, when appropriate, for the assessment of their best interests; the same applies for children who are not able or willing to express a view.[25]

4. EU legal aspects of adoption

Given the Article 21 of the CRC states in the context of adoption, that States Parties shall ensure that the best interests of the child shall be the paramount consideration and that the CRC regulates inter-country adoption [Art 21 (b)], which states that the State recognizes that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin, it is appropriate to examine whether EU law contains any procedural or conflict-of-law rules on adoption.

25 General Comment No. 14 (2013) General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 paras. 43-44. (Accessed: 03.08.2025)

4.1. Regulation of cross-border family law matters in Treaty on the Functioning of the European Union

A cross-border adoption case falls under the terminology of EU law in judicial cooperation in civil matters. Article 81 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) defines the framework of judicial cooperation in civil matters in Title V 'Area of freedom, security and justice'. According to Article 81 (3) measures concerning *family law with cross-border implications* shall be established by the Council, acting in accordance with a *special legislative procedure.* The Council *shall act unanimously* after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

This means that if the EU legislator wants to prepare EU legislation on adoption, the Member States would have to decide unanimously. Harmonization of substantive rules on adoption was not on the agenda in the EU, but what about inter-country adoption cases, are they covered by an EU legal act? We will discuss this topic in detail later.

4.2. Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union[26] (hereinafter: Charter) comprises rights derived from the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) or recognized as general principles of the EU by the Court of Justice of the European

26 In accordance with Article 6 of the Treaty on European Union, the Charter has the same legal value as the EU treaties. It applies to EU institutions in all their actions and to EU countries when they are implementing EU law. https://eur-lex.europa.eu/EN/legal-content/glossary/charter-of-fundamental-rights.html (Accessed: 5.8.2025)

Union (hereinafter: CJEU), in addition to so-called second generation fundamental rights, i.e. economic, social and cultural rights, and also third generation rights that are not thoroughly secured by other relevant international treaties. Among the most innovative are the rights to protection of personal data (Article 8), *the rights of the child (Article 24)*, the rights of the elderly to lead a life of dignity and independence (Article 25), the full integration of persons with disabilities (Article 26), environmental protection (Article 37) and consumer protection (Article 38).[27]

Article 24 on the 'Rights of the child' is included in Chapter III of the Charter entitled 'Equality'. According to Article 24 (1) of Charter "Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity." The Article 24 of the Charter – in accordance with Article 12 of the CRC -, ensures the right of the child to express their views freely. Nevertheless, it is worth mentioning, that paragraph 1 of Article 24 of the Charter ensures this right not only for children capable of forming a view, but for all children. This provision also obliges the authorities involved in the adoption procedure.

4.3. The Brussels IIb regulation and the topic of adoption

The Brussels IIb regulation (hereinafter: Regulation), which entered into force on 1 August 2022, defines the matters affecting children within its scope extremely broadly.[28] According to the Preamble (11) „Any type of placement of a child in foster care, that is, according to national law and procedure, with one or more individuals, or institutional care, for example in an orphanage or a children's home, in another Member State should fall within the scope of this Regulation unless expressly excluded, which is for example the case for placement with a view to adoption, placement with a

27 Bojarski, Łukasz, Schindlauer, Dieter and Wladasch, Katrin: The European Charter of Fundamental Rights as a Living Instrument, Manual, Rome, Warsaw, Vienna 2014. p. 17.

28 See more: Wopera, Zsuzsa: Hatály és fogalommeghatározások. In: A Brüsszel IIb rendelet kommentárja, ORAC Kiadó, Budapest, 2023.

parent or, where applicable, with any other close relative as declared by the receiving Member State. As a result, also 'educational placements' ordered by a court or arranged by a competent authority with the agreement of the parents or the child or upon their request following deviant behaviour of the child should be included. Only a placement – be it educational or punitive – ordered or arranged following an act of the child which, if committed by an adult, could amount to a punishable act under national criminal law, regardless of whether in the particular case this could lead to a conviction, should be excluded."[29]

Article 1(4) enumerates the matters *excluded from the scope* of the Regulation even though they may be closely linked to parental responsibility. According to Art 1(4) (b) the Regulation does not apply to decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption. This means that no phase of the adoption procedure or the decision on adoption falls within the scope of the Regulation, which means that neither the flexibly and child-centered jurisdictional rules of the Regulation nor the facilitated provisions on recognition and enforcement apply.[30]

Remarkably, adoption was also an area excluded from the scope of the Regulation's predecessors.[31] However, in Report published in 1998 by Alegría Borrás was still optimistic and envisioned some level of EU legal harmonization of adoption rules. In her opinion „European integration was mainly an economic affair to begin with and for that reason the legal instruments established were designed to serve an economic purpose. However, the situation has changed fundamentally in recent times so that integration is now

29 Th. M de Boer points out interesting connections regarding the scope of the regulation in his study entitled 'What we should *not* expect from a recast of the Brussels IIbis regulation https://www.nipr-online.eu/upload/documents/20150331T124932-NIPR%202015-1_De%20Boer_sample%20copy.pdf (Accessed: 2.8.2025)

30 The reason for this exclusion is not analyzed in detail in the prestigious commentaries. See, for example: Magnus, Ulrich, Mankowski, Peter (eds.): Brussels IIbis Regulation, Sellier European Law Publisher, in: European Commentaries on Private International Law, Munich 2012. p. 78.

31 According to Article 1 (3) (b) of the Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 Brussels IIa regulation, this Regulation shall not apply to decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption.

no longer purely economic and is coming to have an increasingly profound effect on the life of the European citizen, who finds it hard to understand that he encounters problems in matters of family law while so much progress has been made in property law. The issue of family law therefore has to be faced as part of the phenomenon of European integration. We only need to look at the questions put in the European Parliament not only on dissolution of marriages but also on more general aspects of family law (marriage contracts, paternity, child abduction, adoption, etc.). This Convention is a first step, and a positive and decisive one, along this new road and it may open the way to other texts on matters of family law and succession."[32]

There are many innovative provisions in the Brussels IIb Regulation, but if we want to point out one thing *as a general characteristic*, it is the strong child-centered approach of the Regulation, which is much more effective than in the Brussels IIa Regulation. This child-centered approach is also clearly detectable in other provisions of the Brussels IIb Regulation. The best example of this is the Article 21[33] of the Regulation, which constitute the right of the child to express his or her views.

From the perspective of our topic, it is unfortunate that adoption cases do not fall under the scope of the Regulation, because the Regulation, compared to its predecessor, significantly strengthens children's rights and, with its Article 21, creates a direct connection with Article 12 of the CRC.

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32 Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr. Alegría Borrás Professor of Private International Law University of Barcelona (98/C 221/04) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:51998XG0716 (Accessed: 7.7.2025)

33 Right of the child to express his or her views

1. When exercising their jurisdiction under Section 2 of this Chapter, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body.

2. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.

5. Summary

This introductory study of this book summarizes the most important international legal regulations on adoption. We highlighted the international standards, rules and principles that must be considered in the national law of all European states. The following chapters of the book detail the national rules on adoption in selected European states, and the summary chapter summarizes the common points of the regulations, highlighting good practices.

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International rules on adoption with special regard to the ECtHR's case-law

György Marinkás*

1. The Council of Europe

1.1. Multilateral international treaties concluded within the framework of the Council of Europe

The Council of Europe (CoE), like the *United Nations* (UN), plays a prominent role in the protection of children's rights, as all the human rights treaties signed under its aegis contain explicit provisions on children's rights. The *European Convention on Human Rights* (ECHR)[1] applies equally to all persons, including children, without discrimination. The jurisprudence of *the European Court of Human Rights* (ECtHR) on adoption is essentially based on the interpretation of Article 8[2] , which sets out that "Everyone has the right to respect for his private and family life [...]". The ECtHR has developed a broad

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1 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005).

2 Article 8 of the ECHR: 1. "Everyone has the right to respect for his private and family life, his home and his correspondence."

2. '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."

jurisprudence on the right to respect for private and family life as set out in Article 8, with regard to the rights of the child, extending the interpretation of Article 8 to adoption. Article 14 of the ECHR on the prohibition of discrimination and Article 12 of the ECHR on the right to marry is also often invoked by the parties, therefore one may not dispense with elaborating on case-law related to these articles as well.

In addition to the ECHR, the CoE has also adopted a number of specific conventions on the adoption of children, such as the 1967 *European Convention on the Adoption of Children*[3] and the 2008 *European Convention on the Adoption of Children* (*Revised*) 2008.[4] Under Article 4(1) of the Revised Convention, before the decision is made on granting the adaption, the authority deciding on the adoption must be satisfied that the adoption is in the best interests of the child. Article 5 of the Revised Convention further provides that the authority deciding on adoption may not authorise adoption without the consent of the child who has "sufficient understanding". Children are presumed to have sufficient understanding when they are over 14 years of age, and their consent is therefore a mandatory precondition for adoption. Article 6 of the Revised Convention provides that children who do not have sufficient understanding should, as far as possible, be consulted and their views and wishes should be taken into account in accordance with their maturity. Under Article 22(3) of the Revised Convention, the adopted child may have access to information about his or her birth parents, while the birth parents have maintained the confidentiality of their identity. The competent authority may consider – to the extent permitted by law – providing information about the child's birth parents with regard to the circumstances of the case. Under Article 9(1) of the Revised Convention, the minimum age of the adopter may be between 18 and 30 years, but no upper age limit is set. As regards the age difference between the adoptive parent and the adopted person, it provides for an age difference of at least 16 years – preferably – in accordance with the best interests of the child. While the Revised Convention is primarily intended to regulate national adoptions, Article 12(1) allows for international adoptions.[5] In case of international adoptions the Member States must facilitate the child

3 European Convention on the Adoption of Children (ETS No. 058).

4 European Convention on the Adoption of Children (Revised) (ETS No. 202)

5 On the best interests of the child in international adoption, see Marschalkó, 2013, pp. 221–239.

in obtaining the nationality of the adoptee. The Revised Convention thus complements the 1993 Hague Convention on *Protection of Children and Co-operation in Respect of Intercountry Adoption*[6] by ensuring that, in cases where the Hague Convention does not apply, the best interests of the child – as set out in Article 4 of the Revised Convention – prevail in cases of international adoption.[7] Hungary has signed, but not ratified the Revised Convention.[8]

The *European Convention on the Exercise of Children's Rights*[9] was adopted by the Council of Europe in 1996. The Convention is based on the principle of the best interests of the child and guarantees children[10] procedural rights in proceedings concerning them, including the right to be informed of and to participate in proceedings, the right to be heard and the right to representation. It lays down an obligation for the competent authorities to have regard to the best interests of the child in the proceedings and to hear and give due weight to the views of the child. A further important principle of the Convention is that proceedings should be conducted expeditiously and – where it is justified –, should be brought ex officio. Hungary has signed but not ratified the Convention.[11]

1.2. ECtHR's case-law on adoption

1.2.1. About the right to adoption in general

" *[The purpose of adoption is] providing a child with a family, not a family with a child.*"[12]

The ECtHR's case-law on adoption is based on the interpretation of the right to respect for family life as set out in Article 8 ECHR and the principle of the best interest of the child. While the ECHR does not contains any reference to

6 HCCH 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. Entry into force: 1-V-1995.
7 Explanatory Report to CETS – 202.
8 At the time of writing, a total of 10 Member States of the Council of Europe has ratified the Convention. See Chart of signatures and ratifications of CETS No. 202.
9 European Convention on the Exercise of Children's Rights (ETS No. 160).
10 Person under the age of 18 according to the convention.
11 At the time of writing, a total of 20 Member States of the Council of Europe has ratified the Convention. See Chart of signatures and ratifications CETS No. 160.
12 ECtHR, Frette v. France, para. 42.

the best interest of the child, the ECtHR made it part of its case-law:[13] the Court held – among other cases – in *Pini and others v. Romania*[14] and reiterated in *Harroudj v. France*[15] that Article 8 ECHR must be interpreted in the light of the 1993 Hague Convention, the 1967 European Convention on the Adoption of Children and the 1989 UN *Convention on the Rights of the Child*,[16] two of which explicitly mention the best interests of the child principle. When assessing cases where children are involved like adoption the state authorities must strike a fair balance among the best interest of the child as an individual, the interest of the parent(s) and the public interest – the interest of children as a vulnerable group – represented by the state authorities. While the ECtHR in its jurisprudence has placed the best interests of the child at the centre of the *balancing test,* in accordance with its own well-established case-law, no single criterion can be regarded as a decisive, overriding argument. Furthermore the boundaries are volatile among these three circle of interest as two out of three often coincide against the third depending on the individual circumstances of the case: on the hand, when the child is removed from an abusive family, the child's interest as an individual is also public interest. On the one hand, when the authorities overreact and remove the child from a family without due reasons and give up the child for adoption[17] or removing the child from the adoptive family the interest of the child and the parents – to maintain family ties – coincide and contradict the presumed public interest.[18] As for severing family relationship created by adoption, the ECtHR held that it is both legally and both by its nature identical to the family relationship those between a parent and a child related by blood[19] – as is clear from Article 10 of the 1967 Council of Europe Convention – and that, consequently, the provisions of Article 8 ECHR apply to the termination of adoption as well. Thus, the balancing of interest should be as thorough as in case of granting adoption. Similar balancing is needed in case of the prohibition of discrimination on grounds of age, marital status and

13 Zamperini, 2024, p. 1.
14 ECtHR, Pini and Others v. Romania, para. 139.
15 ECtHR, Harroudj v. France case, para. 42.
16 UN Convention on the Rights of the Child (Treaty Series, vol. 1577, Nov. 1989, p. 3.).
17 In this respect, there are a number of differences in the legislation of the various states. For EU Member States' legislation and practice, see the study made under the aegis of the European Parliament: Adoption without consent. Update 2016.
18 Zamperini, 2024, pp. 3–5.
19 Katonáné Pehr, 2018, paras. [68]–[81]

gender identity. In this respect, the ECtHR has held that the right to adoption cannot be derived from Article 8 ECHR, the article at hand only grants the right to apply for adoption. The ECtHR has also examined the equivalence between adoption under 'Western' law and the *kafala* under Islamic law and found that the latter is more or less the equivalent of guardianship and not adoption.

1.2.2. The best interests of the child vs. the rights of the parents

"*The centrality of the child's interests, which the legal system has long aspired to, is now reflected in the increasing consideration of the right to identity, not necessarily linked to biological truth, but to the emotional and personal ties developed within a family.*"[20]

Differences between temporary placement and adoption

In the case of *Uzbyakov v. Russia* case of the ECtHR, the applicant, who is of Uzbek origin, entered Russia illegally in the 1990s. His residence permit was granted in 2010. In 2013 he obtained citizenship. He and his wife had five children between 1997 and 2009, whose birth certificates did not mention the father, as the applicant wanted to keep out of the authorities' sight. The applicant's wife died in March 2011. At the time, the applicant was in pre-trial detention, from which he was released in April, after the investigation was closed. The applicant initiated proceedings for recognition of his paternity over four children. By then, the authorities had already made arrangements for the children to be taken into care, as they were not aware of any living relative. The four older children were placed first in an orphanage and then – after the authorities had become aware of her existence – with the sister of the deceased mother. Not much later, the court established the paternity of the applicant in respect of the four older children and ordered that the children be placed with the applicant. The youngest child, who was only 14 months old at the time of her mother's death, was separated from her siblings and placed in an age-appropriate care facility. The child was soon declared adoptable and

20 Zamperini, 2021, p. 387.

given to a couple, which adopted her.[21] After analysing the lengthy domestic proceedings, the ECtHR found that the national courts had failed to analyse all the circumstances of the case with sufficient weight and to strike a fair balance between the interests of the parties involved. As the ECtHR reiterated its jurisprudence[22], in deciding on a temporary placement, the State has a wide *margin of appreciation* and the examination – given the temporary nature of the measure – need not be as thorough as in the case of an adoption, which is permanent by its nature. Thus, the placement of the children in temporary state care following the death of their mother was in conformity with the ECHR, particularly since the father's identity was unknown to the authorities, as was the children's aunt. However, in deciding whether to declare a child adoptable or to take other similar measures which seriously restrict or deprive the biological parents of their rights, all the relevant circumstances of the case and the interests of the persons concerned must be carefully examined. Although the case-law of the ECtHR requires that the best interests of the child should be taken into account with a decisive weight in such procedures, the severe restriction – or even total deprivation – of the parent's right to family life requires an assessment of whether there are other less restrictive measures which would ensure that the best interests of the child are safeguarded. The ECtHR took the view that in relation to the youngest child the national authorities failed to fulfil their obligation to ascertain whether the chosen method was appropriate, since they did not even take into account that the child might have living relatives and when the authorities could reasonably have been aware of that fact in the circumstances of the case, they did not even consider placing the child with a blood relative[23] as they did with older children. An important point made by the ECtHR in the case, with reference to its previous case-law[24] , is that the authorities cannot rely on the passing of time and the absence of family ties where these are the results of the authorities activities, in particular

21 ECtHR, Uzbyakov case, paras. 4–23.

22 See paragraph 123 of the ECtHR Uzbyakov judgment and the case law cited there.

23 According to the ECtHR, the national authorities must have known that the child had living relatives for two reasons: *first,* the father had named all five of his children in his application for paternity before the authorities in March 2011. *Second*, the authorities, having learned that the deceased mother had a sister, placed the four older children with her. See ECtHR, Uzbyakov case, paras. 99, 104, 109–111, 114–116, 118.

24 ECtHR, V.D. and Others v. Russia, para. 116; ECtHR, Pontes v. Portugal, paras. 92, 99; ECtHR, Strand Lobben and Others v. Norway, para. 208.

with a view of the positive obligation of the State to facilitate the early reunification of the family.[25] – It is worth noting here that a year later, in the *Zhou v. Italy* case, the ECtHR emphasised that the role of social assistance services is to help people to overcome their difficulties,[26] not to exacerbate them.[27] – As stated in the *Uzbyakov,* the discretion of the national authorities cannot be formalistic, that is, if there are no facts calling into question the suitability of the parent concerned to raise the child, they cannot base their decision merely on the fact that, under the rules in force, an adoption which has already been approved by the court cannot be terminated. The applicant in the present case has been bringing up his children for many years, during which time there has been no evidence that the children in his care have not been developed properly, and he has never attracted any attention of the child protection authorities. The ECtHR, referring to its judgment in *Kocherov and Sergeyeva v. Russia*[28], further recalled that the modest financial circumstances of the biological parent, which were repeatedly referred to by the national courts in the case at hand, cannot in itself constitute a ground for separation from the parent and severing the blood relationship.[29] In view of the above, the ECtHR unanimously found a violation of Article 8 ECHR.

The ECtHR in *Pedersen v. Norway* also ruled that the authorities cannot rely on the passage of time and the absence of family ties where these were their own making. – In ECtHR's phrasing, the authorities "cemented the situation."[30] – In the case at hand, the applicants, aware of their mental illness, requested the competent child protection service themselves to take the then two-and-a-half-month-old child into temporary care until they will be prepared to take him back. However, the county social welfare board *(fylkesnemnda for barnevern og sosiale saker)* decided that the child should be placed in permanent state care because the parents were unable to care for the child properly, resulting in deficits in the child's development. The authority has set the parents' contact time at two hours twice a year. The par-

25 ECtHR, Uzbyakov case, para 101.
26 ECtHR, Zhou v. Italy case, para. 58.
27 Additional note by the author.
28 ECtHR, Kocherov and Sergeyeva v. Russia case, paras. 64–69.
29 ECtHR, Uzbyakov case, paras. 122, 125, 127,130–131.
30 ECtHR, Pedersen v. Norway, para. 68.

ents' applications for review were rejected by the authority and the courts. The child was placed in foster care as a precursor to later adoption. The Norwegian Supreme Court *(Høyesterett),* in the proceedings that had been going on for seven years by that time, placed decisive emphasis on the attachment the child had developed towards his foster parents during the years he had spent with them. The court also emphasised the child's above-average vulnerability, which would have adversely affected his development if he had been separated from his foster parents. Overall, the supreme judicial forum of Norway considered that all of these considerations were more important than the allaged failure of the authorities in facilitating the child's return to his parents.[31] The ECtHR disagreed with these findings, in particular with regard to the fact that the situation was due to the authorities' conduct.[32] Consequently, the ECtHR considered that there had been a violation of Article 8 ECHR.[33]

In Pini and others v. Romania, the Romanian authorities refused to enforce the Romanian court's decision to allow the adoption. The authorities claimed that the children adopted by the Italian couple did not want to leave the private institution in which they had been raised since they were very young and which they considered *de facto* their family and home. Besides learning, the private institution offered the children sport opportunities, artistic activities as well as making many friends. Two of the children, who had reached the age of ten at the time of the proceedings – thus the national law required their consent for adoption – explicitly objected to being placed with persons unknown to them.[34] In examining the application of the pro-

31 ECtHR, Pedersen case, paras. 8–15, 22, 30, 32–36.

32 See also in this respect the ECtHR case of *Omorefe v. Spain*, in which the mother herself applied for temporary care of the child, just like in the Pedersen-case. In its decision, the authority ordering the child's taking into care imposed conditions for the restoration of the mother's custody and informed the mother that if she failed to comply with the conditions within a specified timeframe, the child would be declared adoptable. Given that the mother had failed to comply with the conditions, the court declared the child adoptable. In the ECtHR's view, in the present case the national courts failed to strike this balance when relied almost exclusively on the [presumed] best interests of the child and failed to give serious consideration to the possibility of the child's return to his birth mother and to consider the application of less restrictive measures. - ECtHR, Omorefe v. Spain, paras. 3–6, 46, 52–53, 59.

33 ECtHR, Pedersen case, paras. 68, 72.

34 ECtHR, Pini and others case paras.12–99, 102, 135.

spective adoptive parents, who were Italian nationals, the ECtHR found that, although a family life within the meaning of Article 8 ECHR had been established between the adoptive parents and the children – despite the fact that they did not live together[35] –, the best interests of the child outweighed the adoptive parents' intention to surrender the child for them in order to live together. In its judgment, the ECtHR therefore essentially held that the best interests of the child may – taking all the circumstances of the case into account –, override and prevail over those of the prospective parents. In its judgment, the ECtHR, citing its finding *in the Fretté case*[36] – which will be discussed below –, stressed that "[The purpose of adoption is] providing a child with a family, not a family with a child." In the light of the above facts, as well as the case-law of the ECtHR, and the international and CoE documents[37] the ECtHR found no violation of Article 8 ECHR.[38] However, the Court found that the failure of the Romanian authorities to enforce the final decision of the Romanian courts constituted a violation of Article 6(1) ECHR.[39]

Judge *Loukis Loucaides,* who delivered a partial dissenting opinion against the majority decision, agreed with the majority decision on Article 6(1) ECHR. However, he took the view that the majority decision, by not finding a violation of Article 8 ECHR, effectively assessed the culpable conduct of the Romanian authorities as an exculpatory circumstance. In its view, the lack of a genuine link, which was taken into account by the majority decision as a decisive factor in this regard, was precisely the consequence of the failure of the authorities to allow the applicants and the children intended to be adopted meeting in person. As a consequence of the lengthy procedure, by now there is no real chance for establishing a genuine link. In Judge Loucaides's view, the majority decision in this way runs counter to the principle of "*Nullus commodum capere potest de injuria sua propria*" – i.e. "*No one may gain profit from his own wrongdoing*."[40] In his partially dissenting opinion, Judge *Corneliu Bîrsan,* on the other hand, agrees with the majority

35 In this respect, see the dissenting opinion of Judge Wilhelmina *Thomassen,* cited below, and the case-law cited therein.
36 ECtHR, Fretté case, 26 February 2002, para. 42.
37 See the reference in ECtHR, Pini and Others, para. 139.
38 ECtHR, Pini and others, paras. 136–166.
39 ECtHR, Pini and Others, para. 188.
40 ECtHR, Pini and others, Judge Loukis *Loucaides*, Judge, partial dissenting opinion.

decision on Article 8 ECHR, but in his view, finding a violation of Article 6(1) ECHR is in logical conflict with the majority position on Article 8 ECHR. Bîrsan argues that by finding a violation of Article 6(1), the procedural rights of the complaining parties are guaranteed priority over the interests of the children.[41] The latter finding was also agreed by Judge *Wilhelmina Thomassen* in her dissenting opinion[42], while recalling that, according to ECtHR case-law, the family tie is not created by decision on the adoption, but by actually living together as a family, which was not the case in the present case. Consequently, the majority decision is wrong to hold that a family relationship within the meaning of Article 8 ECHR was created between the applicant parties and the children intended for adoption. It is worth noting here that Judge Thomassen's dissenting opinion is supported, inter alia, by the judgments of the ECtHR in *Marckx v. Belgium*,[43] *K. and T. v. Finland*,[44] and *Eriksson v. Sweden.*[45] In K. and T. v. Finland, the ECtHR held that "[...] the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties."[46] The ECtHR made a similar finding in *Eriksson v. Sweden* when it stated that "[...] the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life."[47] However, the existence of family life is not necessarily conditional on actual cohabitation, where a kinship between a child and a blood relative other than the parent is to be examined, as was stated in the ECtHR in *Bogonosovy v. Russia.*[48] In that case, the ECtHR considered that the national courts when they "automatically" deprived grandparent who had raised the child in his own household for a prolonged period, of the right to see the child after adoption did not give due weight to the right to family life guaranteed by Article 8 ECHR.[49] Finally, with regard to family life,

41 ECtHR, Pini and others, Judge Corneliu *Bîrsan*, partial dissenting opinion.
42 ECtHR, Pini and others, dissenting opinion by Judge Wilhelmina *Thomassen*. Judge *Karel Jungwiert* joined the separate opinion.
43 ECtHR, Marckx v. Belgium, para. 31.
44 ECtHR, K. and T. v. Finland, paras. 150–151.
45 ECtHR, Eriksson v. Sweden, para. 58.
46 ECtHR, Case K. and T., para. 150.
47 ECtHR, Eriksson case, para. 58.
48 ECtHR, Bogonosovy v. Russia, paras. 89, 91, 92, 94, 95.
49 On the family relationship between grandparents and grandchildren, see ECtHR, Kruškić v. Croatia, para. 108.

the ECtHR cases of *Shavdarov v. Bulgaria*[50] and *Mennesson v. France*[51] deserve mention, where the right to respect for family life is essentially characterised by the possibility for the persons concerned to live together as a family in conditions comparable with those of other families as a whole.

Adoption without parental consent

In *Keegan v. Ireland*, the applicant – the father of the child – and the mother of the child once had a civil partnership and a child arising from that partnership. However, the relationship had already broken down during the pregnancy and by the time the child was born, they were no longer living together. The applicant was only allowed to see the child once after her birth, otherwise the mother refused to exercise his right of access to the child. The applicant did not have parental rights as the child was born out of wedlock.[52] Two months after the birth of the child, the mother informed the applicant by letter that she had made the necessary arrangements for the adoption of the child. The applicant then asked to be appointed as the child's guardian and also asked for the child to be placed with him. The *Circuit Court* ruled in favour of the applicant on both his claims. The judgment was upheld by the *High Court.* Following an appeal by the adoptive parents, the *Supreme Court* remitted the case back to the High Court with a guidance it considered appropriate. According to those guidelines, consanguinity is only one of the factors to be taken into account in deciding whether to adopt and is not in itself a decisive factor; under national law, a biological father who is not the legally recognised father of the child does not have an absolute right

50 ECtHR, Shavdarov v. Bulgaria, paras. 40–42.

51 ECtHR, Mennesson v. France, paras. 92, 94.

52 Like in the Keegan case, the violation of the parental rights of the biological father – the applicant – who was not legally recognised was at the centre of Koyshev v. Bulgaria. The Bulgarian law in force did not allow to challenge the parental status of the mother's new partner acquired through the acknowledgement of paternity. The ECtHR held, in relation to the national provision in question, that the discretion guaranteed to the State by Article 8 ECHR may result in the total exclusion of the biological father from the child's life – which is essentially the practical effect of the Bulgarian law – only if it was necessary in order to safeguard the best interests of the child. Given that the national courts in the ECtHR's view had not established the existence of such a fact, it found a violation of Article 8 ECHR. – See ECtHR, Koyshev v. Bulgaria, paras. 4–8, 57, 64–68.

to be appointed as the child's guardian. The High Court approved the adoption taking into account the guidelines. In his application to the *European Commission of Human Rights*[53], the applicant alleged that his right to family and private life under Article 8 ECHR had been violated when his child was adopted without his consent. He also claimed the infringement of his rights guaranteed by Article 6(1) ECHR because he did not have locus standi before the *Adoption Board* (*An Bord Uchtála*).[54] He argued furthermore, that there was a violation of Articles 8 and 14 ECHR read in conjunction with Article 6(1) ECHR, since he was discriminated against a biological father who was married to the child's mother at the time of the child's conception[55]. The Commission declared the application admissible and referred it to the ECtHR, holding that it was not necessary to examine whether there had been a violation of Article 14.[56] The ECtHR took the view, in relation to Article 8 ECHR, that the inadequacy of the assessment made by the national courts in the main case did not cause the violation of rights, and that the interests of the applicant and the child were properly weighed. In the ECtHR's view, the real cause of the violation of rights was that:

> "[...] Irish law permitted the applicant's child to have been placed for adoption shortly after her birth without his knowledge or consent [...] set in motion a process which was likely to prove to be irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child."[57]

In *M.L. v. Norway* the ECtHR examined whether the best interests of the child could be served by removing him from the care of a mother with a mild mental disability and psychological problems, who had led an irresponsible life, and then giving up the child by the authorities for adoption

53 Abolished by the Protocol No 11. (1998) to the ECHR.

54 In this respect, the ECtHR found a violation of Article 6(1) ECHR, albeit not for lack of standing before the Adoption Board, as requested by the complainant, but for lack of standing in the adoption procedure as a whole. In line with the position of the ECtHR, the ECtHR did not consider it necessary to examine whether there had been a violation of Article 14 ECHR.

55 Author's explanatory note.

56 ECtHR, Keegan case, paras. 6–15, 31–32.

57 ECtHR, Keegan, para. 55.

without the mother's consent to the foster parents who had been caring for him for four years. The national authorities and courts have taken into account as a decisive factor the fact that the child, who is likely to have inherited the psychological problems of the mother, becomes stressed and anxious after visits with her mother, even if these visits were rare and short. On the other hand, the presence of the foster parents had a positive effect on her behaviour. In this respect, the child's attachment to the foster parents was also considered as decisive factor, whereas the mother, in the view of the professionals, would be unable to provide this attachment.[58] In its analysis of national procedures, the ECtHR, while referring to its previous case-law, stressed that, unlike provisional measures, in cases of adoption resulting in a complete severance of the blood ties, the public authorities must carry out a more extensive and thorough examination.[59] The ECtHR, referring to the *Pedersen* judgment in paragraph 87, recalled that it is necessary to examine whether the absence of a real family link and the passage of time which makes it impossible to establish that link are attributable to the public authorities or not.[60] According to the ECHR, in the present case, the narrow rights of contact imposed by the authorities had clearly contributed to lack of attachment, since they did not take into account the purpose of the temporary placement, namely to enable the family to reunite on the long run. Thus the State had failed to fulfil its positive obligation under Article 8 ECHR to facilitate reunification and therefore be reached its obligation arising from Article 8 ECHR.[61]

The *V.Y.R. and A.V.R. v. Bulgaria* had a very similar statement of facts with a mother – the first applicant – who was visibly physically and mentally unwell, lacked self-criticism and had 'fantasy notions' about her role as a mother. Furthermore the applicant had substance abuse problems and it happened that she appeared before the social assistance – a non-governmental organisation offering support to parents and children in need – seemingly influenced by alcohol. It was noted that her visits had become 'less frequent' and displayed a 'chaotic' patter. The conclusion of the social assistance's di-

58 ECtHR, M.L., paras. 5–13, 35-36, 39, 44.
59 ECtHR, M.L., para. 89.
60 ECtHR, Pedersen, para. 68.
61 ECtHR, M.L., paras. 93, 97-99.

rector – supported by a psychologist – was that, despite her apparent attachment to her daughter – the second applicant – and her promises, the first applicant was neither capable nor willing to bring about a change in her personal circumstances that led to the premovement of the child from her. – A measure that was ordered on her own request in 2016, until she solves her problems. – In 2018, the director of social assistance ordered placing the second applicant with the foster family and also informed the applicant that a child could be declared eligible for adoption if she does not request the termination of the placement of the child within six months. The first applicant did not appeal for judicial review.[62] In 2019 the director of the social assistance ordered the placement of the second applicant on the Register for adoption on the grounds that the first applicant 'permanently lost interest in the child'. The order was appealed by the first applicant, who never attended the hearings personally. The Sofia City Administrative Court upheld the order, so did the Supreme Administrative Court. The child was adopted in December 2020.[63]

The applicants held that their rights under Article 8 of the Convention was violated, when the authorities had placed the second applicant for adoption against the will of the first applicant, and without having pursued measures towards preserving the family bond between mother and child, and without having assisted the first applicant in improving her parental capacity. The third-party intervener, the Centre for Humane Policy held that there were no proper services providing social and psychological support for parents with substance-abuse problems and that social services were tend to remove a child automatically and too early. As the Centre stated: "pregnancy and motherhood can be a strong motivator in a woman's pathway to recovery."[64]

When assessing the case, the ECtHR carried out the usual test whether the authorities' actions were prescribed by law – as required under Article 8(2) of the ECHR and whether they pursued legitimate aims – namely the 'protection of health and morals' and the 'rights and freedoms' of the

62 ECtHR, V.Y.R. and A.V.R. v. Bulgaria, paras. 6–7., 9–10., 14., 20., 24., 32.
63 ECtHR, V.Y.R. and A.V.R. v. Bulgaria, paras. 30–36.
64 ECtHR, V.Y.R. and A.V.R. v. Bulgaria, paras. 72–73.

second applicant – and answered in the affirmative. The only question remained was that whether the interference was 'necessary in a democratic society' or not. The ECtHR reiterating its earlier case-law, stated that family ties may only be severed in very exceptional circumstances, and that the authorities are obliged to do any reasonable effort to preserve personal relations and, if and when appropriate, to 'rebuild' the family. In the case at hand, the ECtHR found that the authorities acted in accordance with their obligations, it was the first applicant who neglected the child.[65] Thus in the ECtHR's view nothing suggested that "[...] the national authorities can be blamed for the breaking of the family ties and the bond between the applicants, in that they took sufficient steps to assist the first applicant, whenever she was available."[66] On the other hand, the second applicant's best interests required an early-age adoption facilitating her rapid and problem-free adaptation to the new family environment. – Thus, the ECtHR concluded that there has been no violation of Article 8 of the Convention.[67]

In their joint dissenting opinion Judge *Georgios A. Serghides* and *Andreas Zünd* took the view that neither the domestic authorities, nor the majority of the ECtHR's chamber engaged in any genuine proportionality balancing the interference and the applicants' rights under Article 8(1). – In their view such a proportionality test would have moved the tip of the scale towards giving precedence to the interest of the applicants.[68]

The ECtHR, in recent – January 2022 – decision, namely the *D.M. and N. k. Italy* was faced a problem very similar to the one in the above mentioned M.L. k. Norway and V.Y.R. and A.V.R. v. Bulgaria cases in that the mother of the child had serious deficiencies in her personality that adversely affected

65 ECtHR, V.Y.R. and A.V.R. v. Bulgaria, paras. 74–77., 87–90.,

66 ECtHR, V.Y.R. and A.V.R. v. Bulgaria, para. 92.

67 ECtHR, V.Y.R. and A.V.R. v. Bulgaria, para. 95., 101.

68 ECtHR, V.Y.R. and A.V.R. v. Bulgaria, Joint Dissenting Opinion of Judges *Serghides*

And Zünd, para. 4.; See also Judge *Serghides'* paragraph 15 of the dissenting opinion in S.J.P. and E.S. v. Sweden, in which he argues that if the "[...] the limitation completely destroys the *core or essence of a right, without there being exceptionally strong reasons, while, at the same time, there were less restrictive alternative measures available, then one should proceed immediately to find a violation of that right."* – ECtHR, S.J.P. and E.S. v. Sweden (no. 8610/11), 28 August 2018.

her ability to raise the child. However, unlike in the above cases there was a close relationship between the child and the mother, which was interrupted by the authorities by declaring the child adoptable almost immediately after the child was removed from the mother. The ECtHR, recalling its judgment in *Strand Lobben and Others v. Norway,*[69] held that where the best interests of the child and the interests of the parents are in conflict, national authorities and courts must strike a fair balance between those interests. While the interest of the child may take precedence with a view to the circumstances of the case, the severance of family ties can be justified only in exceptional circumstances.[70] On the latter point, the ECtHR noted that, unlike in other previous cases[71], there was no evidence that the parent had abused the child or had committed any act of comparable gravity against the child. On the other hand, the ECtHR considered that the problems affecting the parent could have been overcome with appropriate expert assistance, as noted in the ECtHR's judgment *in Zhou.*[72] – In the light of all these findings, the ECtHR considered that there was no justification for the State authorities to immediately take the most restrictive measure. Accordingly, there has been violation of Article 8 of the ECHR.[73]

In another recent case, the *Abdi Ibrahim v. Norway* the ECtHR summarized the essence of the case as follows:

> "[...] The fact that the applicant [the mother of the child][74] was a Muslim and the intended adoptive parents Christian raised special issues, which were further highlighted by the fact that the latter were active Christians who intended to baptise the adopted child."

In the said case, the ECtHR on the one hand had to face an issue similar to the one addressed in M.L. v. Norway and D.M. and N. K. v. Italy – namely the insuffiencies in the mother's personality and her abilities to raise a child

69 ECtHR, Strand Lobben case, paras. 206–207.
70 ECtHR, Case M.L., para. 74.
71 See the case-law cited in paragraph 81 of the judgment in D.M. and N.
72 ECtHR, Zhou case, para. 58.
73 ECtHR, D.M. and N. case, paras. 74, 78–83, 88–91.
74 Inserted by the author.

and the negative effects of these insuffiencies on the child[75] – on the other hand the mother never contested that the child has a better place at foster parents and would agreed to a so called 'open adoption', which would have been in conformity with the Muslim rules on 'kafala' – introduced in details in the later parts of the chapter – and would have allowed her to keep regular contact with the child. She had one condition, which she emphasized throughout the whole procedure before the domestic authorities: she wanted the child to be brought up in Muslim faith. The underlying problem was that the foster parents chosen by the authorities – in absence of suitable Muslim foster parents – did want a full-adoption and to bring up the child according to their Christian faith even if they more or less considered some of the mother's wishes and paid attention to the child's rights to know about his origin and traditions of their blood ancestors.[76]

Although the domestic legislation on child welfare (*barnevernloven*) stated that due account should be taken of a child's ethnic, religious, cultural and linguistic background when placing the child in foster care, the County Social Welfare Board (*fylkesnemnda for barnevern og sosiale saker*) took the view that – as already mentioned –, the child was by all accounts emotionally damaged.[77] Accordingly – in the authority's view – the primary goal was to find a home which could provide psychological security and a stable life for the child.[78] Based on the documents of the case, the authorities considered Muslim foster parents as well, but they decided that considering all the circumstances of the possible Muslim foster parents, placing the child at them would not serve the above mentioned goal.[79] They finally pick a Christian family.[80] After the applicant's unsuccessfully appeal against the Board's de-

75 As paragraph No. 21 of the majority decision held, the child was emotionally damaged: "[...] who had not developed a secure relationship with his mother, and that he was, at the time, a psychologically vulnerable child with exceptional care needs. The applicant had been provided with considerable help and guidance, but none of it had had any significant effect on her competence as a caregiver. [...] the case clearly involved gross neglect that could be deemed unacceptable by any reasonable standard, regardless of ethnicity, culture and language." – ECtHR, Abdi Ibrahim, para. 21.; See furthermore paras. 23., 47–49.

76 ECtHR, Abdi Ibrahim, paras. 3., 15–19., 27., 30–31., 39., 51–55.

77 ECtHR, Abdi Ibrahim, para. 25.

78 ECtHR, Abdi Ibrahim, para. 23.

79 ECtHR, Abdi Ibrahim, paras. 17–18.

80 ECtHR, Abdi Ibrahim, para. 27.

cision before the District Court, a meeting was held between the applicant and the child welfare services, where the applicant expressed her wishes that the child should neither eat pork nor go to church. Regarding these issues, the child welfare services informed the applicant that while the foster family eats little pork, there is, no guarantee that they will never serve pork for the child. As for attending church, the child welfare services took the view that:

> "[...] it will not be in [the child's] best interests not to allow him to be a part of this. [The child] will follow the foster family's everyday life and, as a result, will go with them to church. [...]. The foster family will not have the right to register him as a member of any denomination without the mother's consent." [81]

It is worth mentioning in this regard that the AIRE Centre – a third-party interviener in the case – raised the Court's attention that in Islamic countries *apostasy* is socially frowned on and in some countries it is even regarded as a crime. In the Centre's view, therefore it is contestable whether it was in the best interests of a Muslim child to be placed with a Christian foster family, to be – in the AIRE Centre's word pick – 'forcibly' converted to Christianity.[82]

The applicant also expressed her opposition to a full-adaption, instead she insisted on an open adoption, more similar to the kafala. An expert witness – a specialist in religious studies – had stated before the High Court that according to rules of Islamic faith, the children of Muslim parents were regarded as Muslims as long as they had not been, for example, baptised. A White Paper from a Government-appointed committee[83]– which the parties invoked – assessing adoption from a cultural and religious perspective stated that while Muslim countries and Muslim schools of law has different views on adoption, they all prohibit breaking the ties with the adoptive child's biological family.[84] Nevertheless, based on international law sources, the High Court took the view that there is, no legal obstacle to the adoption of children from a Muslim background in Norway.[85] When deciding on the

81 ECtHR, Abdi Ibrahim, paras. 27–31.
82 ECtHR, Abdi Ibrahim, para. 127.
83 NOU 2012: 5 Bedre beskyttelse av barns utvikling.
84 ECtHR, Abdi Ibrahim, para. 52.
85 ECtHR, Abdi Ibrahim, para. 53.

issue of adoption and balancing the pros and cons, the authorities took the view:

> "[...] that adoption would be in [the Child's] best interests, in that it would create stability and security for him. Adoption would also be more effective than long-term foster placement in contributing to his recovery at the personality level [...]. [the Child's] rights would be strengthened through adoption and he would gain a stronger identity as a member of a caring family. [...] adoption would place [the Child] on an equal footing with the foster parents' four biological children [...]."[86]

On the other hand the authorities had doubts as to how permanent would be the mother's consent for placing the child at the foster parents that is to say she could have challenged the situation at any time. However, a vulnerable boy such as the child required a stable situation and a calm atmosphere. Therefore the High Court came to the conclusion that there were particularly compelling reasons for authorising the adoption and thus voted to dismiss the applicant's appeal.'[87]

When assessing the case – contrary to the claim of the applicant who relied on the infringement of Article 9[88] and the Article 2[89] of Protocol No. 1[90] of the ECHR – the ECtHR relied on Article 8 of the Convention.[91] As the ECtHR noted in relation to Article 2 of Protocol No. 1 that based on the case-law of the ECtHR, it concerns the obligations of the State in relation to institutionalised education and teaching and that it is *lex specialis* in relation to Article

86 ECtHR, Abdi Ibrahim, paras. 35., 38.,

87 ECtHR, Abdi Ibrahim, para. 56.

88 ECHR Article 9(1): "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."

89 ECHR Protocol No. 1, Article 2: "No person shall be denied the right to 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."

90 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS. No. 9)

91 It is worth mentioning that the government of Turkey – acting as a third-party interviener – also argued that Article 9 was violated. – See: ECtHR, Abdi Ibrahim, paras. 119–123.

9. As for Article 9 of the ECHR, the Court stated that the applicant's claims put forward under the said article may be examined as an integral part of her complaint concerning her right to respect for her family life as guaranteed by Article 8 of the Convention.[92]

When assessing the alleged infringement of Article 8 of the ECHR, the ECtHR came to conclusion that the withdrawal of the applicant's parental responsibility in respect of [the Child] and the authorisation for [the Child's] adoption amounted to an infringement of the applicant's right to respect for family life, as guaranteed by paragraph 1 of Article 8 of the ECHR. The ECtHR saw no reason to question that the measures were prescribed by law and that they pursued a legitimate aim. However, when it came to the assessment whether these measures were necessary in a democratic society, the ECtHR was of the view that the domestic authorities did not perform an effective balancing between the interests of the child and those of his biological mother. Instead, they focused on the potential negative effects of removing the child from his foster parents. In the ECtHR's view, too much weight was given to the foster parents' interests, including their opposition to open adoption compared to the applicant's interest in the possibility of continuing family life with her child through regular contacts.[93] In this regard the fact that the applicant did not apply for the return of the child – only opposed the full adoption – did not relieve the authorities from their general obligation to preserve personal relations it is reasonably feasible and compatible with the child's best interests.[94]

As the majority concluded:[95]

> "Court is not satisfied that in depriving the applicant of her parental responsibility in respect of [the child] and authorising his adoption by the foster parents, the domestic authorities attached sufficient weight to the applicant's right to respect for family life, in particular to the mother and child's mutual inter-

92 ECtHR, Abdi Ibrahim, paras. 134–142.
93 ECtHR, Abdi Ibrahim, para. 151., 153.
94 ECtHR, Abdi Ibrahim, para. 149.
95 The partly dissenting opinions only criticised the amount of compensation awarded. See: the partly dissenting opinion of Judges Paul *Lemmens* and Iulia *Motoc*; and the partly dissenting opinion of Judge Georgios *Serghides*.

> est in maintaining their family ties and personal relations and hence the possibility for them to maintain contact. [...] There has accordingly been a violation of Article 8."[96]

In its October 2023 judgment delivered in the *I.V. v. Estonia* case, the ECtHR had to settle a very complex legal issue with cross-border elements where – in the author's view – the presumption that the Estonian Courts 'should have known' played a decisive role in the ECtHR's assessment.

The applicant was a Latvian national, whose child was born in 2006 in Latvia out of a relationship with the child's mother, which did not long last. Despite the applicant's intentions his parentage was never registered in the birth certificate due to mother's refusal. In 2007 the mother decided not to allow the applicant to meet the child anymore. In the same year the applicant learnt that another man – unknown to him – referred as A.L. acknowledged paternity.[97] The applicant lodged a claim before the Riga District Court (Latvia) to challenge the paternity of the other man. While the DNA test proved the applicant's paternity with some 99% probability, the district court dismissed the applicant's claim on the grounds that the Latvian Civil Code did not grant him the right to contest the paternity established by voluntary acknowledgment.[98] Long lasting legal procedures have started regarding the paternity and the contact rights, which last until February 2021, when the Riga Regional Court – after the Latvian Supreme Court in July 2020 squashed its earlier judgment and remitted the case back – removed the name A.L. from the register and entered the name of the applicant as the father. However only between the birth of the child and 25 April 2018. On that day the child was adopted under Estonian law by the mother's new husband – referred as H.V. – without the applicant's knowledge.[99] The mother informed the Latvian Courts on the fact of the adoption only in May 2018. – In the previous year the mother informed the Latvian courts only about that she had moved to Estonia and married a man, but never mentioned any possible adoption. Based on the mother's 2017 notification, the Latvian Guardianship Institution submitted a judi-

96 ECtHR, Abdi Ibrahim, para. 61.
97 ECtHR, I.V. v. Estonia, paras. 5–7.
98 ECtHR, I.V. v. Estonia, paras. 8–10.
99 ECtHR, I.V. v. Estonia, paras. 21–23.

cial cooperation request to the Harju County Court (Estonia) related to the contact rights limb of the procedures.[100]

As mentioned above the presumption of 'should have known' played a decisive role in the ECtHR's reasoning. This presumption is supported by the fact that – as highlighted by the ECtHR[101] – several documents that either mention that the applicant is the biological father of the child or that A.L. – the man, who acknowledged the child in 2007 and who gave the consent to the mother's new husband for the adoption – is not the biological father. First, the above mentioned request for judicial cooperation referred to the applicant as the biological father of the child. Second, the report prepared by the Estonian Social Security Board recorded the statement A.L. that he was not the biological father. Third, the Tallinn Court of Appeal (Estonia) in its September 2020 expressly refers to the judgment of the Latvian Supreme Court delivered in July 2020 in the procedures aimed challenging A.L.'s paternity.[102]

When assessing the alleged violation of Article 8 of the ECHR, the ECtHR came to the conclusion that it does not appear from the circumstances of the case that the Harju County Court when conducting the adoption proceedings and approving the adoption took into account in any manner that applicant's paternity proceedings were pending in Latvia. Furthermore, consideration of the applicant's possible interests and the balancing of those interests with the child's best interests – as well as with the interests of other parties to the proceedings – seemingly did not form any part of the Harju County Court's reasoning. The ECtHR stated that the domestic authorities' procedure was characterised by a serious lack of diligence in relation to the adoption proceedings.[103] The ECtHR also noted that the Supreme Court of Estonia by way of exception – claiming that it was not in the child's best interest – did not suspend the adoption proceedings, however normally a court should stay the adoption proceedings if it learned that the child's paternity was being challenged in another set of proceedings. In the case at hand however, it was only revealed after the adoption decision had been

100 ECtHR, I.V. v. Estonia, paras. 16–19.
101 ECtHR, I.V. v. Estonia, paras. 96., 99., 101., 103., 112.,
102 ECtHR, I.V. v. Estonia, paras. 17., 24., 29.
103 ECtHR, I.V. v. Estonia, paras. 103., 105–106.

taken that A.L. – the person who had been registered as the child's father and who had consented to the adoption – was not actually the child's biological father. In the view of the Supreme Court of Estonia, the person who had been identified as the child's biological father would not have the right to apply for annulment of the adoption decision domestic law anyway: "[...] it would not be (legally) possible to achieve his objective [the annulment][104] in such proceedings." [105] In the ECtHR's view, the the Supreme Court of Estonia adopted a strict interpretation of the domestic law and the applicant's claim was rejected solely on formal grounds. – Which is contrary to the case-law of the ECtHR. Accordingly, there has been a violation of Article 8 of the ECHR.

Withdrawal of consent to adoption

In ECtHR *Kearns v. France*, the mother of Irish origin – the applicant – gave birth to her child in France in order to remain anonymous by 'birth under X' (*accouchement sous X*), a possibility provided by French law. She also intended to offer the child for adoption. After being duly informed of the legal consequences of the adoption, the applicant consented the child to be adopted. The information was given in the applicant's mother tongue – English – and in the presence of the lawyer representing the applicant. The authorities also informed the applicant on the two-month time limit for withdrawal of consent to the adoption, and the consequences of failure to do so in the given deadline. After five months, as a result of a change in her personal circumstances, the applicant requested the termination of the adoption proceedings, which were already in progress, and asked the authorities to return the child.[106] The ECtHR found that the French authorities' refusal of the mother's application for return was in the best interests of the child, which – in the authorities view – was to establish stable relations within the new family. The ECtHR took the view that the two-month time-limit for withdrawal of consent was in conformity with the margin of appreciation granted to Member States by the ECHR. It also found that the applicant was

104 Inserted by the author.
105 ECtHR, I.V. v. Estonia, paras. 33.
106 ECtHR, Kearns, paras, 7–27.

aware of the consequences of her decision on the basis of the information provided by the French authorities. In this respect the ECtHR did not accept the applicant's claim that she was in a state of confusion and vulnerability following the birth. Thus, in the Court's view there was no violation of Article 8 ECHR[107] or of the other articles relied on by the applicant.[108]

In the case of *Naltakyan v. Russia*, the applicant's wife, having given birth to her child prematurely on the alleged advice of doctors that the child was non-viable, waived her parental rights. She signed the waiver in her husband's name, without his knowledge, forging his signature. According to the applicant's wife, the applicant was told that the child, although born alive, died shortly afterwards. A year and a half later, the authorities informed the applicant that the child, whose parental rights had been relinquished, had been formally declared adoptable. At the request of the applicant, the national courts, taking into account that the documents were falsified and that this fact was acknowledged by the authorities as well, stopped the adoption procedure of the child, which was pending at that time, given that the child's biological father had not given his valid consent to the adoption.[109] The national courts hearing the case had to balance three interests: the interests of the child, the interests of the child's birth parents – who had now jointly applied for the registration of parental rights over the child – and the interests of the adoptive parents, who had initiated the adoption procedure in good faith and had been fostering the child for almost one and a half years. Whilst the trial court acknowledged the applicant's wife's argument that she was vulnerable and easily influenced after giving birth, the Court of Appeal took the view that the applicants' lack of interest in the child's fate, including the fact that the husband's acquiescence in the explanation of the child's death and had not taken any steps to clarify the circumstances, should be weighed against the biological parents. Taking also into account the fact that the child had been living with the foster parents for a year and a half by that time, the national courts considered that it would be contrary to the best interests of the child to be placed with his biological parents. The ECtHR found, on the

107 ECtHR, Kearns, paras, 50, 77-81, 85–87.

108 The applicant also invoked a violation of Articles 6(1) and 14 ECHR. The ECtHR concluded non-violation. – ECtHR, Kearns, paras. 93–94, 99–102.

109 ECtHR, Naltakyan, paras. 7–32.

one hand, that there was no evidence that the child's mother had been properly informed of the consequences of the adoption – for example, the doctor heard in the case denied that any formal discussion had taken place – and, on the other hand, that the evidence adduced by the national courts was insufficient. Furthermore, as in the *Uzbyakov case* described above, the national courts did not take into account the less restrictive measures available *in lieu* of adoption, nor the fact that the child had blood parents who were able and willing to care for him and who were not unfit to care for him. Taking into account all the circumstances of the case, the ECtHR found a violation of Article 8 ECHR. [110]

The adopted children's rights to know about their origin versus the parent's right to remain anonymus

In the *Mitrevska v. North Macedonia* case, the applicant had been adopted as a child under a 'full adoption' procedure that is her biological parents remained unknown for her. As an adult, she requested information about her adoption from the *Skopje Social Care Centre* for medial reasons, namely she wanted to know if she had a hereditary disease. The Centre denied the request claiming that based on the domestic regulations information on completed adoptions was an official secret, which made it impossible to share any information concerning them.[111]

The ECtHR having regarded its case-law[112] according to which to know one's parentage falls within the scope of private life, decided to examine the case through the 'private life limb' of Article 8.[113] As the ECtHR highlighted: "[...] the access of adopted children to information concerning their biological origins is a sensitive moral and ethical issue that involves striking a balance between private and public interests."[114] Having regarded this fact and that there were no consensus among Member States, the margin grant-

110 ECtHR, Naltakyan, paras. 73, 78–80, 182–184, 192–194, 204.
111 ECtHR, Mitrevska, paras. 5-9.
112 ECtHR, Boljević, para. 28.; ECtHR, Gauvin-Fournis and Silliau, para. 109.
113 ECtHR, Mitrevska, paras. 38–41.
114 ECtHR, Mitrevska, para. 52.

ed for the Member States are wider. In accordance with its well-established case-law, the ECtHR stated the State authorities are, in principle, in a better position than the ECtHR to decide on the necessity of a restriction such as in the case at hand.[115]

The ECtHR listed the interests to be weighed against each other[116] by finding that the expression 'everyone' in Article 8 of the ECHR applies to both the child and the parent in an adoption case. While the child has a right to know his or her origins – a right being derived from the notion of private life – based on the Court's case-law[117] the mother's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions could not be denied. Also, general interest at stake may play a role in deciding the case, since domestic authorities may seek, for example, to protect the mother's and the child's health during pregnancy and birth or avoid illegal abortions or child abandonment. The ECtHR, when assessing the Mitrevska case, came to the conclusion that the domestic authorities merely relied on Section 123a of the Family Act – which provided for the secrecy of information concerning completed adoptions and did not provide for an exception on medical grounds to the rule that information concerning the adoption is secret – and that were no information available as to whether and how the legislative authorities balanced the competing interests at stake.[118] – Thus, the domestic authorities failed to strike a balance between the competing interests at stake and overstepped the margin of appreciation afforded to them. There has accordingly been a violation of Article 8 of the Convention.[119]

Intermediate conclusion

The ECtHR case-law on adoption weighs the best interests of the child, which, taking into account all the circumstances of the case, may take precedence over the birth parent's right to family and private life and may justify

115 ECtHR, Mitrevska, para. 47.
116 ECtHR, Mitrevska, para. 46.
117 ECtHR, Godelli, paras. 50–51.
118 ECtHR, Mitrevska, paras. 53–55.
119 ECtHR, Mitrevska, paras. 58–59.

the authorities' dissolution of the family based on consanguinity. However, in accordance with the well-established case-law of the ECtHR, the best interests of the child alone cannot be regarded as a decisive factor that unconditionally overrides any other interests. According to ECtHR's case-law, the termination of a kinship relationship with a blood parent is an *ultima ratio* measure which can only be applied where there are particularly compelling reasons. Before applying it, the national court must carefully consider whether there are other less restrictive measures, including temporary placement of the child. In the latter case, regarding its temporary nature and the urgency of the circumstances requiring it, the State has a wider discretion, which implies that the assessment need not be as thorough as in the case of a decision to terminate a family relationship. At the same time, however, the State has a positive obligation, when taking its measures, to make every effort to reunite the family. – As will be explained in the section on the termination of adoption, all these considerations also apply to the termination of adoption by the authorities, since a family relation created by adoption is identical both legally and by its nature to a parent-child kinship based on descent.

1.2.3. The 'right' to adoption – or rather the lack of it – especially for same-sex couples

„[...] *the right to adopt was not included as such among the rights guaranteed by the Convention*"[120]

Introductory thoughts on the right to adoption

As introductory notes to this issue it is worth reiterating some generally applicable principles from the case-law of the ECtHR.[121] As a starting point, the ECtHR does not perceive that its task include the review of the relevant legislation or practice in the abstract, that is the ECtHR does not wish to

120 ECtHR, Fretté, para. 29.
121 ECtHR, K.K. and Others, paras. 44-47. and the case-law cited there.

substitute itself for the competent national authorities in determining how complex and sensitive matters like the relationship between the intended parents and a child should be regulated, be this relationship based on adoption or surrogacy. In line with this, the States must in principle be afforded a wide margin of appreciation regarding matters which raise – in the ECtHR's below detailed case-law: "delicate moral and ethical questions on which there is no consensus at European level." Furthermore, the Contracting Parties, in accordance with the principle of subsidiarity – which is expressis verbis mentioned in the Preamble of the Convention in accordance with Protocol No. 15[122] –, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto. In doing so, the domestic authorities enjoy a margin of appreciation – since due to their democratic legitimation, the national authorities are in principle better placed than an international court to evaluate local needs and conditions –, however they are scrutinised by the ECtHR.

Justification of the age limit

In *Schwizgebel k. Switzerland* the ECtHR concluded that the Swiss authorities which rejected the application for adoption of a single woman who was 47 years old at the time of the application, had acted without prejudice to the principle of proportionality and within the margin of appreciation accorded to the State under the Convention, in order to protect the best interests of the child and therefore their acts were in accordance with the ECHR. Based on the facts of the case,[123] the applicant had already adopted another child four years earlier, when she was 43 years old. The applicant argued that the decision of the national authorities, based primarily on the argument that she would not be able to care for the child adequately because of her age, amounted to unequal treatment within the meaning of Article 14 ECHR read in conjunction with Article 8 ECHR, especially in comparison with women who are biologically capable of giving birth to their child at a similar age.

122 ECtHR Press Release, Protocol No. 15 to the European Convention on Human Rights enters into force. (ECHR 242,01.08.2021)

123 ECtHR, Schwizgebel, paras. 4–20.

On the latter issue, the ECtHR agreed with the Government that the State has no influence on whether a woman is able to give birth to a child or not. However, on the first argument – that she was discriminated against on the grounds of her age – the ECtHR agreed with the applicant and held that a more thorough examination was necessary to establish whether the applicant had indeed suffered discrimination within and contrary to the meaning of the Convention. In this regard, the ECtHR, referring to its case-law[124], recalled that different treatment is not in itself contrary to Article 14 ECHR, it is contrary to the Convention only if it is not based on objective and reasonable grounds. The States Parties to the ECHR have a certain margin of appreciation as to which of the latter two conditions are met and are capable of justifying differences of treatment between persons in the same situation, bearing in mind also that there is no consensus among the members of the Council of Europe on this issue. In the light of all the circumstances of the case, the ECtHR considered that the Swiss authorities and courts had acted within their margin of appreciation, taking into account all the circumstances of the case, including the fact that the applicant's family members could not be expected to provide any substantial assistance and that, sooner or later, the care of his elderly father would fall to her. Thus the ECtHR took the view that there has not been a violation of Article 14 ECHR read in conjunction with Article 8 ECHR.[125]

The right to adoption for single persons - including the right to adoption for single homosexual persons

In the ECtHR case of *Wagner and J.M.W.L. v. Luxembourg,* a single woman applied to the District Court of Luxembourg *(Tribunal d'arrondissement)* for a declaration of enforceability of a judgment of a *Peruvian* court allowing the full adoption of a three-year-old girl. The court rejected the application on the ground that Article 367 of the Luxembourg Civil Code *(Code civil luxembourgeois)* does not allow a single person to adopt a child by full adoption. Instead, the possibility of a simple adoption was provided for them, which

124 ECtHR, Schwizgebel, paras. 76–81 and the case law cited therein.
125 ECtHR, Schwizgebel, paras, 76–99.

the applicant had requested as a minimum safeguard after her application for full adoption had been rejected. The national court approved the simple adoption.[126] The ECtHR declared the case admissible for the purposes of Article 8 ECHR, given that a family relationship clearly existed between the applicant parties, as described in paragraph 31 of the *Marckx-case*. In considering the merits of the case, the ECtHR pointed out, first, that it was not necessary in the present case to decide whether the applicant had a right to adoption, given that the Peruvian court had already decided on that point. Second, the ECtHR held that the applicant was faced obstacles in her daily family life due to the failure of the Luxembourg authorities to register the full adoption of the child. Although the decision to refuse was prescribed by law and pursued a legitimate interest, the ECtHR was not convinced that the measures were indeed necessary in a democratic society, particularly in view of the fact that – as it stood at the time – no such restriction was in force in the majority of the Member States of the CoE. Furthermore, all the circumstances of the case make it clear that in the past similar requests had been registered by the Luxembourg authorities without any reference to a prohibition in national law, and that the applicant could reasonably have expected that the same would happen in their case. There was a sudden change in the previous jurisprudence of the state authorities, in respect of which the ECtHR found unconvincing the State's argument that the restriction of the right to adoption – and the national provision, which the state started to enforce only recently – namely that the link between the child and the biological family should not be severed immediately was in the best interest of the child. In this respect, the ECtHR recalled that in the present case the child became adoptable because his birth parents abandoned him.[127] The ECtHR then went on to examine the question of a violation of Article 14 ECHR read in conjunction with Article 8 ECHR, which it found to be well founded, in particular in relation to the second applicant, the child, who, because of a change in the practice of the authorities, was unjustifiably discriminated against in comparison with children whose full adoption had been authorised by the authorities. This disadvantage manifested itself,

126 ECtHR, Wagner, paras. 5–39.
127 ECtHR, Wagner, paras. 123–134.

inter alia, in the fact that the child was not granted citizenship and the EU citizenship that goes with it, and consequently was deprived of the benefits of EU citizenship.[128] – In view of this, the ECtHR also found a violation of Article 14 read in conjunction with Article 8 ECHR. [129]

In the *Fretté v. France* and *E.B. v. France* cases, the ECtHR considered whether Article 8 ECHR, read in conjunction with Article 14 ECHR, precluded the refusal of an application for adoption by a homosexual person who would raise the child alone, without a parent of the opposite sex? In the two cases, which were decided only six years apart, the ECtHR has handed down completely contradictory decisions. Both cases were decided by close margins: in the *Fretté-case,* the Chamber decided by a 4:3 margin, while in the *E.B. v. France case,* the Grand Chamber decided by a 10:7 margin. The judges who did not support the majority decision issued characteristic dissenting opinions in both cases.

In the *Fretté-case,* a single man applied for a preliminary authorisation for adoption. The assessment of suitability for adoption included an interview with a psychologist, where the applicant disclosed that he was homosexual by answering the professional's questions in an honest way. The professional advised him to withdraw his application. Both the professionals interviewed during the administrative and judicial procedure both the reasoning of the decisions taken on the basis of these interviews regularly referred – sometimes implicitly and sometimes explicitly –, to the applicant's sexual orientation, most often using the term 'choice of lifestyle'. In his submission, one of the experts recalled that, according to the case-law of the French courts, the homosexuality of the parent is a decisive factor in custody cases as it is considered as a threat to the child's well-being and moral development.[130] In its 2 February 1993 report, the *Paris Social Services Department* raised the question "[...] whether his particular circumstances as a single homosexual man allow him to be entrusted with a child." The authorities and courts in

128 ECtHR, Wagner, paras. 155–160.

129 The case also found a violation of Article 6(1) ECHR, as the national authorities failed to examine the complainant's submissions alleging a violation of Article 8 ECHR, which formed part of the merits of the complainant's pleadings. – See ECtHR, Wagner, paras. 89–98.

130 ECtHR, Fretté, paras. 9–16.

the case, with the exception of the Administrative Court of Paris (*Tribunal administratif de Paris*), have given decisive weight to the homosexual sexual orientation of the applicant, as opposed to the positive tone hit by the above mentioned report of Paris Social Services Department, which inter alia stated that: "Mr Fretté has undoubted personal qualities which make him suitable to take care of the child.'"[131] In the applicant's view, the French authorities and courts in the case thus violated Article 14 ECHR read in conjunction with Article 8 ECHR. The applicant also invoked a violation of Article 6(1) of the Convention, since the French procedural rules did not allow him in practice[132] to attend and respond to the proceedings of the Council of State (*Conseil d'État*). While the ECtHR unanimously found a violation of the ECHR in relation to Article 6(1) ECHR, the Court ruled with a 4:3 majority that there was no violation of Article 8 of the ECHR. The majority decision of the ECtHR recalled that the right to adoption cannot be derived from Article 8 ECHR, that is, no State party to the Convention is obliged to guarantee the right to adoption to unmarried persons. However, where a State decides to go beyond the scope of the Convention in order to guarantee a right – as the French State in the present case –, which also allows unmarried persons to adopt, it must, as a general rule, guarantee that right without discrimination. In case failing to do so, the State must provide objective reasons for the difference in treatment. In the present case, the majority of the ECtHR judges considered that, in the light of all the circumstances of the case, the distinction was objectively justified.[133] As the ECtHR reiterated, "[*the purpose of adoption is] providing a child with a family, not a family with a child*."[134] When granting an adoption, national courts must weigh the interest of the person seeking to adopt against the best interest of the child to be adopted and must place particular emphasis on the latter. The majority took the view that in the present case, the national authorities have examined all the cir-

131 ECtHR, Fretté, para. 10.

132 Although the rules require the notice of hearing to be posted at the Secretariat of the Council of State at least four days before the hearing, the ECtHR has held that a person in a similar situation to the applicant cannot be expected to take regular visits at the Registry. The ECtHR noticed that the applicant party telephoned the secretariat regularly to ask for the date of the hearing, but never received a reply. – ECtHR, Fretté, paras. 49–51.

133 ECtHR, Fretté, paras. 38–41.

134 ECtHR, Fretté, para. 42.

cumstances of the case with due care and have taken account of the fact that there is no consensus among psychological experts as to the possible effects on the child's personal development of being brought up by one or two homosexual persons.[135] Thus, the majority found that, there has been no violation of Article 14 ECHR read in conjunction with Article 8 ECHR.

Judge *Jean-Paul Costa,* attached a concurring opinion. Judges *Karel Jungwiert and Kristaq Traja,* joined to Costa's concurring opinion. Judge Costa argued that paragraph 32 of the majority decision, which finds Article 14 ECHR taken in conjunction with Article 8 applicable, is unconvincing, since it expressly refers to a 'right' guaranteed to the applicant under French law. However, it only states that adoption may be applied for. In his view the majority thus confused the right to adopt with the right to apply for adoption. As Costa writes, to guarantee the latter would mean that the applicant would actually have the right to obtain permission for adoption excluding discretion of the authorities.[136] This 'right' is not guaranteed neither by French law nor by Article 8 ECHR. Consequently, in Judge Costa's view, it would have been simpler to dismiss the application as inadmissible in the context of a breach of Article 14 read in conjunction with Article 8 ECHR than first admit the application just to find no breach in relation to the very same articles.[137] Judges *Sir Nicolas Dušan Bratza, Wili Fuhrmann and Françoise Tulkens,* in their joint partial dissenting opinion, took the view that there was a violation of Article 14 ECHR read in conjunction with Article 8 ECHR. In their view, the French authorities and courts had given decisive weight to the applicant's homosexuality and, in particular, the Council of State had taken into account only the technical arguments against the applicant. For the dissenting judges, it was clear from all the circumstances of the case that if the applicant had concealed his gender identity, the authorities would most probably have granted him adoption.[138] – This foreshadows the so-called *'contamination theory'*[139] which was a characteristic part of the majority decision in the *E.B. v. France* six years later and which re-

135 ECtHR, Fretté, paras. 42–43.
136 Interpretative note by the author.
137 ECtHR, Fretté, Jean-Paul Costa's partially concurring opinion. Joined by Karel *Jungwiert* and Kristaq *Traja*, Judges, paras. 1–2.
138 ECtHR, Fretté, Joint Separate Opinion of Judges Sir Nicolas Dušan *Bratza*, Wili *Fuhrmann* and Françoise *Tulkens,* para 2, subparas 'a' and 'b'.
139 ECtHR, E.B., para. 80.; See also: Bainham, 2008, pp. 479–481.

ceived heavy criticism in the dissenting opinions to the judgment.

In the ECtHR case of *E.B. v. France* the applicant was in a civil partnership with another woman at the time of the application. At the same time, however, she applied to the French authorities for adoption on her own, without the support of her same-sex partner. On the facts of the main case, the experts' opinions, in addition to highlighting the applicant's personal qualities which make her suitable to raise the child, placed a striking emphasis on her sexual orientation,[140] in the words of one of the experts: "[Her] unusual attitude towards men in that men are rejected". Likewise, the administrative court cited the applicant's 'choice of lifestyle'[141] as an acceptable ground for refusal. The Council of State upheld the lower courts' decision.[142] In considering the merits of the case, the ECtHR recalled that Article 8 ECHR and the ECtHR case-law interpreting it do not guarantee the right to adoption.[143] Nor do the relevant national rules and international conventions guarantee a similar right.[144] However, on the facts of the present case, the ECtHR held that the French legislature, which went beyond its obligations under Article 8 ECHR by allowing single persons the right to adopt, could not make the exercise of that right subject to a condition contrary to the prohibition of discrimination laid down in Article 14 ECHR.[145] The ECtHR considered that, based on the facts of the case, the sexual orientation of the applicant played a decisive role in the rejection of his application: as the ECtHR stated in paragpraph 80 of the majority decision it 'contaminated' the deliberation process of the national authorities and courts, which is supported by the quotations from documents of the domestic proceedings, cited above. Furthermore, the ECtHR refuted the argument of the national authorities and courts that, without the support of the partner – i.e. the applicant's partner did not support the applicant's adoption –, the child would have been deprived of the 'father figure' in his life, given that in the case of a single heterosexual woman this is not an

140 ECtHR, E.B., para. 13.
141 ECtHR, E.B., para. 25.
142 ECtHR, E.B., paras. 7–25.
143 Council of Europe: Guide on Article 8 of the European Convention on Human Rights.
144 ECtHR, E.B., paras. 41–42.
145 ECtHR, E.B., paras. 49.

obstacle to the authorisation of adoption.[146] In the light of the above, the Grand Chamber of the ECtHR found the breach of Article 8 ECHR in connection with Article 14 ECHR.[147]

However, the decision was far from unanimous, as indicated by the 10:7 vote and the four dissenting opinions both individual and joint. The common feature of the dissents is that they all reject the so-called 'contamination theory' as a decisive factor in the majority decision. In his dissenting opinion, Judge *Boštjan M. Zupančič,* referring to the case-law of the ECtHR, explained that Article 8 ECHR does not guarantee the right to adoption, only the right to apply for adoption, and that consequently violation of Article 8 ECHR cannot be called into question.[148] A similar position was taken in her dissenting opinion by Judge *Antonella Mularoni*, who, however, in the light of recent ECtHR case-law, considered that the Court should have considered holding that Article 8 ECHR guarantees the right to initiate adoption proceedings to all.[149] *Jean-Paul Costa,* in his dissenting opinion – joined by *Judges Rıza Türmen, Mindia Ugrekhelidze and Danutė Jočienė* –, took the view that the lack of a supportive attitude on the part of the applicant's partner was an essential circumstance of the case which the national authorities were entitled to assess, within the margin of appreciation open to them, as being contrary to the best interests of the child. According to Judge *Costa*, the majority decision in the present case should have rejected the violation of Article 14 ECHR, read in conjunction with Article 8 ECHR, while declaring in principle that if, in a case which might be heard later, sexual orientation was the determining ground for refusing an adoption application, it would be contrary to the Convention.[150] The most characteristic dissenting opinion was delivered by Judge *Loukis Loucaides.* According to Loucaides, the rights guaranteed by the Convention – in this case, the prohibition of discrimination – cannot be invoked as a means of exempting a person or a group of persons from rules that otherwise apply to everyone. [151]

146 ECtHR, E.B., paras, 38, 71, 73, 75, 76, 78, 79, 84–86, 88, 90, 93–96.
147 ECtHR, E.B., paras, 97–98.
148 ECtHR, E.B., dissenting opinion of Judge Boštjan M. Zupančič (no paragraphs).
149 ECtHR, E.B., dissenting opinion of Judge Antonella Mularoni.
150 ECtHR, *Jean-Paul Costa,* dissenting opinion. The dissenting opinion was joined by Judges Rıza Türmen, Mindia *Ugrekhelidze* and Danutė *Jočienė,* paras. 6, 8.
151 ECtHR, ECtHR, E.B., dissenting opinion of Judge Loukis *Loucaides.*

The right of same-sex couples to adopt

In the *Gas and Dubois v. France* judgment, the ECtHR concluded that the ECHR does not require a state to allow the simple adoption of the biological mother's child by same-sex partner of the mother. The facts of the case were that the first applicant had been cohabitating with the second applicant since 1989. On 21 September 2000, the second applicant gave birth to her daughter 'A.', who was conceived by artificial insemination from an anonymous donor. From the birth of the child, she lived in the applicants' shared home. The two applicants entered into a civil partnership, which was registered on 15 April 2002. The first applicant applied for a simple adoption in respect of her partner's daughter after her partner had given her consent, certified by a notary. The public prosecutor lodged an objection against the first applicant's application, arguing that, if the adoption was granted, all parental rights of custody under Article 365 of the *French Civil Code*[152]would be vested in the adoptive parent, unless the adoptive parent is the spouse of the parent of the adopted child. As the prosecutor argued, the termination of the kinship relationship between the biological parent and the child is clearly contrary to the best interests of the child. The court of first instance dismissed the application on adoption in accordance with the prosecutor's request. The judgment was upheld by the Court of Appeal and the highest judicial body of France, the Court of Cassation (*Cour de cassation*). In examining the circumstances of the case, the ECtHR analysed the decisions of the Court of Cassation[153] and the Council of State[154] on similar issues. The Council of State pointed out that the right to family life guaranteed by the Constitution does not guarantee the right to establish a legal relationship –

152 "All rights associated with parental responsibility shall be vested in the adoptive parent alone, including the right to consent to the marriage of the adoptee, unless the adoptive parent is married to the adoptee's mother or father. In this case, the adoptive parent and his or her spouse shall have joint parental responsibility, but the spouse shall continue to exercise it alone unless the couple make a joint declaration before the senior registrar of the *tribunal de grande instance to the effect that parental responsibility is to be exercised jointly [...]*" – ECtHR, Gas and Dubois, para. 19.

153 French Court of Cassation, Case No. 70 and 71; French Court of Cassation, Case No. 392.

154 French Constitutional Council, No. 2010–39.

based on adoption – between a child and the parent's partner. In the view of the Council of State "[...] the legislature had deliberately chosen to confine the option of simple adoption to married couples and that it was not its task to substitute its own assessment for that of the legislature."[155] The applicant parties claimed that they had suffered discrimination on the basis of sexual orientation, since the possibility for a different sex couple to marry and benefit from the right guaranteed by Article 365 of the Civil Code is open at anytime. The ECtHR held, however, that there was no discrimination contrary to Article 14 ECHR, given that the applicants were not in a comparable situation to married couples, since "[...] marriage confers a special status on those who enter into it."[156] As it was pointed out by the ECtHR in *Schalk and Kopf v. Austria* judgment, the State, acting in its discretion, is free to decide to whom it grants this right: Article 12 ECHR, read alone or in conjunction with Articles 8 or 14 ECHR, does not impose any obligation on States Parties in this respect. As explained by paragraph 55 of the said decision:

> "The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex."[157]

The ECtHR considered the applicants' situation to be comparable to that of unmarried heterosexual couples. In this respect, the ECtHR reasoned that under the French law in force at the time the case was tried, an application by a different-sex couple under the same facts would have been rejected in the same way if they were not married.[158] It is worth recalling here the EC-

155 ECtHR, Gas and Dubois, paras. 9-19, 27–31.
156 ECtHR, Gas and Dubois, para. 68.
157 ECtHR, Schalk and Kopf, para. 55.
158 ECtHR, Gas and Dubois, paras. 63–70.

tHR's findings four years later in the case of *Taddeucci and McCall v. Italy*, which dealt the family reunion of same-sex couples. – Otherwise, the case did not deal with the issue of adoption. – In the Taddeucci-case – contrary to its findings in the *Gas and Dubois* –, the Court held that unmarried same-sex couples were not in a comparable legal situation to unmarried opposite-sex couples, since at the time when the facts of the *Taddeucci-case* arose, same-sex couples was allowed neither entering a registered partnership nor marrying.[159] – By the time the ECtHR judgment was delivered, the law implementing the judgment in *Oliari and Others v. Italy*[160] had already entered into force, introducing the institution of registered partnerships *(Unioni Civili).*[161]

In ECtHR *X and Others v. Austria,* the first and third applicants were members of a same-sex couple who, at the time of the application, had been jointly raising the third applicant's child, the second applicant, for seven years, since the child was five years old. The father of the child acknowledged paternity and, although custody was exercised by the child's mother, the files of the case showed that the father maintained contact with the child and paid the maintenance regurarly. The first and third applicants agreed that the former would adopt the latter's biological child. Given that the wording of § 182(2) of the Austrian Civil Code *(Allgemeines Bürgerliches Gesetzbuch)*[162] in force at the time could have been interpreted as effectively excluding couples in a same-sex relationship from the possibility of adopting a stepchild, since in their case – unlike with heterosexual couples –, the relationship with both biological parents is necessarily broken the applicants applied to the Constitutional Court *(Verfassungsgerichtshof, VfGH)* to declare the provision unconstitutional. The Constitutional Court dismissed the application on the grounds that it was for the district court to answer the question. Accordingly, the applicants applied to the district court for approval of the adoption, which was rejected. The district court's decision was upheld by the regional court and the Federal Supreme Court *(Oberster Gerichtshof).* In its judgment, the ECtHR sets out exhaustively the decisions of the national courts, analys-

159 ECtHR, Taddeucci, paras. 82–83.
160 ECtHR, Oliari and others case
161 Legge 20 maggio 2016, n. 76 recante
162 Since 1 August 2013, same-sex couples have also been guaranteed the possibility of stepchild adoption (BGBl I 2013/179).

ing them and concluding that:

> "[...] the legal impossibility of the adoption requested by the applicants was consistently at the centre of the domestic courts' considerations. [...] Indeed, this fact prevented the domestic courts from examining in any meaningful manner whether the adoption was in the second applicant's interests as required by Article 180a of the Civil Code. Consequently, they did not investigate the circumstances of the case in detail."[163]

The national authorities have therefore carried out an essentially formal investigation. In examining the case, the ECtHR, referring to its findings in *Gas and Dubois*, according to which marriage confers a special legal status on the persons who enter into it – a special status which the Contracting Parties to the Convention are not obliged to confer on same-sex couples – held that the applicants' situation should be compared to that of unmarried opposite-sex couples instead of same-sex couples living in wedlock.[164] The ECtHR then examined whether discrimination had occurred, to which it replied in the affirmative, taking into account that, under Austrian law and the circumstances of the case, a different-sex couple would not have been refused an application for adoption by the authorities.[165] Consequently, the next point to be examined was whether the distinction served a legitimate purpose and was proportionate. In this respect, the ECtHR, referring to its finding in *E.B. v. France*, recalled that "[The] State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14."[166] The national courts have cited the protection of the 'traditional family'[167] as the reason for the distinction, based on the implicit presumption that only parents of different sexes are able to provide adequately for the needs of the child. Similarly, the ECtHR has previously held in its case-law[168], that the protec-

163 ECtHR, X and Others, paras. 120, 123–124.
164 ECtHR, X and Others, paras. 105–112.
165 ECtHR, X and Others, paras. 113–131, see particularly para. 125.
166 ECtHR, E.B., para. 49.; ECtHR, X and Others, para 135.
167 For a detailed analysis on the Central-Eastern European notion of traditional family, please see: Barzó, 2021, pp. 287–322.
168 ECtHR, Karner v. Austria, para. 40.; ECtHR, Kozak v. Poland, para. 98.

tion of the traditional family is an overriding and legitimate reason that can justify differential treatment. The protection of the best interests of the child can also be considered as a legitimate aim justifying differential treatment. Consequently, the only remaining aspect to be examined is whether the principle of proportionality has been respected. [169] In this regard, it is for the government to justify that the protection of the family in the traditional sense and, more specifically, the best interests of the child, requires a prohibition on the adoption of stepchildren by same-sex couples.[170] Taking into account the circumstances of the case, in particular the fact that the domestic courts were not able to examine in sufficient detail whether the adoption applied for was in the best interests of the second applicant, since it was legally impossible for them to do so – in fact, authorities were only allowed to carry out a purely formal examination – the ECtHR held that there has been a violation of Article 14 ECHR in conjunction with Article 8 ECHR.[171]

The seven judges who attached a partially dissenting opinion to the majority decision argued that the majority decision, while criticising the domestic courts' assessment for not focusing on the best interests of the child, had itself overlooked the most important issue in the case, namely why it would be in the best interests of the child to sever the relationship with the biological father and replace the mother with a partner. While the dissenting judges acknowledged the importance of the principle articulated in the *Fretté-case* of the ECtHR, namely that "[The purpose of adoption is] providing a child with a family, not a family with a child", they also emphasised the importance of the fact that in the case at hand the child was attached to his father, who, in addition to visits, also supported the child's development by paying the maintenance fee. The child therefore already had a family, which is not altered by the fact that the mother and father were separated. In the light of these considerations, it is clear that the child's best interests

169 ECtHR, X and Others, paras. 138–153.

170 In this respect, the ECtHR noted that the Government has not provided any scientific evidence that a same-sex couple is unable to provide adequately for the needs of the child. Moreover, by allowing homosexual persons in a registered partnership to adopt on their own – provided that their registered partner consents – the legislature practically recognised that a child could grow up in a same-sex couple family without this being to the detriment of the child. – See in particular ECtHR X and Others, paragraphs 142 and 144.

171 ECtHR, X and Others, para. 152.

would not have been served by severing the family relationship with his father.[172] The dissenting judges alleged furthermore that the majority decision did not take into account the father's right to private and family life under Article 8 ECHR, which could be restricted only if the father had seriously breached his parental obligations. However, the facts of the case did not indicate such thing. [173]

The issue of surrogacy

The ECtHR's recent case-law on surrogacy – including its first advisory opinion – deserves to be highlighted, as in the absence of consensus at European level[174]. The ECtHR has to face a hard task, namely striking the fair balance between the best interests of the child and the state legislature's chosen approach to public interest regarding surrogacy, since – quoting the partly dissenting opinion of Judge *María Elósegui* in *D.B. and others v. Switzerland*[175] – its commercial form inherently: "Leads to the commercial exploitation of women [and the] child [...] being degraded to the status of a commodity that can be ordered from third parties."[176]

In its judgment of 2017 delivered in *Paradiso and Campanelli v. Italy*, the Grand Chamber of the ECtHR held by 11:6 – with a characteristic – joint dissenting opinion of six judges, that neither the private life nor the family life limbs of Article 8 of the ECHR had been violated, when the Italian authorities had taken a child from a couple following what the authorities considered to be an illegal foreign adoption procedure including surrogacy. The couple, who had no natural or medically assisted child, applied to become adoptive parents following unsuccessful attempts. In 2006, the

172 ECtHR, X and Others, Joint partly dissenting opinion of Josep *Casadevall*, Ineta *Ziemele*, Anatoly *Kovler*, Danutė *Jočienė*, Ján Šikuta, Vincent A. *De Gaetano*, Linos-Alexandre *Sicilianos*, Judges, paras. 2, 8.

173 ECtHR, X and Others, Joint partly dissenting opinion of Josep *Casadevall*, Ineta *Ziemele*, Anatoly *Kovler*, Danutė *Jočienė*, Ján Šikuta, Vincent A. *De Gaetano*, Linos-Alexandre *Sicilianos*, Judges, dissenting opinion, para. 7.

174 This is well-illustrated by the fact that the issue is divisive even at the national level. – See: Maniaci, 2024, pp. 30–59.

175 ECtHR, D.B. and Others.

176 ECtHR, D.B. and Others, partly dissenting opinion of Judge *Elósegui*, paras. 17–18.

court found the plaintiffs, then aged 51 and 39, eligible for adoption.[177] The applicants claimed that they had waited in vain, the Italian authorities were unable to offer them a child of suitable age, so they decided to use the services of a surrogate mother. Given that the procedure is prohibited in Italy, they chose a clinic in Moscow, which also offered to help finding a surrogate mother. Under the terms of the contract, the clinic used the husband's genetic material to fertilise the eggs from an unknown donor. As the procedure is legal in Russia, the applicants were registered as the parents of the child in the birth certificate, which the Italian authorities did not recognise. The public prosecutor's office charged the parents with providing false information to the authorities and at the same time initiated proceedings aimed at preparing the adoption of the child. The child remained with the parents, but the juvenile court (*Tribunale per i Minorenni*) appointed a guardian *(curatore speciale)* for the minor and initiated adoption proceedings. The report issued by the authority based on the on-site visit at the family hit a positive tone about the parents, who appeared to be caring for the child to the highest possible standard. The report also found that the applicants' income provides a comfortable living and that their home is tidy. However, a DNA test carried out in August 2011 in the framework of the ongoing procedure showed that there is no blood relationship between the child and the husband. According to the Russian clinic, an unfortunate mistake happened. The child – who, in the light of the above, was not related to any of the applicants – was subsequently registered under a new name and spent 15 months in a children's home, from where he was placed with the prospective adoptive parents in January 2013, who have since adopted him. The applicant parties were not allowed to meet the child after the adoption and were not informed of the child's whereabouts. Their action against the adoption was dismissed by the juvenile court on the grounds that they lacked locus standi to bring the case as they were neither the child's parents nor his family members in any other way.[178] The ECtHR, examining

177 Although under the Italian law in force at the time of trying the case only persons under the age of 45 could become adoptive parents, in the case of a married couple, if one of the spouses is under 45, the other spouse is eligible to be the adoptive parent up to the age of 55. – ECtHR, Paradiso and Campanelli, para. 214.

178 ECtHR, Paradiso and Campanelli, paras. 8–33, 49, 53.

the proceedings before the national courts, and focusing in particular on the case files of the juvenile court of first instance in this respect, made the following preliminary findings: the child is not related to either parent, as both the embryo implanted in the surrogate mother and the sperm used for fertilisation came from unknown donors. The latter, according to the clinic, was due to a mistake.[179] Thus, the ECtHR found that its own previous case-law concerning surrogacy was not applicable to the present case.[180] The ECtHR then examined whether family life within the meaning of its case-law existed in the case. In this respect, it concluded that neither the length of time spent with the child – two months in Russia, six months in Italy – nor the unfounded presumption that the second applicant was the father of the child gives base to state that family life existed.[181] Although, the ECtHR acknowledged that it is not possible to establish a uniform minimum duration in this respect, the Court recalled that in previous similar cases[182] the persons concerned had spent significantly longer periods of time together as a family. In the light of these considerations, the ECtHR examined the case in the context of a violation of the right to private life rather than a violation of the right to family life.[183] In this respect, the Court held that the right to private life includes the right to have children in the natural way, to seek medical assistance to have children and to apply for adoption. These rights were undoubtedly affected by the fact that the child had been taken away from them. The ECtHR then scrutinized whether the acts of the authorities were prescribed by law and whether it was necessary in a democratic society. As regards the first condition, the majority of the ECtHR took the view that the decision of the Italian authorities to automatically refuse the recognition of the birth certificate issued by the Russian authorities and to examine the existence of a parent-child relationship on the basis of Italian law instead was in conformity with the relevant

179 It is worth mentioning that both the prosecution and the juvenile court stressed that the complaining parties had failed to prove that the man's sperm had indeed been transferred. Thus, they relied on the premise that the parties had acted in bad faith from the outset. - ECtHR, Paradiso and Campanelli, para. 189.

180 ECtHR, Mennesson case; ECtHR, Labassee case.

181 ECtHR, Paradiso and Campanelli, paras. 142–158.

182 See the ECtHR case law cited in Paradiso and Campanelli, para. 149–154.

183 On the right to privacy, see the ECtHR case law cited in paragraph 159 of the ECtHR Paradiso and Campanelli.

international treaties. The majority decision cut it short to reason why the actions of the authorities served 'purpose described by law' by stating that the enforcement of the provisions of the law constituted such a purpose. As regards necessity, the ECtHR noted that the applicant parties had infringed two laws: first, they had brought a foreign child into the country without filing a request to an authorised body and without any family relationship, in breach of the law on adoption.[184] Second, the surrogacy contract with the foreign clinic contradicts the Italian law governing artificial reproduction procedures. In the ECtHR's view, the national courts properly assessed and weighted the violations of the law and the unlawful situation created by the applicant parties against the interests of the child and the applicant parties. The fact that the authorities remedied this situation in order to enforce public interest, by removing the child from the complaining parties and place him in a new family was in conformity with the Convention.[185] In the view of the ECtHR, the national courts were under no obligation to give priority to the preservation of the relationship between the applicant parties and the child over the enforcement of the provisions of the law. In relation to the consideration of the best interests of the child, the ECtHR noted that the juvenile court sits in a three-member chamber, of which only the president is a lawyer, and the other two members are professionals in child protection. In the view of the ECtHR, the juvenile court properly considered the best interests of the child when it ordered the removal of the child from the applicant parties, taking into account that the child was not yet suffering any psychological trauma due to his very young age. Conversely, leaving the child with the applicant parties during the proceedings – as requested by them – and without any family relationship while later he would have been removed by chance, could have caused the child psychological trauma. Furthermore, the ECtHR upheld the argument put forward by the State as well, namely that the applicant parties had reached the age limit for adoption and that no exception could be made in this respect.[186]

184 In this respect too, the majority accepted the assumption of the prosecution and the juvenile court that the parties had acted in bad faith from the outset.

185 ECtHR, Paradiso and Campanelli, paras. 131–134.

186 ECtHR, Paradiso and Campanelli, paras. 167, 170, 175–178, 189, 199, 200, 204, 209–214, 215.

The six judges who dissented from the majority opinion[187] considered that the conduct of the Italian authorities' constituted a violation of Article 8 ECHR, as found by the Chamber.[188] The dissenting judges agreed with the majority decision that the starting point for examining the case should be whether family life had been established within the meaning of ECtHR case-law. In this respect, the dissenting judges recalled that, although descent by blood is important for establishing the existence of a family relationship, its absence does not necessarily mean that no such relationship exists. The applicant parties had been caring for the child for eight months from birth, a care which was ended by the intervention of the public authorities. Whilst the majority decision accepted that the purpose of this intervention was to put an end to an unlawful situation, the dissenting judges considered that the majority decision failed to take into account that, according to ECtHR case-law, the existence of family life is a question of fact based on existing personal relationships. In this respect, it is not descent by blood or a legally recognised family relationship that is decisive. Consequently, the majority decision drew a distinction between the so-called legal and illegal family, which – as the dissenting judges stressed – is contrary to the case-law of the ECtHR.[189] Another key point of the dissenting opinion concerned the focus of the assessment carried out by the national courts: while the juvenile court focused on the conduct of the applicant parties, which the juvenile court deemed as illegal[190] and which provided basis for official measures against the parents – which could be interpreted as sanctions in essence –, the focus of the appellate court's assessment was on the 'abandonment' of the child by the parents. In this respect, the dissenting judges expressed their 'surprise' because, according to the experts who had assessed the applicant parties' living conditions stated in their report that the parties had taken excellent

187 ECtHR, Paradiso and Campanelli case, Joint opinion of judges Mirjana *Lazarova Trajkovska*, Ledi *Bianku*, Julia *Laffranque*, Paul *Lemmens* and Yonko *Grozev*.

188 ECtHR, Paradiso and Campanelli, para. 101.

189 ECtHR, Paradiso and Campanelli v. Italy, joint dissenting opinion of Judges Mirjana *Lazarova Trajkovska*, Ledi *Bianku*, Julia *Laffranque*, Paul *Lemmens* and Yonko *Grozev*, paras. 1–4.

190 In this respect, the dissenting judges argue that the majority decision is flawed when it considers the use of a foreign surrogate mother to be illegal. As they recall, the procedure is legal in Russia, and Italian law does not have extra-territorial application in this respect – See point 11 of the dissenting opinion.

care of the child and had otherwise met expectations. By paying too much attention to the child's 'abandonment', the majority in fact made a decision that was contrary to the ECtHR's case-law since it was based on a purely formalistic assessment focusing on the need to remedy the wrongful situation – and deter future potential perpetrators – without paying sufficient attention to the best interest of the child and the interests of the applicant parties.[191] – Nevertheless, the well-established case-law stands still: in the recent *T.A. v. Switzerland case*[192] the ECtHR approved the formalistic approach of the domestic authorities:

> "[solving the issues] require balancing two competing interests: the applicant's interest in legitimising a *fait accompli* she had knowingly created, and the public interest in ensuring compliance with adoption procedures, which were ultimately designed to protect the child and to discourage unlawful situations presented under the guise of being in the child's best interests."[193]

The ECtHR in its first *Advisory Opinion* – a type of procedure introduced into the European human rights mechanism by Additional Protocol No. 16 to the Convention[194] –, delivered in 2019 in case No. *P16-2018-001* at the request of the Court of Cassation (*Cour de Cassation*) examined how the French legislation 'adapted' the conclusions of the *Mennesson v. France* judgment. In the *Mennesson v. France*, the ECtHR held that the state's failure to grant legal recognition to parent-child relationship does not only affect the intended parents, but the right of the children to respect for their private life.[195] In its advisory opinion, the ECtHR reiterated these findings, when stated that: "[The] lack of recognition of a legal relationship between

191 ECtHR, Paradiso and Campanelli v. Italy, Joint Opinion of Judges Mirjana *Lazarova Trajkovska*, Ledi *Bianku*, Julia *Laffranque*, Paul *Lemmens* and Yonko *Grozev*, paras.7–12.

192 The case originated from a situation, in which an older, divorced woman brought a child – who was allegedly abandoned and found by her in Ethiopia – to Switzerland without the permission of the Swiss authorities. Unlinked in Paradiso and Campanelli, the issue of surrogacy never emerged that is to say the authorities never made such allegations. – ECtHR, T.A. v. Switzerland, paras. 2–32.

193 ECtHR, T.A. v. Switzerland, para. 29.

194 Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 214)

195 ECtHR, Mennesson, para. 99.

a child born through a surrogacy arrangement carried out abroad and the intended mother thus has a negative impact on several aspects of that child's right to respect for its private life [...] In particular, there is a risk that such children will be denied the access to their intended mother's nationality [...] it may be more difficult for them to remain in their intended mother's country of residence [...] their right to inherit under the intended mother's estate may be impaired [...] their continued relationship with her is placed at risk if the intended parents separate or the intended father dies[...]"[196]

The ECtHR concluded that, under Article 8 ECHR, a State Party to the ECHR must grant domestic legal recognition to a legally recognised parent-child relationship established abroad based on a surrogacy agreement between the child and the prospective mother. This does not mean that the State is obliged to register the 'mother-to-be' as the mother in the national civil register based on the information contained in the birth certificate issued by the foreign authority. A State Party to the Convention has wide discretion *vis-à-vis* the form of such legal recognition, as long as the legal instrument granting recognition functions properly and effectively and coincides with the best interests of the child. The ECtHR referred expressis verbis to adoption as such a legal instrument.[197] In paragraph 47 of its advisory opinion, the ECtHR stressed[198] that, although in the main proceedings which gave rise to the advisory opinion, it was not the prospective mother's own *ovum* that was used for implantation, if such a scenario – that is to say the implantation of own ovum – comes into reality, the obligation of the State to provide for the possibility of recognition of the parent-child relationship will be even more pronounced.[199]

Although in principle the advisory opinions do not bound state parties that haven't ratified Protocol 16, in two subsequent judgments following the Advisory Opinion, in *C and E v. France* and *D v. France*, the ECtHR reiterated the findings of the Advisory Opinion, made them part of its case-law, which

196 ECtHR, P16-2018-001, Advisory Opinion, para. 40.
197 ECtHR, P16-2018-001, para. 46., 53., 55.
198 ECtHR, P16-2018-001, para. 47.
199 The Court had the opportunity to rule on such a case a year later.

was thus binding on Bulgaria.[200] – In *D.B. and Others v. Switzerland*, Judge *Frédéric Krenc* in his concurring opinion provides a detailed analysis why and how the advisory opinions are binding on CoE member states that not yet signed the protocol.[201]

Among the 'post-Advisory Opinion' cases, *K.K. and Others v. Denmark* worth introducing in details on the one hand for the analyzing summary provided by the ECtHR on its 'post-Advisory Opinion' case-law and on the other hand for analysis of the Supreme Court of Denmark – cited in the EctHR's judgment – on domestic law and its relation with Article 8 and the Advisory Opinion.

The ECtHR after analyzing circumstances of the case came to the conclusion that there were no violation of Article 8 of the ECHR neither related to the right to family right nor to right of private life in respect of the mother – the first applicant –, on the other hand the children's – the second and third applicants – rights were violated as the guarantees provided by the state were insufficient.

Based on the facts of the case, the first applicant and her husband – Danish citizens – contracted a surrogacy agreement with a Ukrainian woman, who gave birth to the second and the third applicants in December 2013. Based on the contract the surrogate mother renounced any parental rights in return for a payment amounting some 30.000 Euros. However, only the father was biological parent, the Ukrainian authorities issued a birth certificate indicating both the first applicant and her spouse as parents. The couple brought the children to Denmark in February 2014. The Danish authorities did not acknowledge the first applicant's maternity, since under the

200 de Groot, 2021, pp. 5–6.

201 Krenc argues that, under the ECHR the boundaries between '*soft law*' and '*hard law*' were not completely watertight as it follows from paragraphs 74-86 of the *Demir and Baykara v. Turkey* judgment. Similarly – as the case at hand proves – in his view, the dividing lines between the Court's advisory case-law and its contentious case-law are not hermetic. Furthermore, for the simple reason that in the advisory procedure the ECtHR interprets provisions of the ECHR which are binding on every State and the Court's interpretation of the Convention does not differ according to whether the Court is giving its opinion in an advisory capacity or in a contentious context, abiding such opinions are naturally of interest to all States parties to the Convention, including those which have not ratified Protocol No. 16. – See: ECtHR, D.B. and Others, concurring opinion of Judge Krenc, paras. 12.,16.,21.

domestic legislation on family matters, the woman giving birth to a child considered as the parent of the child no matter of the eggs' origin. Thus, the surrogacy agreement's provisions did not produce any legal effect in Denmark. However, the children gained the Danish citizenship because of their father's citizenship and the spouses have been given joint custody.[202]

Subsequently, the first applicant applied for adoption of the children as a stepparent, which was refused by a 2014 decision of the State Administration (*Statsforvaltningen*) on the grounds that the first applicant and the children had only lived together in Denmark for sixteen days. In 2016 the National Social Appeals Board (*Ankestyrelsen*) affirmed the 2014 decision of stating that adoption would contradict section 15 of the Adoption Act, since the surrogate mother had been paid to consent to adoption. The District Court of Lyngby (*Retten i Lyngby*) in 2018 and the Eastern High Court (*Østre Landsret*) in 2019 upheld the decision to refuse adoption. The Supreme Court (*Højesteret*) also found against the applicants in 2020.[203]

The Supreme Court did a thorough conduct on the case, which involved considering whether the refusal was contrary to Article 8 of the Convention. Referring – inter alia – to Mennesson and the 2019 Advisory Opinion of the ECtHR, the Supreme Court concluded that the advisory opinion also applied to been surrogacy where remuneration had paid. In such situations, the best interests of the child should always be taken into consideration. However, as the Supreme Court pointed out, section 15 of the Adoption Act contained an absolute ban on granting adoption if anybody having to consent to the adoption had been paid or received remuneration.[204] The Supreme Court identified two underlying interests, which had to be balanced in the case: on the one hand the best interests of the children – a legally recognised relationship with the woman, who should raise them as their mother – and on the other hand the public interest to protect children against being turned into a 'commodity'.[205] As for the former the Supreme Court pointed out: "[...] the child's relationship with the intended mother may be jeopardised if the intended parents divorce or are legally separated, or the intended father dies, and that the child has no protec-

202 K.K. and Others, paras. 1–8
203 K.K. and Others, paras. 9–13.
204 K.K. and Others, para. 15.
205 K.K. and Others, paras. 15–17.

tion should the intended mother cease to take care of it."[206] As for the latter, the Supreme Court noted that: "[...] agreements on the 'delivery of a child' against payment seemed in conflict with the fundamental principles of our society."[207] The Supreme Court applied the findings of the ECtHR in the Paradiso and Campanelli case when stated: "[the first applicant's] own interests in obtaining recognition of the legal relationship between her and the children through adoption can be given no particular weight as this would be equal to legalising the situation that she has created by making a payment for a consent to adoption contrary to section 15 of the Adoption Act."[208] – However the Supreme Court held that legislation should consider the revision of the said article.

Having regarded all the circumstances of the case, the Supreme Court concluded that the circumstances emphasised by the ECtHR in paragraph 40 of the Advisory opinion are applicable: the children obtained Danish nationality, the parents had shared custody, thus the first applicant had a duty to care for the children and that in the event of legal separation or divorce or the death of the father, she would be able to retain custody under domestic law. Furthermore, she would be able to make provision for the children in her will under domestic law. Thus, in the Supreme Court's view nothing suggested that there has been a violation of Article 8 ECHR.[209]

In assessing the case, the ECtHR concluded that the measures of the state authorities were prescribed by law and pursued the legitimate aim. The only question remained to be determined was weather these were necessary in a democratic society. As for the applicable limb of Article 8 of the ECHR, the ECtHR concluded the right to family life was not violated neither in relation to the first, nor the second and third applicants, since practically nothing hindered them in living together as a family.[210] Regarding the private life limb of Article 8, the ECtHR excluded a violation in the case of the first applicant in accordance with the evaluation of the Danish Supreme Court.[211] In relation to the second and third applicants, the ECtHR came to the con-

206 K.K. and Others, para. 16.
207 K.K. and Others, para. 16
208 K.K. and Others, para. 16
209 K.K. and Others, para. 18.
210 K.K. and Others, paras. 49–51.
211 K.K. and Others, para. 55.

clusion that the Supreme Court did not limit its scrutiny to Article 15 – that is to a formal examination –, but evaluated the individual circumstances of the persons affected by the procedure as it is required by the ECtHR case-law. The Supreme Court weighed the interests of the second and third applicants against the general interests in protecting children from becoming commodified and preventing the exploitation of vulnerable women. In its assessment the ECtHR paid special attention to the aims of the domestic legislator and the international obligations of Denmark in this respect.[212]

The Court recalls that in its Advisory opinion, it found that the child's right to respect for private life within the meaning of Article 8 of the Convention does not require a specific form of legal recognition. Then the ECtHR provided a summary and analysis on its own 'post-Advisory Opinion' case-law. [213] In the *Valdís Fjölnisdóttir and Others v. Iceland* the ECtHR held that despite the state denied adoption, placing the child in the intended mothers' custody – none of which was biologically connected to the child – and granting the child nationality was sufficient enough to secure the bond between the child and the intended parents. In the *A.M. v. Norway* case, the ECtHR was of the view that denying the adoption request of a woman, whose child's biological father did not consent adoption was in conformity with the ECHR. In the *H. v. United Kingdom,* the ECtHR held that the child's best interests may include fundamental components other than the legal recognition of the intended parents, such as protection against the risks of abuse which surrogacy arrangements may have. The ECtHR concluding on the above findings stated that 'another means' – mentioned in the advisory opinion – could be interpreted in a broad sense.[214] However, in the case at hand, the ECtHR came to the conclusion that the solutions provided by Danish law were insufficient to meet the principle 'that whenever the situation of a child is in issue, the best interests of that child are paramount.'[215] – Thus the ECtHR found that there has been a violation of Article 8.

The word pick 'paramount' became the centre point of the rather detailed joint dissenting opinion of Judges *Jon Fridrik Kjølbro*, *Pauliine Koskelo* and

212 K.K. and Others, paras. 56–59.
213 K.K. and Others, paras. 63–70.
214 K.K. and Others, para. 70.
215 K.K. and Others, paras. 75–76.

Saadet Yüksel. In their view the approach taken by the majority comes very close to granting a 'right to a child' through commercial surrogacy.[216] Summarising their arguments they raised three main issues. First, the majority – in contradiction with the well-established case-law – eliminated the margin of appreciation of the state granted in issues where there is no consensus and where delicate ethical and moral issues are raised.[217] Second, the majority – contrary to the ECtHR's well-established case-law – basically substituted its view for that of the domestic courts, which in the case at-hand carried out a thorough analysis.[218] Third, the majority by picking the word 'paramount' which implies unconditional primacy – though its exact meaning is not explained by the Court – detoured from the well-established word pick in child's rights[219] and applied a stricter standard then those set in the practice of the *UN Committee on the Rights of the Child* and in the text of the *Charter of Fundamental Rights of the European Union* (the Charter)[220], which state that the child's best interest shall be a primary consideration.[221] – All these factors led to the above conclusion.

In its recent *D.B. and Others v. Switzerland* judgment, the ECtHR again had to face issue of finding the balance between the best interest of the child – alongside with the interest of other parties – and the public interest. The first and a second applicant – a same-sex couple – concluded a surrogacy agreement in California, according to which the surrogate mother gave birth to a child, the third applicant. The eggs came from an anonymous donor, which were fertilized with the second applicant's sperm. The competent Californian court handed down a judgment, which declared that the first and the second applicants were the legally recognised parents of the child. After the child was born, a birth certificate was issued accordingly.[222] The Swiss authorities denied the recognition of the birth certificate at the first instance. The do-

216 K.K. and Others, para. 105.
217 K.K. and Others, paras. 85–88.
218 K.K. and Others, para. 100.
219 "As the dissenting judges stated: this detours from is contrary as the Court has otherwise emphasised that the Convention should be interpreted in harmony with the general principles of international law." – K.K. and Others, para. 94.
220 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391–407).
221 K.K. and Others, paras. 93–94.
222 ECtHR, D.B. and Others, paras. 5–6.

mestic legal procedure was concluded by the Swiss Supreme Court, which found against the applicants and stated that well articulated prohibition of all forms of surrogate motherhood required a strict interpretation, otherwise assisted procreation tourism would be encouraged and the national ban on surrogate motherhood would become ineffective. That is, in the Supreme Court's view the public interest outweighed the interest of the parties whose family life was not encroached upon to such a degree that would amount to a violation due to the legal guarantees offered by the domestic legal system.[223]

In January 2018 an amendment to the Civil Code came into force authorising 'step-child adoption' for same-sex couples living in a registered partnership. In December 2018, the authorities registered the adoption of the third applicant by the first applicant.[224] Therefore the government asked the ECtHR to strike out the application under Article (1) 'b', since the case had been resolved in the meantime. The ECtHR was of the view that since the case involves an important issue of general interest, in particular for those States parties to the ECHR which have not adopted laws permitting recognition of the parent-child relationship in circumstances similar to those giving rise to the present case, the continued examination of the applications would contribute to the clarification and safeguarding of the protection provided by the Convention and would also facilitate its development. [225]

The ECtHR decided that the case should be examined from family life aspect in case of all three applicants, while in the case of the third applicant, the Court found the private life aspect to be applicable as well. As for the scope of examination, the ECtHR decided in favour of the government's arguments that the interference was prescribed by law and did pursue a legitimate aim. Thus, the question to be remained was whether the interference was necessary in a democratic society?[226] The third-party interveners, the *Ordo Iuris*[227] and the *ADF*[228] argued that there is no consensus on

223 ECtHR, D.B. and Others, paras. 8–15.
224 ECtHR, D.B. and Others, paras. 16–17.
225 ECtHR, D.B. and Others, paras. 26., 38.
226 ECtHR, D.B. and Others, paras. 51–67.
227 An ultra conservative Polish Catholic think tank. – See: https://en.ordoiuris.pl/who-we-are (Accessed: 09 June 2025).
228 An American conservative Christian legal advocacy group. – https://adflegal.org/ (Accessed: 09 June 2025).

the issue of surrogacy among CoE Member States. The latter also raised the issue of commercialisation and trafficking of human beings and jeopardising the dignity and safety of women and children.[229] – Something that was a central point of the characteristic partly dissenting opinion of *María Elósegui*.

When assessing the case, the ECtHR identified the main distinctive feature of the case, namely: the first and second applicants formed a same-sex couple living under registered partnership, whereas the applicants in the other similar cases – like the Mennesson – the parents were couples of different-sex living in wedlock. However, the ECtHR concluded that the principles developed in the abovementioned cases apply to the present case especially to the parent-child relationship between the first and third applicants. The ECtHR also stressed that the sexual orientation of the parents and public interest cannot play a decisive role in such cases.[230] As for the third applicant, the ECtHR came to the conclusion that the general and absolute impossibility of obtaining recognition of the family link between the third and the first applicant for a significant period of time – that is some seven years – constituted a disproportionate interference with the third applicant's right to respect for his private life protected by Article 8. Thus, the state exceeded its margin of appreciation by failing to provide for such a possibility in its legislation in due time.[231] Regarding the second and third applicants, the ECtHR on the one hand took into consideration that they most probably knew that their acts are in contravention with the applicable Swiss law – at least they never alleged that they were unaware of this –, and on the other hand took into consideration the seriousness of the alleged difficulties of the applicants. The ECtHR took the view that the legal solutions offered by the state were sufficient enough to meet the requirements set in the ECtHR's case-law. Accordingly, the ECtHR found no violation of their right to family life under Article 8 of the ECtHR. With a view to these findings, the ECtHR decided to dispense with assessing the case neither on the grounds of the length of the procedure under Article 8 of the ECHR nor under Article 14 read in conjunc-

229 ECtHR, D.B. and Others, paras. 68–69.
230 ECtHR, D.B. and Others, paras. 84–85.
231 ECtHR, D.B. and Others, paras. 89–90.

tion with Article 8 ECHR.[232] – The latter was the central point in the partly dissenting opinion of *Darian Pavli,*[233] which in the author's view disregards the ECtHR's case-law on Article 12 ECHR, read alone or in conjunction with Articles 8 or 14, namely that the ECHR does not impose an obligation on the Contracting parties to grant the right for same sex marriage.

As mentioned above Judge *Elósegui* attached a partly dissenting opinion with very characteristic statements. Her two main arguments relate to the retroactive affects of the majority judgment and its contradiction to the well-established case-law, namely that there is no right to have a child or to adopt one under the ECHR. Regarding the retroactivity, she argues that the majority, by applying the ECtHR's findings in its 2019 Advisory Opinion to the present case in which the disputed situation existed between 2011 and 2018, makes the Swiss authorities responsible for breaching a requirement they could not anticipate. In her view this retroactive application will discourage the domestic courts in initiating advisory procedures.[234] Judge Elósegui's other argument is that the majority disregarded the moral and ethical issues arising in cases, where commercial agencies are involved[235], namely the commercial exploitation of women and the degradation of children to a commodity that can be ordered from third parties. In her view "*[...] the majority ultimately opened the door to surrogate motherhood by suggesting that the practice was compatible with the Convention.*"[236]

The most recent surrogacy-related case of the ECtHR, the *R.F. and Others v. Germany* was decided unanimously by the court, unlike the above introduced *K.K. and Others v. Denmark* and *D.B. and Others v. Switzerland* cases. The *R.F. and Others v. Germany* concerned the refusal of establishing by the domestic court that the child, whom the second applicant gave birth to, is also the child of the first applicant, the genetic mother of the child and the partner of the second applicant. According to well-established case-law of the German Apex Courts, based on Sections 1591-1592 of the German Civil

232 ECtHR, D.B. and Others, paras. 95–99.
233 ECtHR, D.B. and Others, Partly dissenting opinion of Judge *Pavli*, paras. 2–3.
234 ECtHR, D.B. and Others, Partly dissenting opinion of Judge *Elósegui*, paras. 5.,7.
235 At this point Judge *Elósegui* cites paragraphs 202 and 203 of the Paradiso and Campanelli judgment.
236 ECtHR, D.B. and Others, Partly dissenting opinion of Judge *Elósegui*, paras. 18-20.

Code (*Bürgerliches Gesetzbuch, BGB*), which state that the mother is the woman who gave birth to the child and provides for joint parenthood based on parentage only for the father and mother excludes the maternity of another woman even if the child is genetically descended from her. The domestic courts based their decisions on the fact that the legislator deliberately chose to apply the *mater semper certa est* principle to scenarios such as the case at hand with an intent to discourage 'surrogacy-tourism', that is couples buying surrogacy services abroad, where – unlike in Germany – surrogacy is not prohibited.[237] As for the alleged discrimination, the domestic case-law holds that unequal things should not be treated equally, thus the presumption of the child's genetic descent from the husband and wife, as provided for in Section 1592 of the BGB is not transferable to same-sex partnerships, since in such relationships the genetic descent of the child can only exist to one partner unlike in case of a different-sex couple.

The ECtHR reiterating and summarising its earlier case-law – introduced above in details – held that the identity of a person is less directly affected when the fundamental question is not about the recognition or refusal of one's parentage, but of the means by which recognition is to be achieved. In this regard the ECtHR noted that the adoption took place in less than two years after the birth of the child – a period which as the Government pointed out paragraph No. 50 could have been shortened if the applicants complied with the existing rules – and that the applicants have not claimed encountering any particular difficulties during the procedure.[238] Instead, they placed emphasis on an alleged legislative gap, which resulted in the rejection of the first applicant's request to establish her motherhood. In contrast to certain previous cases in which the refusal of authorities to recognise, under domestic law, legal assignments lawfully established abroad between the intended parents and the children carried by a surrogate mother from the point of view of the negative obligations under Article 8 ECHR, in the case at hand, the Court conducted its examination through the lens of the positive obligations arising from Article 8 of the Convention. By opening the right to marriage for same-sex couples, the legislator had wanted to end existing

237 ECtHR, R.F. and Others, paras. 4–7., 10., 13., 15.
238 ECtHR, R.F. and Others, paras. 63., 94.

discrimination against same-sex couples, but not to change the law of parentage. Thus, there is no unintended loophole: the above regulation is based on the basic legal assumption that the legal father is also the biological father of the child; however, this basic assumption is not applicable to the intended or 'co-mother'. Considering the facts of the case and the wide margin of appreciation attributed to Member States in such contentious issues like surrogacy[239], the ECtHR held unanimously that there has been no violation of Article 8 of the Convention.[240]

As for the alleged violation of Article 14 read in conjunction with Article 8 of the Convention, the ECtHR reiterating its Article 14 related case-law approved the well-established – and 'ECHR conform' – case-law of the German Apex Courts – cited by the ECtHR among the 'Relevant Legal Framework'[241] and indirectly referred to later – namely that same-sex couples and opposite-sex couples bearing child through surrogacy are not in a comparable situation. Thus, the ECtHR held that the complaint is manifestly unfounded and rejected it under Article 35(3)(a) and (4) ECHR.

Intermediate conclusion

According to well-established ECtHR case-law, the right to found a family through adoption cannot be derived from Article 8 ECHR. It is worth recalling here the concurring opinion of Judge *Costa* in the Fretté-case – supported by Judges *Jungwiert* and *Traja* –, in which he argued that the right to apply for adoption should not be confused with the right to adopt. According to the case-law of the ECtHR, the Member States of the CoE enjoy a wide margin of appreciation as to the conditions on which they allow adoption. In line with this, Member States enjoy a wide discretion on determining the age limit for eligibility for adoption as well as granting or denying single persons the right to become adoptive parents. However, according to the same case-law, a legislature that guarantees a right beyond its obligations under Article 8 of the ECHR may not make the exercise of that right subject to a condition

239 ECtHR, R.F. and Others, paras. 27., 61., 63., 66., 78., 82., 88., 95.
240 ECtHR, R.F. and Others, para. 97.
241 See: ECtHR, R.F. and Others, paras. 24–34.

contrary to the prohibition of discrimination laid down in Article 14 of the ECHR. In determining whether there has been a violation of Article 14 of the ECHR, the question to be addressed is the situation of the person, who alleges a violation of that right, namely whether this situation is comparable to the situation of others. In the context of 'single homosexual persons' and 'same-sex couples' right to adopt, the question is whether single homosexual persons and same-sex couples are in a comparable situation to single heterosexual persons and opposite-sex couples respectively. In this regard same-sex couples could only claim a violation of Article 14 read in conjunction with Article 8 if the state – going beyond its obligations under the ECHR – grants them the right to marry. Otherwise, as explained above, these questions are far from clear-cut, given, inter alia, the strong dissenting opinions and the contradictions in the ECtHR case-law.

As a novel trend in the ECtHR's case-law, the issue of surrogacy is raised more and more often. Since the surrogacy raises delicate moral and ethical questions on which there is no consensus at European level – in accordance with the case-law of the ECtHR – states must in principle be afforded a wide margin of appreciation. The ECtHR provided a guidance in its Advisory Opinion No. P16-2018-001 when concluded that, under Article 8 ECHR, a State Party to the Convention is obliged to grant domestic legal recognition to a legally recognised parent-child relationship established abroad based on a surrogacy agreement between the child and the prospective parent. However, a State Party to the Convention has wide discretion *vis-à-vis* the form of such legal recognition, as long as the legal instrument granting recognition functions properly and effectively and coincides with the best interests of the child. In the following case-law the main focal point of the ECtHR's scrutiny was the adequacy of such legal recognition. The characteristic dissenting and partly dissenting opinions in *K.K. and Others v. Denmark* and in *D.B. and Others v. Switzerland* respectively, reveals that this issue too, is open to debate and hard to judge.

Based on the literature, the possible future utilisation of artificial wombs to replace surrogacy would pose similarly divisive moral and legal issues: while the development of the said experimental technology was originally driven by the intent to enhance the life expectancy of preemies, some al-

ready thinking about its possible utilisation for so called complete ectogenesis, where the embryo/fetus is growth within the artificial womb from the conception until 'birth'.[242] The warning of Judge *Elósegui*, namely that due to surrogacy children may be "degraded to the status of a commodity that can be ordered from third parties", is even more so valid for the possible wide-spread use of artificial womb technology, which inevitably require the reconsideration of well-established legal rules and principles with special regard to the 'mater sempre certa est' – a principle that is already questionable in case of surrogacy.

1.2.4. The kafala in the ECtHR's case-law

> „[...] due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."[243]

The *kafala* a legal institution under the rules of Islam can be equated to the legal institution of guardianship. It defined as the obligation undertook by the quasi-guardians the *kafil* and the *kafila* to take care of the minor child in their custody – the '*makfoul*' – as if they were the biological father and mother of the child, however without any family ties being established between them, as explained below. The absence of a family tie is indicated by the fact that the *kafala* does not entitle the *makfoul* to bear the *kafil's* name and inherit his property.[244] – Thus, as highlighted by the case-law of the ECtHR to be introduced below, it is not the equivalent of adoption in the 'Western' sense.

In the above introduced Ibrahim-case, a White Paper from a Government-appointed committee[245]– which the parties invoked – assessing adoption from a cultural and Islamic perspective stated that:

> "[...] religion could be an obstacle to adoption for practicing Muslim families, since Islam had a general prohibition against

242 For a detailed elaboration on the topic, please see: Osmenda, 2024, pp. 41–63.
243 Article 20(3) of UN Convention on the Rights of the Child
244 Duca, 2014, pp. 111–120.
245 NOU 2012: 5 Bedre beskyttelse av barns utvikling

> adoption in the sense of making children born to other biological parents one's own. [While] various Muslim countries and Muslim schools of law had differing views on adoption, but they all had a prohibition against breaking the ties with the adoptive child's biological family. [...] the child welfare services faced a particular challenge when considering adoption as a child welfare measure for Muslim children."[246]

In the *Harroudj v. France* case, the applicant, a then 42-year-old single woman, applied to the French authorities for full adoption of the child, who had been placed with her by the Algerian authorities in accordance with the rules of the *kafala.* The application was rejected by both the authorities and the courts, on the grounds that the *kafala* provides for the protection of children in accordance with international conventions and that, since the law of the country where the child originates from prohibits its adoption, the French authorities cannot authorise the adoption on the basis of Article 370(3) of the *French Civil Code.*[247] In this case, the ECtHR did not find a violation of Article 8 of the ECHR. The reasoning of the ECtHR was essentially based on two pillars. On the one hand, "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law."[248] The French law and the assessment of the French authorities and courts are in line with both the 1993 Hague Convention and the UN Convention on the Rights of the Child, which recognises the institution of *kafala* in Article 20. The domestic authorities have decided, in line with these conventions, that where the law of the country of origin of the child clearly prohibits the adoption of the child, the authorities of the country of the adoptive parent are obliged to respect this. On the other hand, the ECtHR has pointed out that, although *kafala* does not have the same legal effect as adoption – it can be regarded as a guardianship instead –, other provisions of French law make it possible to overcome these shortcomings: for example the right of the applicant to bequeath her property to the child by will, which allows the child to inherit in the same way as if the applicant had adopted him or her. Moreover,

246 ECtHR, Abdi Ibrahim, para. 52.
247 ECtHR, Harroudj, paras. 5–14.
248 ECtHR, Harroudj, paras. 42.

French law allows the gradual circumvention of the prohibition on adoption laid down in Article 370(3) of the Civil Code by providing the child with the opportunity to acquire nationality within a preferential period, which would make the French law applicable to the child thus eligible for adoption.[249] In the ECtHR's concluding assessment:

> "[the applicant State], by gradually obviating the prohibition of adoption in this manner, the respondent State, which seeks to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin, has shown respect for cultural pluralism and has struck a fair balance between the public interest and that of the applicant."[250]

Thus, the ECtHR held unanimously that here has neither been violation of Article 8 of the ECHR, nor has separate issue been arised under Article 14 of the Convention.

The dissenting opinion of Judges *Işıl Karakaş, Nebojša Vučinić and Helen Keller* attached to the 4:3 majority decision in the *Chbihi Loudoudi and others v. Belgium* case of the ECtHR highlighted that the approach taken in Harroudj, namely giving priority to the enforcement of national rules prohibiting adoption over the best interests of the child, can also be interpreted as being contrary to ECHR and the relevant ECtHR case-law.[251] As the abovementioned judges recall, under the well-established ECtHR case-law, the best interests of the child must prevail. It follows from the facts of the case at hand that Belgian law – unlike French law –, does not allow to circumvent the prohibition of adoption. The applicants were a couple of Belgian nationality and an eight-year-old child who was taken into care by them from Morocco in 2003 under the *kafala* rules. The couple applied twice for a simple adoption, but were both rejected by the Belgian courts on the grounds that both Islamic law and the Moroccan national law prohibits the adoption of a child. The Belgian courts argued that adoption would create a new legal

249 ECtHR, Harroudj, paras. 47–50, 51.
250 ECtHR, Harroudj, paras. 51.
251 ECtHR, Chbihi Loudoudi, Joint Opinion of Judges Işıl *Karakaş*, Nebojša *Vučinić* and Helen *Keller*, paras. 5, 9–11.

effect which is not created by the *kafala* and would make it difficult for the child to maintain contact with his birth mother, to whom he visits once a year with the couple who are fostering him. As the Belgian courts have pointed out, Belgian law does not recognise the institution of *kafala*, which in Belgian law is equivalent to the institution of guardianship. The resulting problem, highlighted by the applicant parties, is that *kafala* does not create a family tie between the child and its quasi-guardian like adoption thus it neither creates a right of residence. As a result, the child could only remain in Belgium with a residence permit for a limited period. Although the authorities renewed it regularly, the possibility of a refusal decision hanging over their heads was a source of anxiety for the applicant parties. In addition, the lack of Belgian identity documents excluded the child from opportunities such as going on a school trip abroad.[252] The majority decision of the ECtHR assessed all these facts and agreed with the opinion of the Belgian state, namely that the domestic courts correctly interpreted the applicable international and national law and were right in rejecting the adoption applications. The court found furthermore that, by 'automatically' renewing the residence permit, although not obliged to do so under Article 8 ECHR, the authorities guaranteed the right to family life. According to the ECtHR, the only inconvenience suffered by the child was missing the school trip. Last, but not least, the majority decision stressed that the child was granted a residence permit of indefinite duration by the Belgian authorities in April 2014, thus the uncertainty mentioned by the applicant parties ceased to exist.[253] – In this context, the above-mentioned dissenting opinion notes that this took place after the defendant State was informed of the lawsuit against it in January 2014. In the ten years prior to that, the Belgian authorities had consistently issued residence permits of limited duration.[254]

252 ECtHR, Chbihi Loudoudi, Judgment, paras. 5–48, 125.

253 ECtHR, Chbihi Loudoudi, Judgment, paras. 90, 94, 99–101, 105, 122, 125–126, 129–133, 135, 139.

254 ECtHR, Chbihi Loudoudi, Joint Opinion of Judges Işıl *Karakaş*, Nebojša *Vučinić* and Helen *Keller*, para. 12.

1.2.5. The annulment of adoption by the authorities or the invalidity of the adoption

> *"[the rules of adoption][255] were ultimately designed to protect the child and to discourage unlawful situations presented under the guise of being in the child's best interests."*[256]

Annulment of adoption by the authorities

The rules on severing family ties based on blood also applies to family ties created through adoption. Accordingly, termination of such family relationship by the authorities should only be possible as an ultima ratio measure, after due consideration, having regard to the best interests of the child, and the authorities should take into account the possibility of less restrictive measures, such as temporary foster care. In the latter case, given its temporary nature and the urgency of the circumstances requiring it, the assessment to be made by the public authorities need not be as thorough as in the case of a decision to terminate a family relationship. In the light of all these findings, the ECtHR in *Ageyevy v. Russia* concluded that the State went beyond its margin of appreciation guaranteed by Article 8 ECHR when it terminated the adoption on the ground of the alleged unfitness of the adoptive parents. The ECtHR, on the other hand, held that based on the facts of the case the placement in temporary pre-adoption care was justified.[257] The applicant parties adopted a boy and a girl in 2008. According to the pre-adoption assessment, both children showed symptoms of mild mental retardation for their age, which affected, inter alia, their speech. According to the post-adoption follow-up report, the applicants, lived in a tidy and clean home under good financial circumstances and have taken good care of the children, who appeared to be happy and well-balanced. Their speech has also improved. In March 2009, a year after the adoption, the boy had

255 Insertion added by the author.
256 ECtHR, T.A. v. Switzerland, para. 29.
257 ECtHR, Ageyevy, paras. 151–155.

an accident: he burned himself on the stove upstairs and as a result of his frightened state fell down the stairs. The child was hospitalised with burns and bruises. The police have launched a formal investigation to establish whether the incident was an accident or domestic violence. In the light of the investigation, on the third day after the accident, the competent child protection authority – Leninskiy District Custody and Guardianship Agency – decided to take the children into temporary care on the grounds that "[...] obviously not in the children's interest and actually poses a danger to the life and health of the children remaining in this [family] without access to the necessary medical aid." On the sixth day after the accident, the police interviewed the parents as suspects. A few days after the suspicion, the child protection authority applied for the annulment of the adoption, which the district court approved in June 2009. The judgment was upheld by the appellate court in August 2009.[258] In the light of the considerations set out at the beginning of this paragraph, the ECtHR took the view that, the placement in temporary care met the criteria set out in the ECtHR's case-law, taking into account all the circumstances of the case, including the fact that the police investigation had revealed the criminal liability of the parents and that the wife had subsequently been convicted by the court for endangering a minor.[259] By contrast, in ordering adoption almost immediately and without careful consideration, the national authorities went beyond their margin of appreciation guaranteed by the Convention.[260]

The ECtHR's *Kurochkin v. Ukraine* case involved the adoption of an eleven-year-old child by the applicant and his then-wife. The child caused the break down of the marriage a year later because the child abused the adoptive mother – as confirmed by a medical report – and behaved aggressively and threateningly with neighbours and schoolmates. The wife has filed a divorce and requited the resolution of the adoption, claiming that the three of them are no longer able to live as a family. The applicant did not oppose the dissolution of the marriage and the adoption in relation to her spouse and the child. However, he opposed the termination of the family relationship between himself and the child. During the hearings, the child agreed

258 ECtHR, Ageyevy, paras. 6-25, 26, 29, 30, 34, 42, 44, 46, 47, 48.
259 ECtHR, Ageyevy, paras. 48, 58.
260 ECtHR, Ageyevy, paras. 130–131, 137, 140, 142–144,146, 151, 155.

with the applicant. However, the authorities noted that in their view the applicant was not able to influence the child's personality in a positive way, as evidenced by the fact that he ignored the child's violence towards his adoptive mother. Consequently, the child developed a negative attitude towards women and had a misconception on how family relationships should work. Taking into account all the circumstances of the case, the authorities concluded that it was in the best interests of the child to terminate the adoption in respect of both parents and place the child in state care. However, that decision was never enforced in the sense that the child remained in the care of the applicant and, moreover, at the applicant's request, the applicant was appointed the child's legal guardian.[261] In its assessment of the case, the ECtHR, referring to the finding in *Scozzari and Giunta v. Italy,*[262] recalled that the dissolution of the family unit constitutes a serious breach of the right to family life, and that in this respect a family based on descent and a family based on adoption are equal. The dissolution of this family unit can be justified only by the need to protect the best interests of the child, duly substantiated by sufficiently strong and well-founded reasons. The ECtHR also recalled, however, that the present case must be distinguished from other similar cases in that the reason for the termination of the adoption was not the mental or physical incapacity of the applicant or his violent or abusive conduct towards the child. Instead, the national authorities and courts based their decision on the inability of the applicant to exercise sufficient influence over the child's development and to ensure its proper upbringing. However, the national authorities contradicted their own assertions when, following the annulment of the adoption and the placement of the child in state care – at the request of the applicant, they appointed the applicant as the child's guardian, which includes the duty to ensure the child's upbringing.[263] In the ECtHR's view, the national courts have given decisive weight to the fact that the abusive behaviour of the adopted child towards the applicant's ex-wife made it impossible for them to live together as a family. As pointed out by the ECtHR, at the time of the proceedings before the domestic courts, the wife had already moved away and the marriage had been

261 ECtHR, Kurochkin case, paras. 5–20.
262 ECtHR, Scozzari and Giunta, para. 148.
263 ECtHR, Kurochkin, paras. 54, 57–58.

dissolved, that is, they were no longer a family and the child could no longer abuse the ex-wife, so that, in the view of the ECtHR, the above fact could not be considered a sufficiently valid ground for separating the child from the applicant.[264] Taking into account all the circumstances of the case, the Court unanimously found that there has been a violation of Article 8 of the ECHR.

Invalidity of adoption on application

In the *Negrepontis – Giannisis v. Greece* case, the applicant was adopted by his maternal uncle, the bishop of the *Greek Orthodox Church*, who had played the role of father figure in his life. The uncle was, at the time of the adoption, the Bishop of *Detroit* in the United States of America, where the applicant was pursuing his higher education. The adoption was registered by the competent court in the United States in 1984, and its validity in Greece was confirmed by a judgment of the Athens District Court in December 1999, one year after the death of the adoptive parent. The judgment made the applicant the sole heir of the deceased thus the siblings of the adopter did not inherit. Except for the applicant's mother the siblings of the deceased adoptive parent challenged the judgment of the Greek court in June 2000, in which the court recognised the applicability of the Detroit Court's judgment in Greece. The parties argued that members of the Greek Orthodox Church are not allowed to marry and found a family neither by biological way nor by adoption. The ECtHR, through a detailed analysis of the ecclesiastical and secular rules – which were analysed in detail in the course of the lengthy proceedings before the national courts and which are introduced in the ECtHR judgment –, concluded that there has been a violation of Article 14 in conjunction with Article 8 ECHR. The ECtHR interpreted the ecclesiastical and civil law as permitting priests of the Orthodox Church to marry and found a family, and thus the applicant, who was related to a member of the Orthodox Church through adoption, was discriminated against the biological descendants of members of the Orthodox Church. In the light of this finding, the ECtHR also found a violation of Article 1 of the ECHR Additional

264 ECtHR, Kurochkin, paras. 55–56.

Protocol No 1, guaranteeing the right to property, since an heir by biological descent would not have faced all this discrimination regarding inheritance rights.[265]

In the case of *Zaiet v. Romania*, after the death of the adopter, one of the two adopted siblings requested the termination of the adoption in relation to the other sibling – the applicant – and the adopter in order to inherit the whole fortune. In her application before the domestic court she argued that the adoption of the applicant was driven by selfish and calculating interest on both the adopter's and the adoptee's side: the adopter was seeking support for her old age, while the applicant seeked for the fortune of the adopter. Based on the facts of the case, the applicant was adopted by his adoptive mother in 1972. The applicant, who was 17 years old at the time, had been raised by her adoptive mother for eight years. The other sibling – who initiated the dissolution – was adopted before 1972, that is earlier than the applicant. Based on the application for dissolution, the domestic court terminated the adoption in 2004 on the grounds that it was manifestly not in pursuit of the aim laid down in the Family Law Act, namely to guarantee the applicant a better life.[266] In examining the circumstances of the case, the ECtHR concluded that, on the one hand, there was no justification for dissolving the family ties that had actually been established 32 years earlier. The ECtHR also took into account that the adopter deceased 18 years before. On the other hand the ECtHR noted that, while the appeal was pending, a new law had entered into force which allowed only the adoptee to apply for the dissolution of the adoption. Having regarded the circumstances of the case, the ECtHR found that there has been a violation of Article 8 ECHR. [267]

In a recent advisory opinion, namely P16-2022-001 of 13 April 2023[268] the ECtHR examined the rights of the biological parents in the adoption procedure. However, the case concerned the adoption of an adult child – an aunt lodged a petition against the will of her sister to adopt her sister's grown-up

265 ECtHR, Negrepontis – Giannisis v. Greece, paras. 5–31., 77–84.
266 ECtHR, Zaiet, paras. 5–15.
267 ECtHR, Zaiet, paras. 45–48, 51.
268 Advisory Opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult Requested by the Supreme Court of Finland (Request No. P16-2022-001).

son, who was basically raised by her – the author is of the view that given the nature of the advisory opinions, the findings of the Court may, could be applied to any other later adoption cases.

In December 2018, an application was made to the District Court by a woman, 'B', to grant the adoption by her of 'C', who is her nephew and who was born in 1993 to B's sister 'A'. Based on the request of 'A' – who at a certain time had long-lasting instability in her life as a widow and a single mother with three children – 'C' was appointed as supplementary custodian of 'B'. Although the possibility of adoption emerged back then as well, when later heard in the adoption proceedings, 'A' stated that she never wanted her sister to adopt 'C', who joined the household of 'B' – who was single and childless – in 1996 at the age of three. He spent the next 10 years there until he moved out to live independently. 'A' remained involved in his upbringing along with 'B', including contacts and common holidays with his four siblings. The relationship between the mother and the son was described as good and warm and 'C' always considered – and referred to – 'A' as his mother, while he called 'B' on her first name. However, the District Court decided to grant the adoption with a view to "[...] the desire of the applicant and the adoptee to make their relationship official, comparable to that of a child and parent, which was established over a long period of time while the adoptee was in the care of and was brought up by [B] as a minor."[269]

The Court of Appeal dismissed the appeal of 'A' without consideration of the merits, based on the ground that the domestic legislation did not grant *locus standi* for the biological parents in case of the adoption of an adult. The Court of Appeal referred to Article 8 of the ECHR as well and the related case-law of the ECtHR on 'family life' according to which family life is not applicable to a relationship between a parent and an adult child unless there are additional factors of dependence other than normal emotional ties. Since the Supreme Court did not identify such factors took the view that the case should not be examined under the right to family life. Although it cannot exclude the possibility that the right to private life is applicable. However, the Supreme Court deemed that the ECtHR's case-law is not clear enough on

269 ECtHR, P16-2022-001, paras. 9–18.

the weight that should be given to circumstances related to the protection of a biological parent's private and family life in such a matter.[270]

By its questions, insofar as they relate to Article 8 of ECHR, the Supreme Court essentially asks[271]: "whether that provision – under its family or private life limb – is applicable to legal proceedings concerning the grant of adoption of an adult child. If so, the requesting court asks whether in those proceedings the biological parent of the adoptee has a right to be heard, and whether the biological parent has a right to be granted the status of a party and a right to appeal against the granting of adoption."[272]

The ECtHR, reiterating its case-law, came to the conclusion that it was suitable to focus on the private life aspect of the case.[273] The ECtHR held that personal autonomy is an important principle when it comes to the adoption of an adult since this kind of adoption concerns primarily the personal autonomy of adopter and adoptee, which delimits the rights of the biological parent under ECHR. As for the procedural issues, the ECtHR recalled that while Article 8 does not contain explicit procedural requirements, where interests under Article 8 of an individual are at stake, the individual must be involved in the decision-making process. However, the means, in principle, fall within the margin of appreciation of Member States.[274] Based on a comparative study, the ECtHR found that common practice was not ob-

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270 ECtHR, P16-2022-001, paras. 20–26.

271 See Paragraph 8 of the advisory opinion for the questions:

1) "Should the Convention on Human Rights be interpreted in such a way that legal proceedings concerning the granting of an adoption of an adult child in general, and especially in the circumstances of the case at hand, are covered by the protection of a biological parent referred to in Article 8 of the Convention on Human Rights?"

2) "If the answer to the question asked above is affirmative, should Articles 6 and 8 of the Convention on Human Rights be interpreted in such a way that a biological parent of an adult child should in all cases, or especially in the circumstances of this case, be heard in legal proceedings concerning the granting of adoption?"

3) "If the answer to the questions asked above is affirmative, should Articles 6 and 8 of the Convention on Human Rights be interpreted in such a way that a biological parent should be given the status of a party in the matter, and that the biological parent should have the right to have the decision concerning the granting of adoption reviewed by a higher tribunal by means of appeal?"

272 ECtHR, P16-2022-001, para. 47.

273 ECtHR, P16-2022-001, paras. 50–52.

274 ECtHR, P16-2022-001, paras. 56–57.

servable among the States that permit adult adoption: only a few legal systems provides explicitly that the interests of the biological parents should be taken into account. In most states the biological parents have the right to a certain degree to be heard, while some countries do not grant any right in this regard. The ECtHR reiterated that its task was not to assess the applicable domestic law in general, but to assess the elementary procedural safeguard provide by the law and the authorities. As the ECtHR reiterated, where an individual's interests protected by Article 8 of ECHR are at stake – as an elementary procedural safeguard – the individual should be given the opportunity to be heard and that the arguments made should be taken into account to a due extent. In this regard, the ECtHR was of the view that the procedure before the District Court satisfied the requirements under the Convention. Having regard to the wide margin of appreciation in the issue of adult adoption, the states are not obliged under Article 8 of the ECHR to grant the biological parent the status of a party or the right to appeal in the adoption procedures.[275]

As for the applicability of Article 6 of the ECHR, the ECtHR stated that the biological mother in the case pending before the domestic courts is effectively asserting a 'right', which is clearly not granted by the domestic legislation. As the ECtHR reiterated, according to its well-established case-law, the ECtHR may not create a substantive right which has no legal basis in the State concerned by the interpretation of Article 6(1).[276]

Based on the above facts, the ECtHR delivered the following opinion:

1. "Legal proceedings concerning the grant of adoption of an adult child may be regarded as affecting a biological parent's private life under Article 8 of the Convention. That parent must be given the opportunity to be heard and the arguments made must be taken into account by the decider to the extent relevant. However, having regard to the wide margin of appreciation to which the State is entitled in the regulation of the procedure for adult adoption, respect for Article 8 does not require that a biological parent be granted the status of a party or the right to appeal the granting of the adoption."

275 ECtHR, P16-2022-001, paras. 60–61.
276 ECtHR, P16-2022-001, para. 66.

2. "If the requesting court determines that the right claimed by the biological mother does not exist, even on arguable grounds, in domestic law, it would follow that, from her perspective, Article 6 of the Convention is not applicable to the proceedings for the adoption of an adult."

1.3. Reflections on the practice of the ECtHR

According to the case-law of the ECtHR, Article 8 of the ECHR, which guarantees 'the right to respect for private and family life', applies to adoption, since the family relationship created by adoption between the adopter and the adoptee is the same as the family relationship based on descent both legally, both by its nature. In its case-law, the ECtHR has held – inter alia in *Pini v. Romania* – that when interpreting Article 8 of the ECHR one must take into account the relevant international legal documents. – In case of adoption, this means the documents referred in the introductory part of this chapter. – The ECtHR confirmed this in a witty term in *Harroudj v. France,* when it stated that "[the] ECHR cannot be interpreted in a vacuum."

According to the case-law of the ECtHR, in adoption proceedings, including the removal of a child from his or her birth family and adoption without the consent of the birth parent, as well as the possible annulment of the adoption by the public authority, the best interests of the child may be considered as the primary factor, which in all the circumstances of the case, may override the rights of the other persons concerned. The best interests of the child may therefore take precedence over the biological and the adoptive parents' right to family and private life or the adoptive parents' wish to found a family. In the latter context, the author's choice of words is not accidental: according to the case-law of the ECtHR, the right to found a family through adoption cannot be derived from the provisions of the ECHR. In this respect, it is worth recalling that Judge *Bîrsan,* in his dissenting opinion to the ECtHR's judgment in *Pini v. Romania,* argued that the procedural rights of the applicant parties guaranteed by Article 6(1) ECHR cannot take precedence over the interests of the children. The States Parties to the Convention enjoy a wide margin of appreciation under Article 8 ECHR and the relevant case-law as to, on the one hand, what mini-

mum and maximum age limit and marital status they require as a precondition to be eligible for adoption. On the other hand, the States also enjoy a wide margin of appreciation as to how they weight up all the circumstances of the case against each other when granting an adoption, provided, of course, that the appreciation made by the authorities complies with the requirements of the ECHR and the relevant ECtHR case-law. In this regard, it is worth recalling that, the dissenting judges in the *Frette v. France case* have emphasised, that the right to apply for adoption and the right to adopt cannot be considered as being identical. A contrary interpretation would deprive the authorities of their discretion.

In line with the above paragraph, the ECtHR has also held in *Schwizgebel v. Switzerland* and *Paradiso and Campanelli v. Italy* that Member States, within their margin of appreciation guaranteed by the ECHR, may set an age limit as a condition for suitability for adoption, provided that it is in accordance with the safeguards laid down in the case-law of the ECtHR. According to the ECtHR's judgment in *Gas and Dubois v. France,* the State is free to decide whether or not to guarantee the right to adoption to unmarried couples. As the Court stated, "[...] marriage confers a special status on those who enter into it." The State, within their margin of appreciation, as laid down in *Schalk and Kopf v. Austria*, is free to decide whom it confers this right on. Article 12 of ECHR, read alone or in conjunction with Articles 8 or 14 ECHR, does not create any obligation for States Parties in this respect. Nor, consequently, does the ECHR create any obligation on the signatories of the ECHR to treat married and unmarried couples equally in relation to the right to adoption. Consistent with this, the ECtHR held in *Gas and Dubois* that a Member State is not obliged to guarantee unmarried couples the possibility of adopting a stepchild, that is to say, the adoption of a partner's adopted or natural child. That is, if the state does not grant the right to marry for same-sex couples they cannot invoke the infringement of Article 14 read in conjunction with Article 8 successfully. However, as stated in *ECtHR v. Austria, c. X:* "[The] State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14." Consequently, Article 14 of the ECHR, read in conjunction with Article 8 ECHR, precludes a Member State to legislate in a way

that guarantees unmarried opposite-sex couples the possibility of adopting a stepchild, while not allowing unmarried same-sex couples to do so.

The *Fretté v. France and E.B. v. France* cases focused on the question whether the refusal of an application for adoption by a homosexual person who would raise the child alone, without a parent of the opposite sex, is contrary to Article 8 ECHR and Article 14 ECHR read in conjunction with Article 8 ECHR. Apparently, the ECtHR seemed to be divided on the legal interpretation of the facts of these cases, as illustrated by the completely opposite majority conclusions in these two cases – reached by close votes –and the characteristic dissenting opinions. While the majority decision of the ECtHR in Fretté held that the gender identity of the applicant did not play a decisive role in the decision of the national authorities to reject the application of the applicant – who, according to the expert opinions, was in all respects capable of raising a child, except that he could not provide a parental role model of the opposite sex for the child –, the majority decision in *E.B. v. France*, held that the authorities' assessment was 'contaminated' by the fact that the applicant was homosexual. However, as the dissenting judges pointed out, the majority decisions cannot be fully justified in either case: in their view, taking into account all the circumstances of the *Fretté case*, the homosexuality of the applicant was in fact decisive in the domestic authorities' assessment and it could be concluded that, had the applicant concealed it from the authorities, he would have been granted adoption. In *E.B. v. France,* on the other hand, Judge *Costa* in his dissenting opinion considered that the majority decision gave excessive weight to the so-called 'contamination theory', while ignoring the fact that the lack of support from the applicant's partner was an essential circumstance of the case which the domestic authorities had legitimately assessed – within the margin of appreciation open to them – as contrary to the best interests of the child.

Surrogacy raises delicate moral and ethical questions which are hard to be answered, since on the one hand there is no consensus at European level on this issue, and on the other hand, ECtHR – based on its well-established case-law – should not substitute itself for the competent national authorities in determining the most appropriate policy for regulating such a complex and sensitive matter like the relationship between intended parents and a

child born abroad as a result of commercial surrogacy arrangements. Thus in accordance with the case-law of the ECtHR – states must in principle be afforded a wide – however not unlimited – margin of appreciation in weighing the best interest of the child against the public interest. The latter comes to the picture due to the fact that it is quite common in these cases that the applicants intentionally circumvent the regulations of their home country by concluding surrogacy agreements abroad and then facing the authorities with a '*fait accompli*' claiming that any measures taken by the authorities, which restrict their family life in order to keep public order is in contradiction of the best interest of the child and violates Article 8 of ECHR alone or read in conjunction with other Articles of ECHR. The *Paradiso and Campanelli* and *Mennesson* cases were among the first, where the ECtHR had to face this issue. In these two cases, the ECtHR held that domestic authorities did not violate Article 8 of ECHR, when they gave more weight to the public interest. The ECtHR provided a guidance in its Advisory Opinion No. P16-2018-001 when – assessing the 'post-Mennesson' French legislation – concluded that, under Article 8 ECHR, a State Party to the Convention is obliged to grant domestic legal recognition to a legally recognised parent-child relationship established abroad based on a surrogacy agreement between the child and the prospective parent. However, a State Party to the Convention has wide discretion *vis-à-vis* the form of such legal recognition, as long as the legal instrument granting recognition functions properly and effectively and coincides with the best interests of the child. In the following case-law the main focal point of the ECtHR's scrutiny was the adequacy of such legal protection through the lens of the best interest of the child principle. In the author's view based on the conclusions reached by the ECtHR in *K.K. and Others v. Denmark* and in *D.B. and Others v. Switzerland*, there is a visible shift in the ECtHR's approach in favour of the best interest of the child and in detriment to the prevalence of public interest. The characteristic dissenting and partly dissenting opinions argued that the majority opinions in the said judgments has the potential to create a right to obtain a child through surrogacy. This would mean encroaching upon the margin of appreciation of the domestic legislator to decide what the public interest of its own country is. – It is worth reiterating that this would be contrary to well-established case-law and the perceived role of the ECtHR.

The ECtHR has dealt with the removal of children from their birth families and their temporary fostering and also with the adoption of children against their parents' will in a number of decisions. Although the best interests of the child may override the rights – and intentions – of the parent in all the circumstances of the case, the best interests of the child alone cannot be considered as having unconditional prevalence. The ECtHR's position in *Strand Lobben and Others v. Norway* – reiterated in *D.M. and N. v. Italy* – is that the termination of a child's relationship with a blood parent is an *ultima ratio* measure that can only be applied where there are particularly compelling reasons. In addition to the best interests of the child, such overriding reasons include enforcing the prevalence of the law, which may take precedence over a parent-child relationship which the authorities consider to be unlawful, as the majority decision of the Grand Chamber of the ECtHR in *Paradiso and Campanelli v. Italy* has held. However, according to the dissenting judges in the case, measures taken by the authorities which can be interpreted as essentially sanctions against the parents are contrary to the best interests of the child, in so far as they have the effect of depriving the child of the care of parents who are clearly committed to his upbringing.

As established in *Naltakyan v. Russia* and *Omorefe v. Spain,* before applying a measure such as the above, which is seriously prejudicial to the family and private life of a parent, the national court must carefully consider whether there are other less restrictive measures, including temporary placement of the child. In the latter case, with a view to its temporary nature and the urgency of the circumstances requiring it, the State has a wider discretion, which includes the fact that the assessment does not need to be as thorough as in the case of a decision to terminate a family relationship, as established in *Uzbyakov v. Russia and M.L. v. Norway.* However, the State is under a positive obligation, when taking its measures, to make every effort to reunite the family. As emphasised by the ECtHR in the *Zhou v. Italy* judgment, the social assistance services' task is helping persons in difficulty overcoming these difficulties and not exacerbating them. In *Pedersen v. Norway,* the ECtHR took the view that the authorities could not rely on the passage of time and the absence of family ties where these were of their own making. As Judge *Loucaides* explained in his dissenting opinion in *Pini v. Romania*, in such a case the absence of a real connection, taken as a decisive factor, is

contrary to the principle that 'No one may gain profit from his own wrongdoing'. Likewise, national law which allows the initiation of a process the outcome of which is likely to prove irreparable, as the ECtHR held in *Keegan v. Ireland,* and similarly, a national law like in the *Koyshev v. Bulgaria* and *I.V. v. Estonia* which precludes a challenge to parental status acquired by a declaration of acknowledgement of paternity, are contrary to the ECHR. In the *I.V. v. Estonia*, the ECtHR had to face a rather complex case that – besides the above mentioned prohibition of challenging paternity – included a proceeding aimed at the dissolution of an adoption that was authorised without the consent of the biological parent. As the author pointed out above, the presumption of 'should have known' played an important role in the ECtHR's assessment, namely that the domestic authorities failed to take into consideration all the relevant aspects of the case, when they authorised the adoption based on the consent of a man that was not the biological father of the child and who gained legal parentship by acknowledgment of paternity. A fact that was challenged by ongoing legal procedures in Latvia and on which the Estonian authorities were informed through official channels.

Contrary to the above cases, in the *V.Y.R. and A.V.R. v. Bulgaria,* the ECtHR found that the authorities did their best in facilitating the maintenance of the family ties, it was the applicant, who showed such a degree of negligence towards her child and a lack of willingness to improve her personal conditions that it legitimated the domestic authorities measures. In the *Ibrahim v. Norway*, despite the findings of domestic authorities that the mother displayed "a gross neglect that could be deemed unacceptable by any reasonable standard, regardless of ethnicity, culture and language", the ECtHR found that the domestic authorities did not attach sufficient weight to the mutual interest of the mother and child in maintaining their family ties and personal relations. In the case at hand the fact that the applicant was Muslim and the intended adoptive parents were Christians – who intended to baptise the adopted child – raised further questions that gave hard times for the ECtHR. The ECtHR – in the author's view avoided answering the religious issues directly, when stated that the applicant's claims put forward under Article 9 – granting freedom of religion – may be examined as an integral part of her complaint concerning her right to respect for her family life as guaranteed by Article 8 of the Convention.

The provisions of Article 8 ECHR do not preclude national law which makes the time-limit for withdrawing consent to adoption subject to a two-month limitation period. However, other procedural guarantees – including the requirement to provide sufficiently detailed information on the legal consequences of adoption –, shall ensure that the person who has given consent is aware of the consequences of his decision, as the ECtHR held in *Kearns v. France.* In a recent advisory opinion, delivered in 2023, namely *P16-2022-001*, the ECtHR concluded that in case of the adoption of an adult child, the rights of the biological parents may be scrutinized under the 'private life limb' of Article 8 of the Convention and the biological parent must be given the opportunity to be heard and the arguments made must be taken into account to a relevant extent, however – having regarded the states' wide margin of appreciation, Article 8 does not require that a biological parent be granted the status of a party or the right to appeal. In the *Mitrevska v. North Macedonia* the ECtHR had to weigh the interest of the grown-up child – who sought information on her biological parent's medical records in order to find out whether she suffered from hereditary disease – and the interest of the biological parents, who wanted to remain anonymous. The ECtHR concluded that there has been a violation of Article 8 of ECHR since the domestic authorities relied on a merely formalistic approach and did not conduct a proper analysis of all the relevant circumstances.

According to the case-law of the ECtHR, including the cases of *Pini and others v. Romania*, *Harroudj v. France, Kurochkin v. Ukraine and Ageyevy v. Russia*, the legal nature and substance of the family tie created by adoption is the same as that of a tie based on descent by blood. In this respect, however, it is important to clarify what constitutes a genuine family tie under ECtHR case-law. In her dissenting opinion in *Pini and Others v. Romania,* Judge *Thomassen* recalled that, contrary to the majority decision in Pini, the ECtHR's practice is that the family tie is not created by the adoption decision but by the actual living together as a family, which was not the case in the above-mentioned case. Judge Thomassen's dissenting opinion is supported, inter alia, by the ECtHR's decisions in the *Marckx v. Belgium, the K. and T. v. Finland* and the *Eriksson v. Sweden* cases. With regard to the length of cohabitation, in *Paradiso and Campanelli v. Italy*, the majority of the Grand Chamber of the ECtHR took the view against the dissenting opinion of six judges that a

mere eight months of cohabitation of the applicants and the child, who was not biologically related to them – was not a sufficient basis for establishing the existence of family life. – Quite a surprising finding, when one considers the Court's findings in Pini, namely that family life existed without actual cohabitation. – Although, as the ECtHR acknowledged, it is not possible to establish a uniform minimum period in this respect, the Court recalled that in previous similar cases in its jurisprudence, the persons concerned had lived together as a family for a significantly longer period. By contrast, where there is a family relationship between a child and a relative by blood other than the parent, the existence of family life may be established even without actual cohabitation, as was held in *Bogonosovy.* In the context of the formation of such family ties, the ECtHR held in *Wagner and J.M.W.L. v. Luxembourg* that the State has a duty to refrain from any conduct which would prevent the formation of a bond between the child and the adoptive parent and the integration of the child into the adoptive family.

In the light that a family created through adoption is both legally and both by its nature identical to a family based on descent, where the authorities have to decide on the dissolution of the family relationship established by adoption, as in the cases of *Ageyevy v. Russia* and *Kurochkin v. Ukraine*, the termination of family relationship can be considered an *ultima ratio* measure which can only be applied where there are particularly strong reasons exist. And before applying it, the national court must carefully consider whether there are other, less restrictive measures, including temporary placement of the child. In the latter case, the State has a wider margin of discretion, given its temporary nature, but the state is under a positive obligation to do its utmost to facilitate family reunification when taking its measures, as the ECtHR held in *Ageyevy.*

As regards the subsequent annulment of an adoption on request, the ECtHR held in *Zaiet v. Romania* that the termination of the family relationship 32 years after the adoption and 18 years after the death of the adopter was unjustified in all the circumstances of the case and clearly did not serve the legal purpose of the termination of the adoption. In the case of *Negrepontis v. Giannisis v. Greece,* the ECtHR, taking into account the fact that priests of the Orthodox Church are allowed to marry and found a family, held that the applicant – whose adoption

by his uncle had been terminated on the request of his own relatives in order to obtain the inheritance – was discriminated against within the meaning of Article 14 read in conjunction with Article 8 ECHR, as compared with the biological descendants of members of the Orthodox Church.

Last but not least, two decisions of the ECtHR – *Harroudj v. France* and *Chbihi Loudoudi and others v. Belgium* – worth mentioning in which the Court examined whether the legal concept of *kafala* under Islamic law and the legal concept of adoption are mutually compatible and, depending on the answer, whether the state is obliged to recognise a placement under *kafala* as an adoption. On this question, the ECtHR has taken the view that a State is not obliged to recognise adoption as a legal instrument such as *kafala,* which in the Council of Europe countries is equivalent primarily to guardianship. This interpretation is supported by the ECtHR's finding in the Kurochkin case – albeit not in relation to *kafala* – that the rights and obligations created by guardianship cannot be assimilated to adoption, since the latter creates rights and obligations similar to those of parent-child relationships based on biological descent. However, the dissenting opinion to the 4:3 majority decision in *Chbihi Loudoudi and Others* shows that the approach taken in *Harroudj,* whereby the enforcement of national rules prohibiting adoption takes precedence over the best interests of the child, can also be interpreted as being contrary to the Convention and the relevant ECtHR case-law. As the dissenting judges recalled, according to that practice, the best interests of the child must prevail.

2. European Union legal background

2.1. EU legal background and European Parliament resolution

Adoption is not regulated by a binding EU act, the Member States of the European Union therefore apply their own internal legislation to this legal instrument, and as a consequence the legislation of countries display differences.277

277 For some differences, such as the minimum age of contribution for a child, see FRA summary: FRA, 2018.

However, it can also be noted that all EU countries respect certain principles laid down in international instruments on adoption, such principles are: the best interests of the child are the decisive factor in adoption; the consent of the child's birth parents is required in the event of adoption if they are living; and adoption must be authorised by a court or a competent administrative authority. [278]

There were strives to create a binding regulation: the *European Parliament,* in its resolution of 2 February 2017[279] – on the basis of Article 225[280] of the *Treaty on the Functioning of the European Union* (TFEU)[281] – requested the European Commission to submit a proposal on cross border adoption. Commission decided not to initiate the legislative process. The Commission's decision was based on two main reasons, namely that the issue is regulated by a number of international rules and that it is not yet clear to the Commission how to achieve sufficient uniformity at EU level.[282] The proposal, if adopted, would have codified at EU level the main international and regional rules and principles on adoption, including those already set out in the ECtHR case-law. At the same time, the proposal would have enshrined the rules deriving from the *sui generis* nature of EU law, including provisions on the free movement of persons.[283]

Other EU rules – not specific to adoption – apply as a background rule to adoption procedures: the provisions of the *Charter of Fundamental Rights of the European Union* (the Charter)[284] binds Member States given that Article 6(1) of the Treaty on European Union provides that "[the Charter] shall have

278 See the 'Adoption' section of the 'Your Europe' website. Available at: https://europa.eu/youreurope/citizens/family/children/adoption/index_en.htm (17.06.2024)

279 European Parliament, Cross-border aspects of adoptions European Parliament resolution of 2 February 2017.

280 Article 225 TFEU: "The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons."

281 Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47–390).

282 European Commission, SP (2017) 188.

283 For example, the habitual residence of the parent or other relative who wishes to take custody of the child should not be a determining factor, and parents of different nationalities should be treated equally.

284 Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, pp. 391–407.

the same legal value as the Treaties." The relevant provisions of the Charter are in Article 7, which guarantees the right to private and family life with a general nature – which also apply to children –, and Article 24, which sets out rights specifically for children. *Article 7 of* the *Charter* states that "Everyone has the right to respect for his or her private and family life, home and communications." Although the wording of Article 7 differs from Article 8 of the ECHR – in order to take account of technical developments inter alia[285] –, the substance of the two articles are the same. The 'child-specific' Article 24(1)-(3) of the Charter guarantee that:

> (1) "Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity"; (2) "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."; (3) "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[286] covers parent-child relationships based on adoption, as adoption creates a relationship equivalent to that of blood.

Although *Council Regulation 2201/2003* concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (*Brussels IIa Regulation*)[287] – which is no longer

285 While Article 8 of the ECHR mentions 'correspondence', the Charter use the term 'communication'.

286 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending.

287 Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

in force[288] – did not cover adoption[289] played a decisive role in a case introduced in the section of the case-law of the Court of Justice of the European Union (CJEU) – therefore it is appropriate to be included here. Its successor[290] – which does not cover adoption either – is also mentioned in a novel case.[291]

According to Article 4(1)(d) of the *Council Directive 2003/86/EC on the right to family reunification,*[292] "[...] the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her" should be regarded as a family member. It is also worth mentioning the *Council Decision 2003/93/EC*[293] authorising EU countries to sign the *1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.[294]

These EU background rules also consist of principles, recommendations, resolutions and other *soft law* instruments. However, the European Commission's '*EU strategy on the rights of the child (2021-24)*'[295], does not explicitly address adoption, it is worth mentioning since it echoes the statements from documents adopted in the framework of the CoE, as an example the opening sentence, which states that "Children's rights are human rights. Every child in Europe and across the world should enjoy the same rights and be able to live free of discrimination, recrimination or intimidation of any kind."[296]

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288 Repealed by: Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

289 Article 1(3)(b) of Council Regulation (EC) No 2201/2003: "This Regulation shall not apply to: [...] decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption."

290 Council Regulation (EC) No 2201/2003 Article 4(b) is identical to Article 1(3)(b) of Council Regulation (EC) No. 2201/2003.

291 CJEU, C-27/23, Hocinx, Judgment of the Court, 16 May 2024.

292 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

293 2003/93/EC: Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

294 HCCH 34: Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

295 European Commission, (COM (2021) 142 final).

296 For an analysis of the Commission's strategy on the rights of the child, see Benyusz, 2021, p. 149.

The European Parliament[297] and its *Committee on Petitions* (PETI)[298] addressed the issue of the so called 'rainbow families',[299] just like the European Commission, which in its 2020 document called 'Union of Equality: LGBTIQ Equality Strategy 2020-2025'[300] stated that: 'If one is parent in one country, one is parent in every country.' In this context, the Commission will promote mutual recognition of family relationships in the EU, whereby in 2022 the Commission will initiate the procedure for a legislative act under Article 81(3) TFEU[301] to promote mutual recognition of parenthood between Member States.[302] If the legislative plan is implemented, the status of parents legally registered in one Member State will be subject to mandatory recognition in another Member State. In preparation for the draft legislation, a public consultation was carried out in 2021, which showed that a majority of EU citizens support the proposal[303] and a preparatory working group was set up.[304] The Justice and Home Affairs configuration of the Council was put on the agenda of 4 February 2022.[305] According to reports, there was no agreement among ministers either on that day or earlier.[306] This is due to the fact that the Commission, relying on the principle of functional recognition[307] enshrined certain CJEU judgments,[308] is essentially seeking to extend EU

297 European Parliament resolution of 14 September 2021 on LGBTIQ rights in the EU.

298 To address the difficulties faced by the so called 'rainbow families', the PETI recommended the deletion of the phrase "[...] if the legislation of the host Member State treats registered partnerships as equivalent to marriage" from Article 2(2)(b) of Directive 2004/38/EC. It further proposed that the terminology used in Directive *2004/38/EC* be clarified in a Commission Communication in a way that it would make it clearly applicable to rainbow families. Last but not least, it proposed that the Commission take the initiative to adopt a directive harmonising the rules for the recognition of birth certificates at EU level. – European Parliament (PE 671.505- March2021) (PETI report), pp. 73–81, 94–98.

299 European Parliament resolution of 14 September 2021 on LGBTIQ rights in the EU.

300 European Commission: COM (2020) 698 final.

301 Article 81(3) TFEU: "Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament."

302 European Commission Equality Union: a strategy for equality for LGBTIQ people Ibid, p. 18.

303 European Commission, Document No. 6847413 - 08/11/2021.

304 Expert Group on Recognition of parenthood between Member States (E03765).

305 French Ministry of the Interior, 2022.

306 Ellena, 2022.

307 Meeusen, 2022.

308 The Coman and the Pancharevo cases, which are introduced in the next part.

competences into an area which, under the Treaties, remained the exclusive competence of the Member States.

On 7 December 2022, the European Commission issued a proposal[309] for a '*Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood*'.[310] A key element of the proposal is that a legal parent-child relationship established in one EU Member State should be recognised in all other Member States without any additional legal procedures.[311] The Commission proposed a harmonised template that would be compulsory to accept throughout the EU. It stressed that the regulation would not harmonise substantive family law, which remains a competence of the Member States. With a view to the lack of consensus on the issue among Member States' governments, it is unlikely that the proposal will be adopted in its recent form, as the legislative procedure under Article 81(3) of the TFEU requires the Council to make unanimous decisions. This procedure requires the Council to consult with the European Parliament, which has been done. In December 2023, however, the European Parliament adopted its position on the Commission's December 2022 proposal,[312] adding greater emphasis to the best interest of the child, compared to the original document. However, during the parliamentary debate on 15 March 2023[313] it became clear that the Commission's proposal is highly controversial. Also, some Members of the European Parliament submitted a question for written answer to the Commission arguing that the "[...] above proposal risks undermining principles such as subsidiarity and proportionality, directly or indirectly impacting on what parenthood and family values represent for each Member State, an area falling outside EU remit." They asked the Commission how it intends to protect Member States that ban surrogacy, es-

309 European Commission: Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. [Brussels, 7.12.2022 (COM(2022) 695 final].

310 For follow-up information on the proposal please see: Procedure 2022/0402/CNS (Online).

311 For a detailed analysis of the proposal, please see: Tryfonidou, 2023, p. 111.

312 European Parliament legislative resolution of 14 December 2023 C9-0002/2023 – 2022/0402(CNS).

313 See: European Parliament (2019-2024) Verbatim Report of Proceedings (15.03.2023.).

pecially where other Member States issue national documents recognising surrogacy occurring in third countries?[314] The Commission's answer lacked any merit.[315]

Furthermore, the Italian and French parliaments submitted a reasoned opinion under the Early Warning System[316] aimed at scrutinising the prevalence of the principles of subsidiarity and proportionality by the national parliaments. Both Parliament's upper houses, namely the '*Senato della Repubblica*' of the Italian Parliament (*Parlamento italiano*) and the '*Sénat*' of the French Parliament (*Parlement français*) stated that the proposed legislation does not comply with the principle of subsidiarity.[317] The senate of the Dutch Parliament (*Eerste Kamer der Staten-Generaal*) initiated political dialogue[318] to inquire about the number of cases where the recognition of parental responsibility and rights of access, succession rights, and name met legal obstacles and to see if there were any alternative solution to these problems that do not require the initiation of EU legislation.[319]

The Council of the European Union held a policy debate on a proposed regulation of the Commission on 14 June 2024.[320]

314 Question for written answer to the Commission under Rule 138, E-000580/2023 (22.2.2023) (Online)

315 Answer given by Mr Reynders to question E-000580/2023 (22.2.2023) on behalf of the European Commission 20.4.2023.

316 Article 6 of the Protocol No 2 of the TFEU on the application of the principles of subsidiarity and proportionality.

317 Parlamento italiano, risoluzione della 4ª commissione permanente (politiche dell'unione europea) doc. xviii-bis n. 2 [Online]; Parlement français, N° 84 sénat session ordinaire de 2022-2023 (22 mars 2023) (Online).

318 Vragen over voorstel voor een verordening betreffende wederzijdse erkenning van afstamming FCOM(2022)695G 24 maart 2023 (172946.01U) (Online).

319 The author did not find any evidence that the dialogue started that is the Commission answered this question.

320 Council of the European Union, Provisional Agenda (Justice and Home Affairs), Luxembourg 13 and 14 June 2024.

2.2. The case-law of the CJEU

At the time of writing this chapter, the CJEU has delivered only one judgment in which the legal effects of 'adoption' of a minor[321] by 'kafala' could be deemed as the direct subject of the case[322] – the *C-129/18 – SM contra Entry Clearance Officer*[323] –, but has never delivered a judgment in, which the right to become a parent by adoption or surrogacy was the directly assessed.[324]

321 The Nabiel Peter Bogendorff von Wolffersdorff and Sayn-Wittgenstein cases of the CJEU included the assessment of certain legal effects of being adopted as an adult. – See: C-438/14, Nabiel Peter Bogendorff von Wolffersdorff, Judgment 2 June 2016; C-208/09 – Sayn-Wittgenstein, Judgment, 22 December 2010.

322 Certain issues that usually form part of the ECtHR's adoption cases were raised as an example, the right of the family members to live together versus enforcing decisions of the authorities. In the 'G.N.' case the domestic court in essence asked if a Member States' authority could deny the enforcement of an *European Arrest Warrant*, which is not addressed to the children, but effects them seriously by possibly depriving them from enjoying their mothers' company in a way as guaranteed in their own country, since the issuing country allegedly does not provide the same guarantees as regards the child's placement during the mother's detention. In the 'M.A.' case the referring court asked in essence whether the enforcement of a domestic order to leave the country accompanied by entry ban was in conformity with EU law – including Article 24 of the Charter – if as a result, the child is required to leave the territory of the European Union and to deny herself the effective enjoyment of the rights conferred on her by virtue of her status as a Union citizen in order to enjoy his father's company. – See: C-261/22 GN v. Procuratore generale presso la Corte d'appello di Bologna, paras. 19., 38–57.; C-112/20, M. A. v. État belge, 11 March 2021, para. 15.

323 CJEU, C-129/18 SM k. Entry Clearance Officer, Judgment.

324 In the two cases which touched upon the issues of surrogacy the main focal point was the refusal of maternity leave for women, who became mother through surrogacy. Unlike in the related ECtHR cases, their right to become a mother trough surrogacy was not raised as an issue. In the 'Z' case the country did not regulate surrogacy and – based on the facts of the case – the maternity of the domestic procedure's applicant over the child – who was created from her and her husband's gametes, thus being linked to both parents genetically – was never challenged by the domestic authorities. Nor did the Californian birth certificate indicating both of them as parents. The underlying problem was that the Irish regulation did not provide her the same amount of maternity leave that was due to mothers who gave birth their child or adopted the child. The CJEU took the view that the Member States' regulation did not constitute discrimination, thus was in conformity with EU law. In the 'C. D. v. S. T.' case, the child born through surrogacy as well, which is in the case at hand was regulated by the country, permitting it under certain circumstances. The mother was not the biological parent – only her partner –, who in the absence of a 'matching certificate' issued by an adoption agency was not eligible for maternity leave despite a court order granted the spouses full parental responsibility. The CJEU was of the view that that the Member States' regulation did not constitute discrimination, thus was in conformity with EU law. – See: C-363/12, Z. v. Government Department and The Board of Management of a community school, paras. 25., 36–44., 91.; C-167/12, C. D. v. S. T., paras. 17–26., 50–57.

In the SM case CJEU faced the same question as the ECtHR, namely, whether *kafala,* in terms of its legal effects, is more akin to adoption or guardianship? The EU law relevance of the case arose from the question whether a Member State is entitled to refuse the entry of a third country national on the ground that the child covered by *kafala* does not qualify as a 'direct descendant' within the meaning of *Article 2(2)(c) of Directive 2004/38*? In this opinion,[325] the Advocate General suggested that the CJEU should answer that question by stating the concept of direct descendant of a Union citizen "to be interpreted as meaning that a child cannot be classed as a 'direct descendant' of a Union citizen where the child is only in the legal guardianship of that Union citizen under the institution of (kafala) that applies in the Republic of Algeria."[326] In his Opinion, the Advocate General reviewed the relevant sources of international and EU law, from which he concluded that *kafala* does not amount to adoption. Only the European Commission's Communication on *'Guidance for better transposition and application of Directive 2004/38/EC'*[327] interprets the relationship between a minor under the permanent care of a guardian and a guardian as equivalent to the parent-child relationship established by adoption.[328] According to the Advocate General, if the Commission's position is accepted, Mr. S.M. could be considered to be an adopted child of the spouses who have taken care of him. However, as the Advocate General recalled, on the one hand, the position taken in the Commission's Communication is contrary to the conclusion drawn from the interpretation of the international treaties and sources of EU law examined and on the other hand, the Commission's Communication has no normative force. In the light of this interpretation, and of the ECtHR's *Harroudj* and *Chbihi*

325 CJEU, C-129/18 SM k. Entry Clearance Officer, Opinion of the Advocate General, para.123.

326 CJEU, C-129/18 SM, opinion of the advocate general, para. 236.

327 European Commission, Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. COM (2009) 313 final, Brussels, 2.7.2009.

328 The author considers worth mentioning the T-283/17 SH judgment of the General Court in which the Court provided an analysis on the differences between guardianship and adoption: '[...] There are significant differences between adoption and guardianship. First, it should be emphasised that, unlike adoption, guardianship comes to an end, in principle, when the child reaches the age of majority. Second, it should be observed that guardianship is, in principle, revocable, while adoption, which is a form of affiliation, is intended to be permanent.' – T-283/17 SH, [...] v. European Commission, para. 69.

cases, the Advocate General took the view that: "I cannot therefore see why the rejection of one route (that for direct descendants) should be an obstacle to carrying on family life, when the alternative route (where permission to reside is granted subject to verifying that SM is a dependant or member of the household of the Union citizen having the right of residence) does not prevent the child from obtaining *actual* legal protection of that same family life."[329] The CJEU, having itself examined the aspect of the best interests of the child[330], ruled according to the Advocate General's Opinion.[331] The CJEU therefore held that: "the concept of a 'direct descendant' of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38 must be interpreted as not including a child who has been placed in the permanent legal guardianship of a citizen of the Union under the Algerian *kafala* system, because that placement does not create any parent-child relationship between them."[332] The CJEU also agreed with the Advocate General that a child placed under guardianship in the context of *kafala* is a so called 'other family member' – within the meaning of Article 3(2)(a) "[...] it is for the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of a citizen of the Union pursuant to Article 3(2)(a) of that directive, read in the light of Article 7 and Article 24(2) of the Charter."[333]

The author of the present chapter also considers the *joined cases C-325/18 PPU and C-375/18 PPU* of the CJEU to be worthy of analysis, although they are only indirectly related to adoption issues. In those cases[334] , the CJEU had to decide, inter alia, on the question:

> "[Is it] compatible with EU law and, specifically, the provisions of Council Regulation No 2201/2003, for the courts of one Member State to grant an interlocutory injunction (protective

329 CJEU, C-129/18 SM, Opinion of the Advocate General, paras 71–83, 93.

330 "That assessment must take into consideration, inter alia, the age at which the child was placed under the Algerian *kafala* system, whether the child has lived with its guardians since its placement under that system, the closeness of the personal relationship which has developed between the child and its guardians and the extent to which the child is dependent on its guardians, inasmuch as they assume parental responsibility and legal and financial responsibility for the child." – See CJEU, C-129/18 SM, judgment, para 69.

331 CJEU, C-129/18 SM, judgment, para. 73.

332 CJEU, C-129/18 SM, Judgment, para. 73.

333 CJEU, C-129/18 SM, Judgment, para. 73.

334 CJEU, C-325/18 PPU and C-375/18 PPU, Judgment.

> measures) directed *in personam* at the public body of another Member State preventing that body arranging for the adoption of children in the courts of that other Member State where the *in personam* injunction arises from the necessity to protect the rights of the parties in enforcement proceedings arising under Chapter III of the 2003 Regulation."[335]

In essence, the question is whether the decision of the Irish *Court of Appeal* addressed to an authority of another Member States, namely the *Hampshire County Council (HCC)* of the United Kingdom merely halts the adoption proceedings pending further investigation, or does it also prevent HCC from reopening proceedings for the adoption of the child before its own national court? In the latter case, the Irish Court of Appeal's order would constitute an *anti-suit injunction*[336], which is prohibited under EU law. The starting point in the main case was an interim care order made on 30 June 2017 by the *Family Court Portsmouth* (United Kingdom), by which the court granted HCC parental custody of both children of a couple living in the UK. In the application on which the order was made, the HCC justified the need to terminate parental custody on the grounds, inter alia, with the father's violent nature, his drug abuse and the couple's neglect of the children. With regard to the latter, the HCC highlighted the poor hygiene conditions in the house and the inadequate nutrition of the children, which led to their obesity. Following the initiation of the procedures, the parents of the children were cooperative and in several cases sought advice from the social services to improve the hygiene and nutritional conditions, which led to an improvement in the conditions. Taking all this into account, the HCC decided to leave the child in parental care for the time being. However, in August of the same year, the HCC informed the couple that it would also apply for the custodial rights of the child due to be born in September. According to the mother, the HCC worker then verbally informed her that while the two older children were too old to be adopted – and therefore the possibility of adoption did not arise in their case – it was a potentially viable option for the unborn child. As the mother argued the HCC worker told her that it was easy to make a baby

335 CJEU, C-325/18 PPU and C-375/18 PPU, Opinion of the Advocate General, para. 56.

336 For more on the legal institution rooted in English civil procedure law, see Grosu, 2010, pp. 419–433.

adopted. In the days following the birth of the child, the HCC informed the couple that the HCC had decided to remove the children from the family. The couple then left for Ireland with the three children on 5 or 6 September[337]. On 8 September 2017, the *High Court of Justice (England & Wales),* on the application of the HCC, ordered that the children be placed in care of the services and that they be returned. On 13 September 2017, the *District Court of Gorey* (Ireland) made interim care orders in respect of the three children and ordered their placement at the Irish *Child and Family Agency (CFA).* On 21 September 2017, the Irish *High Court* made an order recognising and enforcing the English *High Court* order of 8 September 2017. The CFA staff handed the children over to HCC staff, who placed the two older children with a relative and the youngest child with foster carers. The parents have appealed against the decisions of the English and Irish courts. While the appeal was dismissed in England, it was declared admissible by the Irish Court of Appeal. Following the admissibility decision, the parents filed an application for interim measures on 23 May 2018, requesting that the Irish Court of Appeal order the HCC to stop the adoption proceedings of the youngest child. The Irish Court of Appeal referred three questions to the CJEU on the appeal, which was supplemented by a fourth question, already cited above, following the filing of the said application for interim measures.[338] – Given that only the latter is relevant for the chapter, the author refrains from presenting and analysing the other questions.

As Advocate General *Julianne Kokott* argued, in the fourth question, the referring court is essentially seeking guidance – as the court itself emphasises –, as to whether, it would be contrary to EU law, in particular *Regulation 2201/2003* if it were to order in its decision an authority of another country, which, according to the Advocate General, could in itself raise concerns of constitutional and international law.[339] The question also arose because the HCC had indicated to the Irish Court of Appeal that it did not intend to return the children, irrespective of the outcome of the appeal. By the latter statement, it effectively challenged the jurisdiction of the Irish Court of Ap-

337 It is not clear from the statement of facts of the case.
338 CJEU, C-325/18 PPU and C-375/18 PPU, Opinion of the Advocate General, paras. 24–58.
339 CJEU, C-325/18 PPU and C-375/18 PPU, Opinion of the Advocate General, paras. 139–142.

peal.[340] In this respect, it should first be recalled that the HCC had initiated the exequatur proceedings in Ireland, thereby accepted the jurisdiction of the court of another State. The Advocate General argued that the acceptance of jurisdiction in the case at hand could also be deducted from the *European Convention on State Immunity.*[341] Secondly, it should be stated that Regulation No. 2201/2003 does not extend to matters relating to adoption, including the preparation of adoption. However, as the Advocate General recalled in paragraphs 147 to 150 and 153 to 154 of her Opinion, the measure which the parents seek to obtain from the referring court against the HCC is not an anti-suit injunction but a 'freezing' or 'Mareva' injunction. The purpose of such a measure is not to prevent the addressee from going to court but to prevent the addressee from creating an irreversible situation before the dispute is concluded. This is exactly the case here based on the above introduced statement of facts. Thus the Advocate General argued that the principles set out in the CJEU's anti-suit injunction related case-law[342] were not applicable to the present dispute.[343] The CJEU came to the same conclusion in paragraph 92 of its judgment, referring back to the points of the Advocate General's Opinion introduced above. Thus, in the third point of the operative part, the CJEU stated:

> "Regulation No 2201/2003 must be interpreted as not precluding, in a situation such as that at issue in the main proceedings, a court of one Member State from adopting protective measures in the form of an injunction directed at a public body of another Member State, preventing that body from commencing or continuing, before the courts of that other Member State, proceedings for the adoption of children who are residing there."

In the recent C-27/23 *Hocinx*-case[344] Advocate General *Maciej Szpunar* in his opinion[345] provided an interpretation on the family status of a child placed with a family by a court order. In the advocate general's view: "[...] a child

340 CJEU, C-325/18 PPU and C-375/18 PPU, Opinion of the Advocate General, para. 50.
341 Council of Europe, European Treaty Series — ETS No. 74.
342 See the relevant CJEU case-law cited in paragraph 143 of the advocate general's opinion.
343 CJEU, C-325/18 PPU and C-375/18 PPU, Opinion of the Advocate General, paras. 139–164
344 As the advocate general and the court's judgment notes: the name of the case is fictitious and does not correspond to the real name of any party of the proceedings.
345 CJEU, C-23/27, Hocinx, Opinion of the Advocate General, 25 January 2024.

who is placed by a court order in the household of a frontier worker must, for the purposes of granting the family allowance, fall within the scope of a 'member of the family', since that concept also covers persons other than those listed in Article 2(2) of Directive 2004/38."[346]

The CJEU, however delivered the judgment without making any reference to the above statement of the advocate general, thus the above definition has not been embodied in its case-law. The applicant of the domestic case worked in Luxembourg and resided in Belgium and had frontier worker status and therefore dependence on the Luxembourg system for family allowances. The child, FW has been placed in FV's – the applicant – household since 26 December 2005 pursuant to an order made by a Belgian court. The competent Luxembourgian authority withdraw the family allowances with a retroactive effect from 1 August 2016, received for the child FW on the ground that that child, who has no child-parent relationship with FV, is not a 'member of the family' for the purposes of Article 270 of the Social Security Code of Luxembourg (code de la sécurité sociale).[347] The Court of Cassation of Luxembourg (*Cour de cassation*) in essence asked by its question for a preliminary ruling:

> "whether [EU law] must be interpreted as precluding the legislation of a Member State under which cross-border workers may not receive a family allowance associated with their pursuit of an activity as an employed person in that Member State for children who have been placed with them and of whom they have custody, whereas children who have been placed in care by a court order in that Member State are entitled to receive that allowance paid to the natural or legal person who has custody of the child, and whether the fact that the frontier worker provides for the maintenance of the child has a bearing on the answer to that question."

While Advocate General *Maciej Szpunar* emphasized that the referring court only asked whether the Luxembourgian law is in conformity with EU law – namely does the latter exclude the above mention discrimination

346 CJEU, C-23/27, Hocinx, Opinion of the Advocate General, para. 57.
347 CJEU, C-23/27, Hocinx, Opinion of the Advocate General, paras. 17–18.

– and did not ask the Court whether, the scope of Article 270 of the Code should be extended in accordance with Article 2(2) of Directive 2004/38 to include children placed in custody by a court order, he went ahead to answer this question as well. [348] In the advocate general's view since the provisions establishing the free movement of workers, must be construed broadly according to the CJEU case-law, the concept of 'member of the family' must be interpreted broadly as well. In his view, where appropriate, it shall cover, persons other than those listed in Article 2(2) of Directive 2004/38, in particular a child placed under long-term legal guardianship by a court order, where they are in a situation comparable to that of a child covered by that provision. In that regard, the advocate general pointed out that recital 31 of Directive 2004/38 states that that directive respects the fundamental rights and freedoms and observes the principles recognised, in particular, by the Charter. The advocate general emphasized specially the principle of the primacy of the best interests of the child, as recognised in Article 24(2) of the Charter and also the interest of children in maintaining their family life, protected by Article 7 of the Charter a provision that – as it was introduced above – corresponds to Article 8 of the ECHR.[349] Thus the advocate general referred to the case-law of the ECtHR which states that the existence of de facto family life between foster parents and a child placed with them dependent on a number of elements.[350] With a view to the above considerations, the advocate general took the above cited view that a child like FW should be considered as a family member.[351] The CJEU, dispensing with a commentary on the notion of family member decided that the domestic regulation at hand is contrary to EU law due to its discriminatory nature.[352]

Although, to date, no case has been brought before the CJEU directly addressing the issue of the right to adoption of homosexual persons alone or as a cou-

348 CJEU, C-23/27, Hocinx, Opinion of the Advocate General, paras. 37–40, 47.
349 CJEU, C-23/27, Hocinx, Opinion of the Advocate General, paras. 51–53.
350 Such as the time spent together, the quality of the relationship and the role played by the adult vis-à-vis the child. – Here the advocate general referred to paragraph 48 of the ECtHR's Moretti and Benedetti judgment of 22 November 2010.
351 CJEU, C-23/27, Hocinx, Opinion of the Advocate General, para. 57.
352 CJEU, C-23/27, Hocinx, Judgment, para. 41.

ple, it is worth mentioning the *Pancharevo*[353] and the *Coman*[354] cases in which the CJEU, relying on the so-called 'functional recognition' essentially held that the right guaranteed by *Directive 2004/38/EC* overrides the rules of national identity of the Member State. In other words, Member States are obliged to guarantee the right of free movement and residence of the spouse of an EU citizen even if the legislation of the country concerned does not recognise same-sex marriages as it was stated in the Coman-case. Similarly, as the CJEU held in the *Pancharevo-case,* Member States must ensure that two persons of the same-sex can be registered as parents of a child. Under the Pancharevo ruling the national authority is obliged to issue the identity card or passport necessary for the free movement of a child who is a national of a Member State, even if it is not possible to register two same-sex parents in that Member State.[355]

The reasons why the CJEU decided to apply the principle of functional recognition can be found in the Opinion of the Advocate General Julianne Kokott in the Pancharevo-case[356]. As the Advocate General wrote:

> "If the same-sex spouse of a Union citizen with whom that citizen has validly entered into a marriage pursuant to the legislation of a Member State is not classified as a 'family member' on the ground that the law of another Member State does not provide for that possibility, this would risk a variation in the rights deriving from Article 21(1) TFEU from one Member State to another, depending on the provisions of their national law.'"[357]

She hopes to avoid this situation by applying the principle of 'portability of personal status' to Directive 2004/38/EC, an idea that was originally formulated by *Silvia Pfeiff*[358] and invoked by Advocate General *Melchior Wathelet* in the Coman case.[359] According to Pfeiff:

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353 CJEU, C-490/20, 'Pancharevo', Judgment para 69.
354 CJEU, C-673/16 Coman, Judgment, paras. 51, 56.
355 For a detailed analysis of the two cases see: Marinkás, 2023, pp. 177–201.
356 CJEU, C-490/20, V.M.A., Opinion of the Advocate General.
357 CJEU, C-490/20, 'Pancharevo', Opinion of the Advocate General, para. 61.
358 Pfeiff, S., La portabilité du statut personnel dans l'espace européen, Bruylant, Coll. Europe(s), 2017, especially No 636, p. 572; See furthermore: Sarah Den Haese, Crossing Borders: Proving Your Personal Status: Interactions Between Private International Law and Human Rights Law. Eleven International Publishing, 2023. p. 477.
359 CJEU, C-673/16 Coman, Opinion of the Advocate General, Endnote No. 21.

"The main argument against recognition of the homosexual marriage relates to the desire to protect traditional marriage. However, recognition of the foreign homosexual marriage does not directly undermine traditional marriage in the forum State. It does not prevent heterosexual couples from marrying. Nor does it allow couples of the same sex to marry in the host State. The effect of recognition of the foreign homosexual marriage is therefore confined to the couples concerned and does not undermine the superstructure."[360]

According to Advocate General Kokott, the application of this principle would help avoid encroaching on the national identity within the meaning of Article 4(2) TEU[361] which would result from the Member State being forced to change its 'traditional concept of family' as enshrined in constitutional and legal rules in order to fulfil its obligations under EU law.[362] This train of thoughts worth comparing with the argument put forward by Advocate General *Henrik Saugmandsgaard Øe in the Erzberger case*[363] of the CJEU in 2017[364] that, in a non-harmonised area, the legislation of the host Member State of an EU citizen that would be less favourable than that of the citizen's Member State of origin cannot be interpreted as constituting an obstacle to free movement. The Court took the same position as the Advocate General in the case at hand.[365] Advocate General Saugmandsgaard Øe, reiterated the above reasoning in his opinion in the *Eurothermen*-case.[366] Again, the CJEU approved.[367] – It is worth mentioning that substantial family law is such a non-harmonised area under EU law.[368]

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360 Pfeiff, 2017, p. 572.

361 Article 4(2) TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including [...] maintaining law and order [...]."

362 CJEU, Opinion of the Advocate General in Coman, para. 41; CJEU, Coman judgment, paras. 45–46.

363 CJEU, C-566/15 Erzberger, Judgment.

364 CJEU, C-566/15 Erzberger, Opinion of the Advocate General, paras. 75–78.

365 CJEU, C-566/15 Ezrberger, Judgment paras. 34–36.

366 CJEU, CJEU, C-437/17, Eurothermen Resort case, Opinion of the Advocate General, para. 51.

367 CJEU, CJEU, C-437/17, Eurothermen Resort case, Judgment, para. 37

368 Graovac, 2021, p. 48.

While the Bulgarian Supreme Administrative Court (*Varhoven Administrativen Sad*) on 1 March 2023 ruled[369] contrary to the CJEU's judgment in the Pancharevo-case, stating that the Bulgarian authorities are not obliged to issue the birth certificate for the child as – contrary to what the Sofia Administrative Court (*Administrativen sad Sofia-grad*) alleged in its request for preliminary ruling[370] – she is not a Bulgarian citizen, some Member States' courts already 'surrendered' following the *Coman*-judgment. Even the Bulgarian Supreme Administrative Court in an earlier case ruled that the Australian member of a same-sex couple of French and Australian origin qualifies as a spouse within the meaning of Directive 2004/38/EC in order to comply with the country's obligations under EU law.[371] The Polish Supreme Administrative Court *(Naczelny Sąd Administracyjny, NSA)* in its decision of 2 December 2019[372] anticipated the CJEU's Pancharevo judgment by two years for the purposes of functional recognition. In the case of a foreign birth certificate showing two persons of the same sex as parents of a child, the NSA held that the refusal to register the said birth certificate in Poland on public policy grounds did not prevent the authorities from registering the child directly with a so-called PESEL (*Powszechny Elektroniczny System Ewidencji*) number on the basis of the foreign document. The PESEL, which essentially functions as an electronic identity number, will later be the basis for issuing identity cards, passports and other official documents.[373] In a 2020 decision[374] – also using functional recognition – the NSA recognised the child born to a surrogate mother of a Polish woman as a Polish citizen, while declaring that Polish law still does not recognise the institution of

369 Varhoven Administrativen Sad, Decision No. 2185 of 1 March 2023 (Case 6746/2022).

370 Sofia Administrative Court (*Administrativen sad Sofia-grad*), which referred the question to the CJEU. The referring court explained that under Article 25(1) of the Bulgarian Constitution (*Konstitutsia na Republika Balgaria*) and Article 8 of the Bulgarian Law on Bulgarian Citizenship (*Zakon za balgarskoto grazhdanstvo*), a child is a Bulgarian citizen even if he/she does not have a Bulgarian birth certificate, as a child whose ancestor is a Bulgarian citizen is considered a Bulgarian citizen. – CJEU, C-490/20, 'Pancharevo', judgment, para. 25.

371 Associated Press, 2019 [Online].

372 NSA, II OPS 1/19 (2019/12/02).

373 The Population Registration Act of 25 September 2010 (Journal of Laws of 2021 r. Item 510).

374 NSA, II OSK 3362/17 (10/09/2020).

surrogacy. Although the decision bound the Polish administration, some authors doubt whether similar applications will be dealt as smoothly in practice.[375]

2.3. Reflections on the case-law of the CJEU

At the time of writing the current lines, the CJEU has only tried one case that could be regarded as directly related to adoption: in the *SM contra Entry Clearance Officer* case, the CJEU took the view that the Islamic legal institution of *kafala* could not be equated with adoption in the 'Western' sense, because, unlike adoption, *kafala* does not create a parent-child relationship similar to that of blood, but is instead equivalent to the institution of guardianship. The CJEU's decision is fully in line with ECtHR case-law. In the joined cases C-325/18 PPU and C-375/18 PPU – also introduced above –, the CJEU gave a legal interpretation on a point of law which only indirectly concerned issues related to adoption. An important observation made by the CJEU was that an appeal against an exequatur decision and the interim measure suspending the execution of the exequatur by a domestic court of a Member State other than the Member State of the authority – which requested the exequatur decision in the Member State other than its own – does not prohibit the said authority to later bring the case to court in its own member state. The interim measure has only temporary effect and is intended only to prevent irreparable harm pending the outcome of the appeal proceedings. Thus, there was no infringement of the prohibition of *anti-suit injunction in* EU law. In the *Hocinx-case*, the advocate general was of the view that a child placed with a family by a court order must, for the purposes of granting the family allowance, fall within the scope of a 'member of the family'. However, CJEU has not make any mention of this statement, thus the advocate general's statements remained outside the CJEU's case-law.

It is also worth highlighting, the functional recognition developed in the Opinions of Advocate Generals Whathelet and Kokott in the CJEU Pancharevo and Coman cases respectively. In Whathelet's view the said principle

375 Wysocka-Bar, 2020 [Online].

allows to avoid different interpretations of the rights deriving from Article 21(1) TFEU in different Member States without encroaching on the national identity of the Member State, since the Member State is not obliged to change the constitutional rules that form part of its national identity. There are two arguments against functional recognition: the first, a legal argument, can be found in the Opinion of Advocate General Henrik Saugmandsgaard Øe in the Erzberger case, who argued that, in a non-harmonised area, any legislation of the host Member State of an EU citizen which would be less favourable than the legislation of his Member State of origin cannot be interpreted as an obstacle to free movement. The second argument is that functional recognition ultimately leads to the emptying out of the rules that constitute the national identity of the Member State: although the Member State is not obliged to rewrite the Constitution, its provisions cannot be enforced in practice. Phrasing it another way, while the constitution de jure remains intact, it is de facto it is overwritten by EU law and it is hard to see the end of this process: although the Pancharevo and Coman cases have forced the Member States to give way only in relation to the right to free movement, the Polish cases mentioned above and the Commission's legislative intentions show that, over time, constitutional rules will have to be 'functionally' superseded in an increasing number of areas.

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Regulation of adoption in Croatia

Irena Majstorović*

1. Substantive legal issues concerning adoption

Adoption, as a legal means of establishing civil kinship, is one of the fundamental institutes of Croatian family law. Historical development of adoption witnessed significant changes in various aspects, however, its unique feature remained the same during its long legal history – it represents legally generated establishment of family relationship between certain persons and in most of the cases breaking the bond with one's own family.[1] In contemporary legal framework, the institute of adoption stems from the idea of altruism and "in the legal sense it has reached an almost identical legal picture as the natural relationship of parenthood".[2]

Therefore, adoption in most of the cases represents the most appropriate institute for providing care to children without (adequate) parental care. Namely, in accordance with the provisions of the *Constitution of the Republic of Croatia*,[3] family is under the special protection of the state (art. 62 para. 1), and the children are guaranteed protection both in general and in particular as regards the socially neglected children and children neglected by their parents (art. 64 paras 3 and 5 respectively). It is the duty of all to protect children (art. 65 para. 1).

Sedes materiae for the institute of adoption is the Family act of 2015 (further: CFA),[4] which defines adoption as a special form of family-law providing for and taking care of the child without adequate parental care, establishing

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1 Bakarić-Mihanović, 1976, p. 73.

2 Hrabar, 2021b, p. 8.

3 Official gazette, Nos. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

4 Official gazette, Nos. 103/2015, 98/2019, 47/2020, 49/2023, 156/2023.

permanent relationship between parents and the child (art. 180 para. 1 CFA). Adoption can only be established if it is in accordance with the welfare of the child (art. 180 para. 3 CFA). Therefore, "the best interest of the child is not only one of the factors which should be taken into consideration, but it becomes the decisive factor, the standard that must take precedence."[5] This concept recognises the legacy of the Convention on the rights of the child (further: CRC).[6]

Namely, it is defined in art. 3 para. 1 CRC, that "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*." Nevertheless, as emphasised by D. Jakovac-Lozić, art. 21 CRC prescribes that "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be *the paramount consideration.*"[7]

1.1. Realisation of the welfare of the child as the core aim of adoption

In contemporary, Croatian family law considers the welfare of the child as the *core aim of adoption*. In accordance with art. 3 CRC, this principle is the key criterion in all decisions related to the child. It should be mentioned that the Croatian family law theory gives prevalence to the concept of the welfare of the child in comparison to the concept of the best interest of the child, since it is considered a more comprehensive term, reflecting the *summum bonum* on the part of the child.[8]

In deciding if adoption is in the welfare of the child, "it is important to evaluate if the adoption brings a total gain, which is greater than losing all the links to the biological family, which follows as a consequence of the closed adoptions, still prevailing in Croatia".[9] It is clear that certain fun-

5 Jakovac-Lozić, 2021, p. 279.
6 UNTS 1577, p. 3. The Republic of Croatia is a member state of the Convention since 1991, on the basis of the notification of succession. Official journal of the SFRY, No. 15/1990, Official gazette – International treaties, Nos. 12/1993, 20/1997.
7 Jakovac-Lozić, 2021, p. 278.
8 Hrabar, 2021a, p. 210.
9 Sladović Franz, 2019, p. 41.

damental rights of the child are challenged in cases of adoption. Furthermore, it should be emphasised that the right of the child to be brought up in (one's own) family environment is by all means important, but the holistic approach to each and every child is a dominant one, interconnected to the principle of the welfare of the child.

As a consequence, the option of adoption is considered to be the best solution for most children without adequate parental care, but it is definitely not the only one. One might well think of foster families or even in certain, rather exceptional, cases of institutions as more appropriate solutions for a particular child. Namely, for certain children foster parenthood can be a more suitable option, since it allows easier adaptation, as well as the possibility of maintaining contact with the biological family.[10] Furthermore, for certain children, particularly those challenged with health difficulties, institutional approach can be useful, as a means of a treatment. Hence, it is the duty of the state to evaluate all important facts and circumstances of the case and to decide on the modalities of providing adequate care to the child, therefore securing the realisation of the welfare of the child.

1.2. Requirements for adoption

In Croatia, the parental relationship of the adoptee and the adopter is established by virtue of the decree of the competent administrative authority – the Croatian Institute for Social Work, under the precondition that regarding both parties the preconditions for the establishment of adoption are fulfilled.[11]

The requirements for adoption on the side of the adoptive parent are numerous and reflect the awareness of the legislator that it is the most challenging duty of the state to choose parents for a child. It should be emphasised at this point that it is only a capability of a person to adopt, not a right to adopt. There is no such right in Croatian family law. Similar approach is taken by

10 Zurak and Laklija, 2019, p. 23.
11 Jakovac-Lozić, 2013, p. 73.

international legal sources, as confirmed in the jurisprudence of the European Court of Human Rights.[12]

In this regard, Croatian legal theory defines several elements of the active adoptive capability, *i. e.* the capability of a person to adopt. Indeed, there are positive elements that are taken into consideration in evaluating the option of adoption by a certain person. Those elements are: positive characteristics in regards to the welfare of the child, belonging to a certain age group, marital status and citizenship. There are also negative elements, of factual or legal nature, defined by the legislator as obstacles which hinder the adoption procedure. On the one hand, there are obstacles deriving from personal status and characteristics of a person, which hinder adoption of any child. On the other hand, there are obstacles deriving from special relationship between a prospective adopter and a child, which hinder a particular adoption. Let us briefly present the mentioned elements of the active adoptive capability.

Positive characteristics in regards to the welfare of the child are being evaluated during the adoption procedure in relation to the welfare of the child (art. 180 paras. 2 and 4 CFA). This request follows from the idea that a matching procedure should make a good compound of the positive traits of the adopter taken into consideration from the perspective of a particular child. Namely, "the aim of the matching procedure is to evade or as much as possible lessen the difficulties, before, during and after the establishment of adoption".[13]

Belonging to a certain age group follows the concept accepted in Roman times – *adoptio naturam imitatur*.[14] Namely, it is the reflection of the idea that "adop-

12 D. Jakovac-Lozić in this regard mentions the cases Fretté v. France, E. B. v. France, Pini and others v. Romania, X and others v. Austria, A. H. and others v. Russia, Antkowiak v. Poland. Jakovac-Lozić, 2021, p. 280. For detailed analysis of the decisions of the European Court of Human Rights, particularly in regards to the establishment of adoption without the consent of the mother or the father or both parents of the child, as well as the sexual orientation of the prospective adopters. v.: Jakovac-Lozić, 2013, pp. 76-97.

13 Sladović Franz, 2019, p. 52. The same author suggests that "the most important criteria for choosing are: a) adoptive family shows understanding for the needs of the child, b) adoptive family shows willingness to fulfil the child's need for certainty, securing the welfare and the stability of the child in present and in future and c) the child accepts the adoptive family as his/her own family." Sladović Franz, 2019, p. 51.

14 As emphasised by M. Petrak, this Roman legal rule often used in Croatian family law literature in its abbreviated version, and the integral version of the Iustinian's Institutions reads as follows: *adoption enim naturam imitatur et pro monstro est, ut maior sit filius quam pater*. Cf. Petrak, 2005, p. 620.

tion should be as close to the parentage" and that adopters are of certain age "which can be described as optimal for parenthood."[15] Pursuant to art. 184 CFA, the adopter can be a person of the age of at least twenty-one years, who is at least eighteen years older than the adoptee. In case of particularly justified reasons, the adopter can be a person younger than twenty-one years of age, but the *age difference* of eighteen years still has to be respected.

The legislator hence defines the lower age limit, trying to secure that adopters are presumably mature persons ready to deal with all the challenges of parenthood. The upper limit is *de lege lata* not defined. It used to be defined by previous family acts, but the amendments of the Family Act 2007 reflected the benevolent approach to the older prospective adopters.[16] Although this change was subjected to criticism,[17] it should be noted that it did not bring any significant changes. It could have been expected that a number of adoptions of older children by older adopters would have increased, since "the older adopters are often more prone to adopting older children, due to their awareness of own age and the limitations the years bring in regards to the adoption of a younger child".[18] However, the number of adoptions had not increased, since older persons are in fact reluctant to apply as prospective adopters, presumably aware of the significance of the permanent bond established by adoption in relation to the raising of children.

As regards the *marital status*, in accordance with art. 185 CFA, a child can be adopted by: spouses or extramarital partners jointly; one spouse or extramarital partner if the other is parent or adopter of the child; one spouse or extramarital partner with the consent of the other; as well as a person who is neither married nor lives in an extramarital union. This provision contemporaneously reflects two concepts. On the one hand, that it is of crucial importance for the life of the child to be brought up in a family and on the other hand that special circumstances in certain cases ask for departure of the two-parent principle, respecting the welfare of the child.[19]

15 Jakovac-Lozić, 2021, p. 295.
16 Official gazette, No. 107/2007.
17 Hrabar, 2008, pp. 1122-1124.
18 Jurić and Blažeka Kokorić, 2019, p. 84.
19 Such cases could, *inter alia*, be the situations of adoption by a relative upon the death of the parents. Hrabar, 2021b, p. 12.

Although it is claimed in Croatian family law theory that CFA does not make any difference in regards the desirability of a choice, namely does not necessarily entail preferences.[20] We would argue that it should, especially having in mind that the core idea of adoption is not to find a child for a couple, but to provide adequate parental care and upbringing within the family of the child. Furthermore, it should be noted that having one's own posterity, either biological or adopted, does not constitute an obstacle for adoption.[21] Spouses in accordance with art. 31 para. 3 CFA (and extramarital partners, made equal to the spouses by virtue of art. 11 CFA) consensually decide on giving birth and raising children. Such a provision by its nature encompasses also the issue of adoption.

Several additional notes should be made concerning the marital status as an element of the active adoptive capability. Firstly, in accordance with the Constitution of the Republic of Croatia, marriage is a heterosexual and monogamous life union.[22] This provision, which in essence already existed in all previous pieces of family legislation, became a part of the Constitution following the people's referendum, which took place in 2013. Hence, the term spouse applies only for heterosexual life unions in accordance with the provisions of the CFA, which stipulates that "marriage is a legally regulated life union between a woman and a man" (art. 12 CFA).

Secondly, the term "extra-marital union" applies to "a life union between an unmarried woman and an unmarried man lasting for at least three years or less if a common child is born into it or it is continued by entering into a marriage" (art. 11 para. 1 CFA). Although the family law status of extramarital partnerships has been regulated in Croatia for half a century, the CFA now in force for the first time in Croatian legal history endeavours to equalize marriage and extramarital union.[23]

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20 Jakovac-Lozić, 2021, p. 300.

21 Ibid., p. 292. It should nevertheless be mentioned that „the age difference between the biological child and the adopted sibling is an important factor in evaluation of the appropriateness of the placement". Kolarević and Blažeka Kokorić, 2019, p. 132.

22 Namely, it is defined in art. 62 para. 2 of the Constitution, that "marriage is a life union between a woman and a man."

23 B. Rešetar claims that this change is a result of the political amendments of the CFA. Cf. Rešetar, 2022, p. 711.

It is not done consistently, nevertheless one of the consequences of this approach is the fact that extramarital partners are equal to spouses regarding adoption. Let us mention that in order to prove the existence of their union, extramarital partners have to commence a contentious proceeding with the aim of gaining declarative judgement, causing "a life- and legally illogical situation in which they sue each other, and at the same time they want to adopt a child together."[24]

It should be mentioned that although the CFA is the *sedes materiae* for adoption, the *Life partnership act* (further: LPA),[25] regulating the position of unions of same-sex partners, regulates an institute which is a novelty in Croatian legal system. It is called "partner care", which is a "form of care for a minor child that can be provided by a life partner after the death of the life partner who is the child's parent, and exceptionally also during the lifetime of the life partner who is the child's parent, if the other parent is unknown or if the other parent has been deprived of parental care due to child abuse." (art. 44 LPA).

Regarding the rights and obligations of the child's co-guardian, pursuant to art. 47 LPA, the child's co-guardian acquires parental care based on a court decision on co-guardianship of a minor child. In accordance with art. 48 LPA, such a relationship establishes "permanent rights and duties that exist by law between parents and children and their descendants".

This is definitely an institution that is "very close to the institution of adoption."[26] Therefore, as D. Jakovac-Lozić rightfully emphasises, by using "descriptive, ambiguous and in any case nomotechnically unacceptable terminology... the legislator is not calling the same or similar things by their proper names."[27] B. Rešetar on the other hand claims that sexual orientation of potential adopters "can hardly be understood as a factor relevant for adoption" [28] and that "emphasizing the sexual orientation of a person who

24 Ibid., p. 711.
25 Official gazette, Nos. 92/2014, 98/2019.
26 Jakovac-Lozić, 2021, p. 305.
27 Ibid. Similarly, D. Hrabar claims that the legislator "played" with marriage and the Constitution and the best interest of the child, transposing these family law contents into something else. Hrabar, 2021b, p. 16.
28 Rešetar, 2022, p. 714.

is a potential adopter of a child constitutes discrimination based on sexual orientation."[29] It should be reiterated that the adoption serves primarily the best interest of the child, therefore, considerations regarding the characteristics of the potential adopter should be taken into account, especially with this in mind.

Regarding the citizenship of adoptive parents, the legislator gives priority to Croatian citizens. Namely, pursuant to art. 186 paras. 1 and 2 CFA, a child can be adopted by a Croatian citizen and only exceptionally, if it is in the best interests of the child, the adopter can be a foreign citizen. In case either the adopter or the child is a foreign citizen, adoption can be established only with the prior approval of the ministry competent for social welfare (art. 186 para. 3 CFA).

The Croatian legislator has a rather unfavourable position regarding the adoption by foreign citizens. There are several reasons for this approach,: the limited ability of the competent Croatian state authorities to audit the particularities of the environment the child shall be a part of; the possibility of taking intervention measures are limited; the child's difficulties in adapting to a family of foreign citizens as well as the loss of a Croatian citizen, which is an indisputable argument from a demographic point of view.[30] Furthermore, even in cases of evaluating the intention of foreign citizens to adopt, priority shall be given to a spousal couple in which a spouse is a Croatian citizen, then to foreign citizens who are by virtue of origin linked to Croatia, and only then the other foreign citizens shall be evaluated as prospective adopters.[31]

After the overview of the positive elements that are taken into consideration in evaluating the option of adoption by a certain person (i.e. positive characteristics in regards to the welfare of the child, belonging to a certain age group, marital status and the citizenship), it is important now to examine the negative elements that the legislator identifies as obstacles to the adoption process. In Croatian family law, there are *two types of impediments to adoption*: absolute and relative ones, the former precluding a person from

29 Ibid., p. 749.
30 Jakovac-Lozić, 2021, p. 294.
31 Ibid.

adopting any child, and the latter precluding a person from adopting a particular child, due to their relationship.

Absolute impediments to adoption derive from personal status and characteristics of a person and therefore preclude this person from adopting any child whatsoever. These impediments are: the deprivation of the right to parental care; the deprivation of legal capacity and the circumstance that past behaviour and character of a person indicate that it is not advisable to entrust the person concerned with parental care (art. 187 CFA).

The deprivation of the right to parental care is the strictest measure to protect the welfare of the child. It is only applied in cases of the most serious violation of the child's rights by the parent.. Pursuant to art. 170 CFA, the court shall deprive the parent of the right to parental care if it finds that the parent abuses or seriously violates parental responsibilities, duties and rights. The examples of such a behaviour (imprecisely defined as special preconditions) include abandonment of the child; exposing the child to violence among adult members of the family, disrespect of the measures previously issued by a competent authority for the purpose of protecting the rights and welfare of the child or committing criminal acts against one's own child (art. 171 CFA). It seems that the system, both administrative (i.e. the Croatian Institute for Social Work) and judicial (i.e. the courts) are unreasonably restrained in regards this measure and, as emphasised by D. Jakovac-Lozić, "obviously approach this issue from the perspective of the parents, and not of the child."[32]

Deprivation of legal capacity is used as an *ultima ratio* in cases where a person is unable to adequately their own rights and interests or threatens the rights of others. In accordance with art. 234 para. 1 CFA, the court shall deprive the legal capacity a person of full age who as a consequence of a mental disability or other reasons is not capable to take care of her/his own rights, needs and interests, or who threatens the rights and interests of others.

Unlike the two aforementioned absolute obstacles to adoption, which are of a legal nature, the third one is of a factual nature. Namely, adopter cannot

32 Ibid., p. 296.

be a person whose past behaviour and character suggests that it is not advisable to entrust the person concerned with parental care, for instance if a potential adopter has a history of addiction.[33]

Relative impediments to adoption, as previously mentioned, preclude adoption from occurring between certain persons due to their legal relationship. These obstacles are consanguinity and the relationship between guardian and ward.

Namely, pursuant to art. 182 CFA, persons in lineal consanguinity cannot adopt each other, neither brothers nor sisters. D. Jakovac-Lozić emphasises two dimensions of this issue. On the one hand, "adoption by close relatives leads to the distortion of natural relationships between the parties – relatives."[34] On the other hand, "the proximity of affiliation existing between them implies both emotional and all other components of closeness and connection, so that the enabling of adoption between them, would not achieve any positive developments in comparison to the existing condition."[35]

Furthermore, a guardian cannot adopt his/her ward, until he/she is acquitted of guardian duties by the Croatian Institute for Social Work. Namely, if the guardianship relationship could become a direct parental or kinship relationship, the guardian could avoid all control..[36] Therefore, this impediment is of preventive nature and the welfare of the child points to the necessary caution.[37]

1.2.1. The requirements for adoption on the side of the adoptable child

The requirements for adoption on the side of the adoptable child in general relate to the welfare and the age of the child. The principle of the welfare of the child is the predominant one and the child can be adopted only if the adoption is in line with his/her welfare (art. 180 para. 3 CFA). Furthermore,

33 D. Hrabar mentions also the situation of the parents who have lost their child, since in such cases either unreasonable concern over the adopted child or the transmission of feelings might occur. Hrabar, 2021b, p. 9.
34 Jakovac-Lozić, 2021, p. 289.
35 Ibid.
36 Jakovac-Lozić, 2021, p. 289.
37 Jakovac-Lozić, 2000, p. 70.

in the adoption procedure, the characteristics of the prospective adopter are evaluated in regard to the welfare of the child (art. 180 para. 4 CFA). Another important provision confirming the intention of the legislator to protect the welfare of the adopted children is the one defining that in adoption procedures special attention must be paid to ensuring that siblings are adopted by the same adopters. whenever possible and in accordance with the welfare of the child (art. 180 para. 5 CFA).

The purpose of this provision is clearly to avoid further traumatization of the child due to separation, but unfortunately it can be safely stated that the greater number of siblings, on whose side all the conditions for adoption are met, reduces the possibility of joint adoption..[38] In case they are separated, all efforts should be made in order to keep them in mutual contact and consequently to allow for adoption by adopters willing to support contact, unless it is contrary to the wishes or interests of the child.[39] Namely, the relationships with the biological siblings is "an important anchor which secures stability to children in the complex situations of adaptations and the construction of new social ties".[40]

Regarding age, there are four issues which deserve particular attention. Firstly, in accordance with art. 181 para. 1 CFA, adoption can be established until the child reaches eighteen years of age. Hence, it is *possible to adopt only a child, not an adult.* As already emphasised, the purpose of adoption is to provide parental care to a child, which criterion would not be met for adults.[41]

Secondly, it is not possible to adopt a *nasciturus* (a conceived unborn child). Croatian family legislation therefore bans so-called prenatal adoption. Furthermore, a child cannot be adopted before the child is at least six weeks old. Namely, pursuant to art. 194 para. 3 CFA, a parent may give the consent to adoption before the adoption procedure is initiated, but no later

38 Jurić and Blažeka Kokorić, 2019, p. 72.
39 Grgec-Petroci, 2019, p. 125.
40 Kolarević and Blažeka Kokorić, 2019, p. 137.
41 However, it should be emphasised that the obligation of the state to assist the ones in need asks for legal protection of adults who are unable to protect their own rights and interests, but this type of protection is provided through the institute of guardianship and not adoption.

than before the child is six weeks old. The intention of the legislator is clear – to prevent hasty and reckless consents given by young, single mothers.[42]

Thirdly, a special provision applies to the legal status of an abandoned child of unknown origin – the decision on adoption can be made three months after the child's birth or abandonment (art. 181 para. 2 CFA). This postponement gives the biological parents the opportunity to commence a procedure to establish their maternity (and paternity).

Fourth and finally, an important provision concerns the age of the child and the biological parents.. Pursuant to art. 183 para. 1 CFA, as a rule, a child of minor parents cannot be adopted.[43] However, in exceptional cases a child of minor parents can be adopted one year after its birth if there is no prospect of the child being raised in a family of parents or grandparents, or other close relatives (art. 183 para. 2 CFA), but minor parents have to give consent to adoption (art. 183 para. 3 CFA). This provision is clearly aimed at preserving family life. Nevertheless, as D. Jakovac-Lozić mentions, it should be changed by inserting the following *addendum*: „under the condition that they are capable of understanding the meaning and the legal consequences of adoption", due to jeopardy of manipulation of the child, always contrary to the principle of legal certainty and the obligation to protect the child.[44]

It should be mentioned that there are certain children who by some of their characteristics belong to the group of *so-called children less likely to be adopted*, since the certain circumstances can be aggravating for the realisation of adoption. A research conducted in Croatia in 2016 confirmed that a weaker inclination to adopt concerns four categories: children older than six years of age, children being adopted with siblings (more than two), children who are members of minorities (especially Roma minority), as well as the children having developmental and / or health difficulties.[45]

Most of the adopters would like to adopt very young children. The reasons for not deciding on adoption of the older children in general lie in the fear of possible explosion to neglect, abuse and trauma, as well as in the fear of

42 Jakovac-Lozić, 2021, p. 284.

43 Until 1998, this was in Croatian family law, a rule without any exceptions whatsoever. Cf. Bakarić and Ujević, 1990, pp. 77-87.

44 Jakovac-Lozić, 2021, p. 309.

45 Matković and Modić Stanke and Topčić-Rosenberg, 2016, p. 4.

the adopters that it would be more difficult to establish a relationship with the child and also make up for the lost time.[46] The reasons for which it is more difficult to adopters to decide on the adoption of a child belonging to a minority, particularly a Roma child, are most often of cultural nature and "include the fear of more difficult integration, prejudice and discrimination of the society."[47]

Thirdly, most of the adopters feel reluctant in regard the adoption of children with health difficulties, above all those in the spectre of autism, since they feel unable to cope with all the challenges deriving from the health status of the child.[48] Finally, the reasons causing the decision not to adopt more children are linked to socio-economic factors and also the inappropriateness of the living space.[49] All the aforementioned considerations have to be priorities of the social welfare system, and further concern should be directed towards changing this paradigm..

2. Procedural framework of adoption

The adoption procedure in Croatia consists of two phases. The first is the so-called preliminary procedure, which refers to the evaluation of eligibility and suitability for adoption and the second is the procedure of establishment of the adoption. Both parts of the procedure are in the competence of the Croatian Institute for Social Work, i.e. its branch offices.

46 Ibid., p. 5. It should be mentioned that the legal system as a whole in a way deters from adopting an older child, since for instance art. 46 of the *Maternity and parental benefits act* when regulating the adopters leave, guarantees the right of the employed or self-employed adopter to the parental leave and all other rights of the parent until the adoptee turns eight years of age. Official gazette, No. 155/2022. Such a solution, although criticised in legal theory, clearly puts adoptive families who adopt older children into a less favourable position. Jurić and Blažeka Kokorić, 2019, p. 92.

47 Ibid., p. 5.

48 Ibid., p. 6 and 7.

49 Ibid., p. 6.

2.1. Qualifications to become an adopter

In the preliminary procedure, the prospective adopter(s) contact the Croatian Institute for Social Work filing a written application of the intention to adopt a child, as well as the request for an opinion on their eligibility and suitability for adoption. The evaluation of eligibility and suitability of prospective adopters is an exceptionally important step in deciding upon adoption in each case.

Namely, in order to be able to adopt a child, a person has to fulfil two sets of preconditions. The first set concerns the elements of afore analysed active adoptive capability, including the absence of barriers to adoption.. This set is a general precondition for adoption, and it is defined as eligibility for adoption. The second set concerns the so-called suitability for adoption, which includes the circumstances relating to the physical, psychological and social precondition that prospective adopters need to have in relations to a particular child.

The elements of evaluation and the procedure of determining the eligibility and suitability are regulated by a special bylaw - *Bylaw on elements related to eligibility and suitability for adoption, content of expert opinions on eligibility and suitability for adoption, methods of determining eligibility and suitability, content of reports on the child, keeping a register of potential adopters and the method of keeping a register of adoptions* (further: the Bylaw on elements).[50]

The aim of this first phase is to gain as thorough insight into various elements on the part of the prospective adopters and to evaluate them in connection with the welfare of the child, hence coming to a valid conclusion regarding the adoption in a concrete case.

The instruments on that path used by the professionals employed in the Croatian Institute for Social Work include the social history; assessment of personal, family and environmental factors relevant to parenting skills; an expert opinion of a psychologist; as well as the recommendations of the expert team on the capabilities of the persons applying to become an adopter. On that basis, a joint expert opinion is prepared, pursuant to art. 9 para. 1

50 Official gazette, Nos. 106/2014, 5/2015, 28/2016, 103/2015.

of the Bylaw on elements. The methods reflect the intention of the system to use multidisciplinary as one of the basic features of the branch offices of the Croatian Institute for Social Work in order to secure the welfare of the child in each case.

Therefore, the expert opinion includes information on the identity of prospective adopters; information on their eligibility and suitability for adoption; information regarding life circumstances which led the prospective adopters to requesting the opinion on their eligibility and suitability; information on their family history (anamnesis) including information regarding the relationships between family members and on social connections of the prospective adopters with family and friends, as well as expectations and beliefs of members of the extended family on adoption; information on health status of prospective adopters and their medical history; information on social environment; information on living and material status of prospective adopters; their reasons (motivation) for adoption; information on capability of establishing intercountry adoption; competences of prospective adopters for parenthood in regards to particular traits and characteristics of the child, as well as the proposal and conclusion (art. 3 of the Bylaw on elements).

Regarding motivation, as B. Sladović Franz puts it, "in Croatia, the problems and motives of adopters are similar to those in developed Western countries (infertility, desire to have more children, intention to help certain child, altruistic reasons)."[51] In that regard, it should be stressed that wrong motives for adoption, particularly the adoption of the older child generate a whole plethora of negative consequences. For instance, as emphasised by I. Jurić and S. Blažeka Kokorić, if the adopters decide to adopt an older child only for their fear of this being their last chance of adoption, having in mind their age and the long wait in the Register of prospective adopters, without being genuinely prepared to accept all the challenges such an adoption bears, it is to be expected that various problems and difficulties in the adaptations of the adoptive family shall occur.[52]

51 Sladović Franz, 2019, p. 40.
52 Jurić and Blažeka Kokorić, 2019, p. 79.

The same authors emphasise another, often unspoken truth – "Each and every parenthood entails certain challenges, difficulties, insecurities and concerns, and in certain situations even weakness .... the adopters, the same as the biological parents, are not exempted from the mentioned problems in regards to their children."[53]

B. Sladović, commenting the competences of parenthood stresses that in most of the cases only potential parenthood capacities are evaluated, and that their parenting skills after the adoption has been established depends primarily on their specific interaction with the child, as well as the means in which both the adopters and the child shall react in a new situation, which is stressful by itself and includes changes in family relationships.[54]

Let us briefly touch upon the methods used by professionals employed in the branch offices of the Croatian Institute for Social Work. Social workers and psychologists examines the eligibility and suitability of the adopters during the phase of evaluation. As already mentioned, it is the responsibility of the state to pass a viable decision on adoptive parents.

Social workers use the following procedures: interviewing each of the persons applying to be adopters (jointly and individually); comprehensive family evaluation; evaluation of prospective parental competences as well as personal, family and environmental factors of importance for parenthood, such as family social integration, community resources, risk of abuse and neglect of children and evaluation of interconnection of spouses or extramarital partners; visit to the home address; insight into necessary documentation and also the conversation with close relatives and friends of persons applying to be adopters (art. 7 of the Bylaw on elements). Furthermore, in the same evaluation, psychologists use the procedures of interviewing each of the persons applying to be adopters (jointly and individually) and they visit their home to prepare an environmental study. The psychologists also test the persons applying to adopt using one clinical psychological test and two questionnaires to examine their emotions and attitudes. Following their professional evaluation, prospective adopters are informed of the conclusion. (art. 8 of the Bylaw on elements).

53 Ibid., p. 93.
54 Sladović Franz, 2019, p. 42.

When a positive expert opinion on the eligibility and suitability is passed, which has to be done within six months since filing the request,[55] the Croatian Institute for Social Work enrols the prospective adopters in the Register of prospective adopters (art. 207 CFA).[56] The Register itself represents a starting point for most of the experts when selecting the suitable adopters taken into consideration for a certain child.[57] Of course, if more than a year elapsed since the issuing of the positive expert opinion, the Croatian Institute for Social Work has to re-evaluate the possible change of circumstances, pursuant to the *rebus sic stantibus* principle.[58]

2.2. Qualifications to become an adoptable child

As previously emphasised, the competence for determining if a child is adoptable lies with the Croatian Institute for Social Work. Namely, all preconditions for a particular child must be met, above all the criterion of the welfare of the child.

In order to assess whether a child is adoptable, the competent authority issues a report on the child, regulated by the afore analysed Bylaw on elements. The report on the child, in accordance with art. 10 of the Bylaw, contains important information relating to: the identity of the child; his/her eligibility for adoption; the background of the case; the social environment; family history (anamnesis); health status and medical history of the child and of his/her parents; religious and ethnic origin and cultural heritage of the child; the characteristics and needs of the child as well as his/her specific traits, which all forms strong basis of the proposal and conclusion of the Croatian Institute for Social Work regarding adoption.

In general, it could be stated that "the prospective adopters should be informed beforehand of the potential risks of adoption (as in any other parentage)

55 Art. 204 para. 3 CFA.

56 CFA does not regulate the procedure in the case of a negative opinion on eligibility and suitability of the Croatian institute for social work, however, the person's request which was rejected should be decided upon by the authority of the second instance, i.e. the ministry competent for social welfare. Rešetar, 2022, p. 770.

57 Jurić and Blažeka Kokorić, 2019, p. 91.

58 Art. 211 para. 2 CFA.

since there is no guarantee how will the adopted child and the adoptive family develop and behave as the time passes."[59] Namely, health status and medical history of the child, as well as characteristics and the needs of the child often represent a significant concern on the side of the prospective adopters.[60]

We concur to the standpoint that "if a child has certain developmental and other difficulties, it is the duty of the experts to inform the adopters of it, as well as to provide recommendations and advice as how to act towards the child".[61] Nevertheless, two other important issues deserve attention.[62] Firstly, in certain cases, not even the experts have all the information on the child. Also, not all behaviours and traits are clearly visible, or they become visible only after the child has become a part of a new family. Secondly, in certain cases the adopters approach the procedure quite "idealistically and in the matching phase often listen only selectively to the information on the child provided by the experts, remembering only the parts which they like more. This is not surprising, taken into consideration that at this point, the prospective adopters are extremely focused on the possibility of the shortly upcoming realisation of their parental role which they have wanted for so long and in general imagined it to be completely positive and pleasurable."[63] This issue deserves particular attention in efforts of the experts employed in the Croatian Institute for Social Work, who should be able to invest more time and effort in order to achieve the most realistic situation possible. Any other scenario can lead to multiple difficulties, both from a social and psychological perspective.

2.3. Authorisation of adoption

As mentioned above, the adoption procedure is in the competence of the Croatian Institute for Social Work. Therefore, it is initiated and *ex officio* led by the branch office of the Croatian Institute for Social Work, competent ac-

59 Sladović Franz, 2019, p. 56.
60 Jurić and Blažeka Kokorić, 2019, p. 71.
61 Zurak and Laklija, 2010, p. 28.
62 Sladović Franz, 2019, p. 55.
63 Ibid., p. 55.

cording to the place of residence of the child (art. 208 CFA). In the so-called preparatory phase, the duty of the competent authority is to verify if all the preconditions are met on the side of the prospective adopters and on the side of the child, all in line with art. 21 CRC.

After all verifications have been made, the adoption procedure enters into its *central phase* – the adoption procedure in the narrow sense. One of the cornerstones of the adoption procedure is acquiring the necessary *consents*, as prescribed by CFA. Namely, the consents in concern belong to one of the *biological parents, the child, the spouse or extramarital partner of the parent in cases of the adoption by persons known to the parent and of the guardian of the child*. In accordance with art. 194 para. 4 CFA, all persons, prior to giving their consent, shall be informed by the Croatian Institute for Social Work of all legal and psychosocial consequences of the consent and the adoption itself.

As a precondition for the establishment of adoption, a *consent from both parents* of the child is required, unless the CFA stipulates differently (art. 188 para. 1 CFA). As a rule, the parent gives the so-called *bianco* consent to adoption, i.e. the parent is not informed of the fact who is to become a future adopter. Indeed, the only situation in which the parent shall give the consent regarding the adoption by an adopter known to the parent is the adoption by a step-parent or an extramarital partner of the parent (art. 188 para. 4 CFA). A parent can revoke the consent within the period of thirty days after signing the minutes on the consent (art. 188 para. 6 CFA). When a parent provides his consent to adoption, he/she loses the right to exercise parental care, and the Croatian Institute for Social Work places the child under guardianship (if the guardian had not already been appointed) (art. 195 CFA).

No consent is needed from a parent who is dead,[64] unknown or of unknown residence or from a parent who is deprived of the right to parental care (art. 188 para. 5 CFA). In such cases, the consent needs to be given by the guardian of the child (art. 192 para. 1 CFA). As B. Rešetar mentions, "in practice, the guardian of a child whose parents have died will be a close relative of the child or a person appointed on the basis of the parents' ad-

64 This part of the provision is commented by D. Jakovac-Lozić, 2021, p. 312.

vance directive" [65] and in other cases, namely the ones when the parent is missing, unknown or deprived of the right to parental care, the function of the guardian shall be primarily exercised by foster parents, employees of the social welfare institution where the child is placed or the professionals employed in the Croatian Institute for Social Work.[66]

The parent deprived of parental care shall be given the opportunity to express his/her opinion on the possibility of the adoption of the child, which opinion is not binding on the Croatian Institute for Social Work, but shall be taken into consideration when deciding whether adoption is the best form of permanent care for the child (art. 210 paras. 2 and 3 CFA). The idea behind informing the parent deprived of parental care of the adoption is another intention of the legislator to preserve family life.

However, this idea is highly debatable in these circumstances, especially taken in conjunction with the principle of the best interest of the child.[67] Namely, its advantages are exclusively directed to the parents, and the disadvantages aggravate the legal position of the child. Indeed, as A. Korać Graovac argues, in such a situation, "the adoption procedure is delayed, the quality of parental care of a parent whom only a notification of the possible "danger" of adoption of his/her child would encourage him/her to want to exercise parental care over the child is questionable"[68] and furthermore, that the provision itself makes no sense since it does not oblige the Croatian Institute for Social Care to halt the adoption procedure if the parent initiated the procedure to restore the right to parental care.[69]

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65 Rešetar, 2022, p. 748.

66 Ibid.

67 D. Hrabar describes this legislative solution as "an excessive hesitation" in establishing the adoption. Hrabar, 2019, p. 208.

68 Korać, 2021 b, p. 84. Opinion to the contrary is presented by B. Rešetar, who claims "it is the right of the parent to oppose adoption and request the court to restore parental care, which the court is obliged to decide on and assess whether there are still reasons for which the parent was deprived of the right to parental care or assess the current relationship between the parent and the child. Although, as a rule, such a procedure would result in the rejection of the parents' request to restore the right to parental care, at the same time the adoption procedure itself would have to be stopped until the court decision becomes final." Rešetar, 2022, pp. 728 and 729.

69 Ibid.

An opinion can be asked, upon estimate of the Croatian Institute for Social Work, of close relatives of the child regarding circumstances of significance for adoption (art. 201 para. 1 CFA). Namely, not only that they can provide valuable insight into the general life situation of the child, they can also in certain cases provide care to the child themselves, which case particularly concerns grandparents or older siblings. In such cases, the Croatian Institute for Social Work may, instead of establishing adoption, offer them help and support in taking care of the child, pursuant to art. 134 CFA.[70]

If a child is under guardianship, and the consent of the guardian is not needed, the guardian has the right to express his/her opinion on the adoption (art. 192 para. 2 CFA). If the guardian whose consent is needed declines to provide it without justified reasons, the court may pass a decree replacing the consent for adoption (art. 192 para. 5 CFA). In any case, a guardian cannot revoke the given consent (art. 192 para. 6 CFA). If a consent is needed from a guardian who is an employee of the Croatian Institute for Social Work, the court shall pass a decree replacing the consent for adoption (art. 192 para. 3 CFA), in order to avoid the conflict of roles.

If the consent is given by a minor parent or a parent deprived of legal capacity, regardless of whether the parent is deprived of legal capacity, they must understand the meaning of the adoption consent, and the Croatian Institute of Social Work is obliged to properly inform them on legal and factual consequences of adoption (art. 188 para. 3 CFA). As emphasised by A. Čulo Margaletić, "persistence in often unfounded efforts to preserve parental rights and providing countless opportunities to a parent whose actions and/or omissions undoubtedly endanger the child results in a deep underestimation of the welfare of the child".[71]

Furthermore, assessing whether the incapacitated parent is able to understand the situation in practice requires additional medical expertise. Namely, as D. Jakovac-Lozić notes, the expertise has already been done in the procedure for the deprivation of legal capacity. Now, another expertise is needed in order to decide on this issue as well.[72] In case they are found

70 Rešetar, 2022, p. 773.
71 Čulo Margaletić, 2021, p. 174.
72 Jakovac-Lozić, 2021, p. 310.

to be unable to understand the meaning of the consent, such a consent can be replaced by a court order (art. 188 para. 3 CFA), in connection to art. 190 para. 1 subpara 3 CFA.

Namely, pursuant to art. 190 CFA, a court may by virtue of its decree replace the consent of the parents in three situations.[73] Firstly, "if a parent for a longer period of time misuses or gravely breaches parental responsibilities, duties and rights". Secondly, if a parent in a shorter period of time misuses or gravely breaches parental responsibilities to such an extent that it is likely that he/she will permanently would not be entrusted with the care of the child. And finally, if a parent is so incapable that he/she is permanently incapable to exercise any part of parental care and there is no prospect of the child being raised in the family of close relatives.

The legislative solutions are disputable in all three situations, particularly since they are, as D. Jakovac-Lozić puts it, "too vague, whether we observe them individually or jointly."[74] Furthermore, in such cases it is necessary that the Croatian Institute for Social Work has already informed, or warned the parents of the possibility of issuing the decree on the measure of intensive professional assistance (as a measure for the protection of the rights and welfare of the child unless the child already does not live within a family (art. 189 para. 2); if a period of three months had not elapsed since the warning; or if a period of three months had not elapsed since the first activity regarding establishing the address of the parents in case it was not possible to warn them due to the unknown place of residence (art. 190 para. 2 CFA). It should be emphasised that this novelty "places the interests of the child in the back corner" due to the delays in passing the permanent decision of his/her legal position.[75]

A *consent* is also required by *the spouse or the extramarital partner* of the adopter. Namely, although the adoption does not extend to them, "the child still enters their family and it is in the interest of the child to be accepted by the spouse or the extramarital partner of the adopter."[76] Since the adoptive

73 In all three situations of replacing the consent by virtue of a court decision, the child shall be represented by a special guardian (art. 240 para. 1 pt. 4 CFA).
74 Jakovac-Lozić, 2021, p. 311. Similar: Hrabar, 2019, p. 205.
75 Jakovac-Lozić, 2021, p. 310.
76 Ibid., p. 299.

family needs in a way to present "credentials" in advance, this is an example of preventive legislative approach, in order to additionally secure the welfare of the child in each case.

The *consent of child* is also required, if the child is twelve years old (art. 191 para. 1 CFA). Such a consent can be revoked until the decree on adoption becomes final (art. 191 para. 2 CFA). If a child is younger than twelve years of age, the child is entitled to express his/her opinion on adoption, and his/her opinion and wishes shall be taken into consideration in accordance with his/her age and maturity[77] (art. 191 para. 3 CFA). This reflects art. 12 CRC, as well as the Statement given by the Republic of Croatia in regards to art. 1 para. 4 of the European convention on the exercise of children's rights, according to which statement Croatia determined that it shall apply, i.e. to the adoption procedure.[78]

In general, if the child is informed of the events in his life, it helps him/her to feel included in the process, as well as to regain control over his or her life.[79] Therefore, the opinion and wishes of the child are of utmost importance for the whole procedure, however the decision is never child's. Therefore, "the experts should pay particular attention so that the child would not be out in a position in which he/she would feel burdened by responsibility for expressing his/her opinion nor the endeavour to be liked or disliked by certain prospective adopters."[80] The consent is given and the opinion expressed without the presence of parents and prospective adopters (art. 191

77 As T. Zurak and M. Laklija mention, "it is estimated that the children begin to understand the concept of adoption and its consequences approximately at the age of five, and the stress is shaped when the adoption is considered as stigmatising, threatening or connected to a loss." Zurak and Laklija, 2019, p. 12.

78 Statement Related to Article 1, Paragraph 4 of the European Convention reads as follows: In accordance with Article 1, Paragraph 4 of the European Convention on the Exercise of Children's Rights, the Republic of Croatia determines that the European Convention shall apply to the following categories of family cases that are conducted before its judicial authorities: the procedure for deciding on parental care during the divorce of the parents; the procedure for obtaining parental care; measures to protect the personal rights and interests of the child, adoption procedure and guardianship procedure for children. Official gazette – International treaties, No. 1/2010.

79 Jurić and Blažeka Kokorić, 2019, p. 85.

80 Sladović Franz, 2019, p. 53. The particularities regarding the exercise of the right of the child to express his opinion and beliefs are regulated by the *Bylaw on the method of obtaining the opinion of the child*, Official gazette, No. 123/2015.

para. 4 CFA). In accordance with art. 240 para. 1 Point 4, the child shall in this procedure be represented by a special guardian.

When all the afore mentioned preconditions have been met on the side of the adopters and the side of the child, the Croatian Institute for Social Work shall initiate the procedure. The parties in the procedure of establishing the adoption are the child and the most suitable prospective adopter (art. 209 para. 1 CFA). Namely, the most suitable prospective adopter is the one chosen by the Croatian Institute for Social Work, from the Register of adopters, in regards to a particular child. When passing this decision, the Institute takes into consideration the characteristics of the child as described in the report on the child, as well as the expert opinion on the eligibility and suitability of the adopter (art. 211 para. 1 CFA). In case the adopter is the spouse or the extramarital partner of the child's parent, the parent married or living in an extramarital union with the adopter is a party in the procedure, and the other parent is not a party upon the expiry of the period of thirty days since signing the minutes in the procedure (art. 209 para. 3 CFA).

2.4. Professional training programmes of the adopters and the child

Persons who, pursuant to the opinion of the Croatian Institute for Social Work, fulfil legal preconditions for adoption are obliged to take part in professional training programmes of prospective adopters (art. 205 para. 1 CFA). Such programmes are provided by professional employees of the Croatian Institute for Social Work or other social welfare institutions, as well as the non-governmental organisations, authorised to implement professional training programmes for adoptive parents (art. 205 para. 2 CFA).

The particularities of this process are regulated by the *Bylaw on the conditions that must be met by civil society organizations for the implementation of the professional training programme for adoption, the mandatory content and the method of implementing the professional training programme for prospective adopters and the conditions for the professional training of workers, as well as the method of keeping documentation in connection with the implementation of the*

professional training programmes of prospective adopters (further: Bylaw on conditions).[81]

Since the family law reform of 2015 and the entry into force of CFA, the professional training programmes were available for the interested prospective adopters only in Zagreb, through the programme „School for adopters" organised by the association „In another way" („Na drugi način"). Today, such training programmes are obligatory and free.[82] Indeed, the educations of adopters represent an important part of activities of other associations as well (for instance association "Adopta" in Zagreb) as well as family centres in the Republic of Croatia in general.

One of the important steps in the procedure is also the *preparation of the child for adoption*. As already stated, it is the duty of the Croatian Institute for Social Work to inform the child of all legal and psychosocial consequences and the effects of the adoption. As a novelty in the Croatian family law, CFA foresees the maintenance of the contact between the child and the most suitable prospective adopter (art. 212 CFA). It should be noted that the "Croatian scientific and professional public traditionally take the stand on the undesirability of pre-placement, because of the possible additional traumatisation of the child in case of the negative outcome of such a placement."[83]

In accordance with the FCA, the aim of such placement would be to evaluate whether the adoption by a certain adopter shall be in the welfare of the child, during which time the most suitable adopter has the duty, right and responsibility to provide daily care to the child (art. 212 para. 6 CFA) orit is

81 Official gazette, Nos. 106/2014, 5/2015, 28/2016, 103/2015.

82 Art. 2 para. 3 of the Bylaw on conditions. In accordance with art 3 of this Bylaw, the professional training programme is carried out for 40 hours, with the aim of tackling different issues, i.e.: familiarization with the meaning and procedure of adoption; growth and development of the child and the developmental possibilities and needs of the child; development of bonding and attachment; development and formation of the child's identity; the importance of origin and biological parents in a child's life; how and when to tell the child that he/she is adopted; adoption and development periods; how to deal with the loss, the grieving process; adoption of children whose early childhood development phase is over; adaptation of the child to the new family, difficulties and needs of the adopted child; emotions and their control; support for the development of the child's self-confidence; parenting of an adopted child and educational procedures, as well as the development of the relationship between the adoptive parents and the child.

83 Hrabar, 2008, p. 1125. For arguments claiming the contrary: Rešetar, 2022, p. 779.

the duty of the Croatian Institute for Social Work to provide professional assistance and support to the family of adopters (art. 212 paras. 2, 3 and 5 CFA). The contact shall be allowed only after the parents, or the guardian, had given their consents to the adoption, unless a procedure for replacing the consent through a court decree had been commenced, in which case no such consents are needed (art. 212 para. 3 CFA). There is no minimum mandatory period during which the adoptive parent should care for the child, since it is the intention of the legislator to promote an individualistic approach to each case.

D. Jakovac-Lozić stated the view that the legislator, although proclaiming adoption, which cannot be terminated as the only form of adoption, modified this system, "by conditioning it to the pre-placement of the child in the family of the prospective adopters."[84] The same author is of the opinion that "beyond any doubt, the better protection of the child being adopted would require the ban of the pre-placement, which would serve as a warning to all participants in the process ... to the need of extremely serious approach to adoption."[85]

2.5. The establishment of adoption

The adoption is established once the *decree on adoption*, issued by the Croatian Institute for Social Work, becomes final (art. 214 para. 2 CFA). Hence, the adoption procedure ends contemporaneously for all – children, biological parents and adoptive parents.[86] A complaint against the decree can be filed to the ministry competent for social work (art. 214 para. 1 CFA).

The dispositive of the decree contains five obligatory elements: personal information on the child, on his/her biological parents, on his/her adopters, decision whether the adopters shall be registered as parents and the decision whether it is necessary to determine a new personal identification number to the child (art. 213 para. 1 CFA).

84 Jakovac-Lozić, 2021, pp. 283. and 324.
85 Ibid., p. 325.
86 Rešetar, 2022, p. 771.

The lastly mentioned two elements reflect the individualistic approach. Namely, the registration of adopters as parents is the rule, but in certain cases they shall not be registered as parents, for instance in a case when an older child is adopted by his/her aunt, since it would be contrary to the interest of the child to cause confusion of roles. If the child is older than twelve years of age, the change of the data on the parents can be implemented only with the consent of the child (art. 213 para. 4 CFA).

The need of determining a new personal identification number could appear as a useful instrument of preserving the privacy of the newly established adoptive family, who might otherwise be under the pressure of the biological parents or other relatives, who would, through the use of the unchanged personal identification number be able to gain insight into the adoption data. Nevertheless, D. Jakovac-Lozić rightfully warns that the *Personal identification number* act[87] defines in art. 4, that this number is "unique, non-disclosing, unchangeable and unrepeatable." [88]

Furthermore, if by virtue of the establishing of adoption, the personal data of the adopted child changed, namely the name and the nationality of the child the dispositive of the decree will contain the new data as well (art. 198 in connection to art. 213 para. 2 CFA). If the child is older than twelve years of age, changes to the child's name[89] or nationality can only be made with the child's consent. (art. 198 para. 5 CFA).

"The act of adoption necessarily entails the need to harmonize the existing situation with the newly created situation in state registries".[90] Namely, in accordance with art. 15 of the *State registries act*,[91] when the registrar receives the decision of the Croatian Institute for Social Work that the child

87 Official gazette, No. 60/2008.

88 Jakovac-Lozić, 2021, p. 331.

89 It should be mentioned that the Personal name act defines that the consent of the child is needed for such a change when a child is older than ten years of age (art 4 para. 3). Personal name act (Zakon o osobnom imenu), Official gazette, Nos. 118/2012, 70/2017, 98/2019.

B. Rešetar claims that "this inconsistency of regulations should be interpreted in favour of the child's right to express an opinion in accordance with age and maturity, and a ten-year-old child should be mature enough to express his/her wish if he/she wants to change his/her personal name, which was used for the first ten years of his/her life". Rešetar, 2022, p. 756.

90 Jakovac-Lozić, 2021, p. 329.

91 Official gazette, Nos. 96/1993, 76/2013, 98/2019, 133/2022.

is adopted, he/she will enter a note about the adoption in the child's birth certificate, noting also that no documents will be issued based on this entry, and having done so, the registrar will close the previous one and make a new basic entry of the fact of the birth. Hence, the adoptee, unlike other citizens, have two basic entries of the fact of birth.[92]

2.6. The privacy and the protection of the personal data in adoption case files

In accordance with art. 4 of the *Bylaw on the manner of keeping registers and case files on adoption and the content of the report on the adaptation of the child in the adoptive family*,[93] the adoption case files comprise all documents, administrative, court and other decisions, relating to the whole procedure of establishing adoption, by which it is proven that all preconditions for the establishment of adoption as prescribed by the CFA, as well as the administrative acts containing decisions passed during the proceedings.

The insight into adoption case files and the register of births for adopted child shall be allowed to the adoptee of full age, to the adopter and to the parent who gave the consent to adoption by an adopter known to him/her, that is his/her spouse or extramarital partner, in accordance with art. 217 para. 3 CFA. The particularities of the procedure are regulated by art. 33 of the *State registries act*,[94] as well as art. 29 paras. 1 and 2 of the *Instructions for the implementation of the state registries act*.[95] The entry of the fact of adoption is made in accordance with the CFA, and the adoptee is enrolled in the registry of birth with the data valid for him/her since the finality of the decree on adoption.

Furthermore, the Croatian Institute for Social Work shall allow the minor adoptee an insight into the adoption case files and the registrar into the register of births, if it is established that such an insight is in the adop-

92 Jakovac-Lozić, 2021, p. 329.
93 Official gazette, Nos. 106/2014, 5/2015, 28/2016, 103/2015.
94 Official gazette, Nos. 96/1993, 76/2013, 98/2019, 133/2022.
95 Official gazette, No. 117/2021.

tee's interest.[96] The reasons for restricting the right of the minor adoptee are clear: "at the age of puberty, just before the coming of age, resistance towards parents is common, and some children are not able to maturely deal with information about who their biological parents are (given the circumstances of giving parental consent, its replacement and the deprivation of the right to parental care)."[97] Close blood relatives of the adoptee shall be allowed to obtain an insight into the adoption case files if the Institute secures an approval of an adoptee of full age. Such an insight necessarily entails the danger of breaching the secrecy of adoption and it is an additional duty of the Croatian Institute for Social Work to warn the relatives of the importance of privacy.

3. On adoption within a country, intercountry adoption and foster care

Having analysed the substantive and procedural issues of adoption within the Croatian national framework, it is time to examine the form and general characteristics of adoption and contrast it with intercountry adoption and foster care. It should be emphasised: there is no similar institution to adoption. It is unique since it represents the legal means of establishing legal kinship. On that basis, the child gains new family and the adopters fulfil their wish to adopt. The adoption within the national system is the first solution and the intercountry adoption is an alternative way to care for a child without adequate parental care. Foster care, on the other hand, "is of temporary nature and represents a better alternative in regards to the institutional placement".[98]

96 It should be also emphasised, as D. Hrabar warns – "the comprehensive protection of the welfare of the child, his/her personality and health, should imply the legal regulation of a possibility that the competent authority, during the insight into the adoption case files, marks off the documents containing the information which could harm the adoptee or his/her relationship with the adopters". Hrabar, 2008, p. 1125.

97 Korać Graovac, 2019, p. 135.

98 Hrabar, 2021b, p. 1.

3.1. The Adoption and its unique form

The Family act of 2003,[99] after decades of existence of two types of adoption differentiated in preconditions and effects, finally introduced the sole form of adoption – the full adoption (*adoptio plena*).[100] Hence, today adoption creates an unbreakable familial, or kinship relationship between the adopter and his/her relatives on the one side and the adoptee and her/his descendants on the other, and also transfers all the rights and obligations stemming from such a relationship to the adopter (art. 197 para. 1 CFA).

Family matters and proceedings are generally very intimate and personal in nature, so that "the third persons are *per se* excluded from participating in them".[101] The adoption in Croatia represents a *secret adoption* and consequently also a *closed adoption*. It should be mentioned that "the reasons for the openness or closedness of adoption are subject to the influence of demographic and population factors in a society, the worldview change, but also to the influence of different lobbies."[102]

Still, as T. Hoško puts is, Croatian legislative framework "has certain features of openness,"[103] at least when the child reaches the age of majority.

Namely, the child has the right to know his/her origin, the adopters are advised to inform the adoptee of the fact of adoption and the insight into the adoption case files and state registry of births is restricted, as already discussed in this chapter.

As regards the right of the child to know his/her origin, pursuant to art. 206 CFA, the Croatian Institute for Social Work shall inform the adopters of the right of the child to learn from them that he/she is adopted. Furthermore, they shall be advised to inform the child about the adoption by the

99 Official gazette, Nos. 116/2003, 17/2004, 136/2004, 107/2007, 57/2011, 61/2011, 25/2013, 75/2014, 5/2015, 103/2015.

100 This term is even used in (rather) contemporary court practice, cf. Decision of the Constitutional Court of the Republic of Croatia, U-I-904/1995 (para. 4. of the Reasoning of the Decision). Also indicated in: Horvat and Petrak, 2022, p. 96, note 46.

101 Hrabar, 2008, p. 1125.

102 Ibid., p. 1109.

103 Hoško, 2019, p. 324

time the child is seven years old at the latest, or if the child is older, immediately after establishing the adoption. This corresponds to art. 7 para. 1 CRC, guaranteeing i.e. the right of the child to, as far as possible, the right to know and be cared by his or her parents.

It should be emphasised that art. 206 CFA represents a *lex imperfecta*, since there is no direct sanction for the adopters if they fail to provide such an information to the child. The right to know one's origin is generally well respected in Croatian family law, with some exceptions, some of which are caused by legislative changes in 2015 or by factual deficiencies of the system (for instance in cases of giving birth in a hospital with personal documentation belonging to a third person without her knowledge, since the *anonymous births* are not foreseen by law).[104]

Pursuant to art. 202 CFA, in the adoption procedure, the public is excluded and all participants to the procedure are obliged to respect the right to the protection of the personal data. The adoption information represents an official secret, regulated in detail by art. 217 CFA and the Bylaw on the manner of keeping registers and case files on adoption and the content of the report on the adaptation of the child in the adoptive family (arts. 6 to 8). The breach of this provision may be sanctioned as a disclosure of an official secret or the unauthorised disclosure of a professional secret.[105]

3.2. Intercountry adoption as an alternative way of childcare

Intercountry adoption, although widespread internationally, is seen as an alternative, or as an alternative *ultima ratio* solution in providing care to a child, as defined by art. 21 of the CRC.[106] It is mostly used in cases where it is

104 On different views: Hrabar, 2008, pp. 1131-1135.

105 Both offences are prescribed by the Criminal Code (Kazneni zakon) in art 300 and art 145 respectively. Fortunately, this solution is not problematic in practice. Ibid., p. 1125.

106 States Parties shall ... (b) Recognize that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it;

unlikely that a child will be adopted by Croatian citizens, for instance due to illness or various risk factors on the part of the child.[107] It is established very rarely, only a few times a year.

It should be said that Croatian family law theory differentiates between the intercountry and international adoption – the concept of intercountry adoption concerns the adoption in which the child changes the state in which he/she had previously lived in, independently of the citizenship of the adopter, while the international adoption concerns the adoption in which the adopters are of different citizenship in regards the citizenship of the child, independently of the fact whether they live in the same country or not.[108]

Hence, the designation of adoption as intercountry or international "depends on the facts of the specific case. If there is a relocation, it will be of intercountry nature in the true sense of the word. If relocation does not occur, then the adoption is international, and the international feature is manifested in the circumstance whether the adopter(s) or the adoptee are of foreign citizenship."[109]

Irrespectively of this differentiation, D. Jakovac-Lozić emphasises three common goals of all adoptions with an international element.[110] Firstly, it is of utmost importance to prevent the abandonment of the child and to fight for social justice (at the national and international level). Secondly, alternatives are to be found to the usual placement of the child in institutions. And thirdly, good adoption practices must be developed and the child trafficking and abuse must be fought against.

In that regard, it should be mentioned that the Republic of Croatia is a state party to the Convention of 29 May 1993 on protection of children and co-operation in respect of intercountry adoption[111] since 2014.[112] There are three main objects of this treaty, as defined in art. 1. Firstly, to establish safe-

107 Jakovac-Lozić, 2021, p. 294.
108 Jakovac-Lozić, 2006, p. 10.
109 Hoško, 2019, p. 320.
110 Jakovac-Lozić, 2006, pp. 25-28.
111 The text of the Convention is available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=69 (Accessed 1 December 2023).
112 Official gazette – International treaties, No. 5/2013.

guards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law. Secondly, to establish a system of co-operation amongst contracting states to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children. Finally, the aim is to secure the recognition in contracting states of adoptions made in accordance with the Convention.

At the national level, the issues of the adoption with the international element are regulated by the *International private law act* (further: IPLA),[113] namely the issues of the applicable law and the competent authorities. This Act defines the applicable law for the preconditions of establishing and terminating adoption and also the effects of the adoption (art. 43 IPLA). In case the application of foreign law is contrary to the best interest of the adoptee and if the adoptee or the adopter(s) clearly have close relation with the Republic of Croatia, Croatian law is applicable (art. 43 para. 6 IPLA).

Furthermore, with regard to the competent authorities, if not prescribed otherwise, the court or other authority of the Republic of Croatia is competent (along with the cases of temporary-, insurance and enforcement measures (art. 57 IPLA) in proceedings regarding personal status of physical persons, such as the establishment of adoption, if the person has habitual residence in Croatia or is a Croatian citizen (art. 47, adoption being explicitly mentioned in para. 2 subpara 4 and also in art. 52 IPLA).

A special provision has been introduced in 2023 in amendments of this Act,[114] concerning the intercountry adoption – art. 71 a, as a legislative reflection of particular practical cases. As regards the recognition of foreign court decisions on adoption of the child from the country which is not a party to the international treaty regulating the issues of international adoption (i.e. the Convention of 29 May 1993 on protection of children and co-operation in respect of intercountry adoption), it is defined that it shall be recognised when the court, through diplomatic channels, verifies the authenticity of

113 Official gazette, Nos. 101/2017, 67/2023.

114 Official gazette, No. 67/2023. It should be mentioned that this provision is a legislative reflection, or a reaction to particular cases of adoption of children from the Democratic Republic of Congo by Croatian citizens. Cf.: Hrabar, 2023.

the decision and if the proof of legalisation of the decision has also been filed, in accordance with the act regulating the legalisation of documents in international transactions (para. 1 IPLA).

During this procedure, the Croatian court shall ask for information from the ministry competent for social welfare, whether the adopter is enrolled in the Register of prospective adopters, under the condition that the adopter, at the time of the establishment of adoption, was obliged to be enrolled (para. 2 IPLA). And finally, the Croatian court shall deliver the final court decision on the recognition of a foreign court decision regarding adoption to the ministry competent for social welfare, as well as the Croatian Institute for Social Work for the entry into the register of adoptions and the monitoring of the adaptation of the child into the adoptive family, in accordance with the CFA.[115]

In accordance with the *Croatian citizenship act*,[116] a child of foreign citizenship or a child without citizenship acquires Croatian citizenship by origin if he or she has been adopted by Croatian citizens pursuant to the provisions of a special law. Such a child is considered to be a Croatian citizen from the moment of his or her birth (art. 4 para. 2). On the contrary, a child adopted (with the kinship effect) by a foreign citizen, shall be released from Croatian citizenship upon the adopters' request (art. 20).[117]

3.3. Foster care

Foster care is a form of social service with the aim of providing care and support to the beneficiary in encouraging and positive family environment pursuant to his/her individual plan of change, namely the plan of chang-

115 Particularities of the entries of notes in state registries based on decisions of foreign courts and other authorities are defined by art. 59 of the Instructions for the implementation of the state registries act.

116 Official gazette, Nos. 53/1991, 70/1991, 28/1992, 113/1993, 4/1994, 130/2011, 110/2015, 102/2019, 138/2021.

117 In accordance with the Instructions for the implementation of the state registries act, when registering an adoption of a child of foreign citizenship or without citizenship adopted by Croatian citizens, the registrar *ex officio* enters information about Croatian citizenship in birth registration (art. 29 para. 3).

ing life situation, i.e. the behaviour of beneficiary made on the basis of the comprehensive evaluation of needs, difficulties and resources, in agreement with the beneficiary and the members of his/her family with the aim of overcoming unfavourable life circumstances, as defined by arts. 1 and 2 in connection to art. 9 Point 7 of the *Foster care act* (further: FCA).[118]

Foster care is provided in congruence with the fundamental principles of social welfare, principle of the best interest of the beneficiary, equality in the family environment, sustainability of social ties, involvement of the beneficiary and the prohibition of discrimination (art. 3 FCA).

As regards to children as beneficiaries of foster care, certain general principles should be briefly presented. Namely, when deciding on the need and circumstances of the particular case, the Croatian Institute for Social Work takes into consideration the non-separation of siblings, as well as the needs of the beneficiary and the aims set by the individual plan (art. 4 para. 1 FCA). The foster parent is primarily selected within the circle of relatives or other persons close to the beneficiary, in his/her place of residence, always when such a choice is possible and in the best interest of the beneficiary (art. 4 para. 2 FCA). Taking into consideration the place of residence is of utmost importance for the sake of maintaining family and other social ties and the preservation of the level of the social inclusion of the beneficiary, and it is considered as a first choice, unless it is not in the best interest of the beneficiary or if there are no foster families in the area of the place of residence of the beneficiary (art. 6 FCA).

There are three basic types of foster care in the Croatian legal system: traditional, professional (which can be provided as standard foster care and specialised foster care for children) and kinship foster care (art. 10 FCA). When the right to placement is granted, the beneficiary becomes an equal member of the foster family and all forms of discrimination – direct and indirect are prohibited (arts. 5 and 8 FCA).

During the placement of the beneficiary in foster care, the Croatian Institute for Social Work, foster parent and the provider of service jointly plan and prepare the departure of the child from foster care "for the pur-

118 Official gazette, Nos. 115/2018, 18/2022.

pose of return to one's own family, *adoption*, independence, placement with another service provider, with the aim of gradual adaptation to new circumstances" (art. 44 para. 5 in connection to art. 48 and art. 50 para. 2 subpara. 9 FCA, emphasis by author). It should be noted that the process of adaptation of the child previously in foster care can be more challenging, since the child has developed attachment to the foster parents, which might cause the repeated feeling of loss of a person whom the child was attached to.[119]

Therefore, it should be emphasised that foster care and adoption are two different institutions, which should not be interchanged with each other. When the preconditions for adoption are met, the foster care ends, and there is no time limit during which a child should be in foster care before being adopted. Hence, foster care is by no means a compulsory pre-step for adoption. Furthermore, it must not be used as such, so that the foster parents must not consider the foster care as a vestibule to adoption.

4. Legal effects of adoption

Adoption, as a special form of family-law providing for and taking care of the child without adequate parental care, creates important legal effects. Its primary effect is by all means the establishment of a *permanent relationship* between the child and the adopter, who gains *the right to parental care* (art. 180 CFA). Pursuant to art. 91 para. 1 CFA, "parental care consists of the responsibilities, duties and rights of the parents, for the purpose of protecting and promoting the child's personal and property rights and well-being. Parents are obliged to provide parental care in accordance with the child's developmental needs and capabilities."

Hence, by virtue of adoption, *an unbreakable familial, or kinship relationship* is established between the adopter and his/her relatives on the one side and the adoptee and her/his descendants on the other, as well as all rights and responsibilities stemming from such a relationship (art. 197 para. 1 CFA). Such

119 Zurak and Laklija, 2019, p. 10.

a relationship of kinship is considered to be an impediment to marriage,[120] since the civil and the blood kinship are equalised in this regard. The institute of maintenance represents another important right and duty, stemming from the same principle.

Furthermore, adoption terminates mutual rights and responsibilities between the adoptee and his/her (blood) relatives, unless the child was adopted by a step-parent or extramarital partner of the parent, in which case the rights and responsibilities remain valid (art. 197 paras. 2 and 3 CFA).

The adopters shall, as a rule, be *registered as parents in the register of births and the citizenship records* (art. 215 CFA), unless the Croatian Institute for Social Work determines it would be contrary to the interest of the child. If the adoptee is over twelve years of age, his/her consent is needed for registering the adopters as parents (art. 213 paras. 3 and 4 CFA). Upon the establishment of the adoption, maternity or paternity cannot be established or contested (art. 196 CFA).

As already mentioned, the *personal name and the nationality of the adoptee* can be changed (art. 198 CFA). The adopters define the adoptee's name – the adoptee shall have the adopters' joint surname, and in case they do not have one, they shall decide upon the surname in accordance with the *Personal name act*.[121] The adoptee may well retain the name and surname he/she had before the adoption, or add the adopters' surname to his/her own, if the Croatian Institute for Social Work established it is the best interest of the child. The adopters may also determine the adoptee's nationality. Regards both changes of name and nationality, if the adoptee is over twelve years old, his/her consent is needed. Both issues obviously represent an issue of the identity of the child and they should be paid considerable concern.[122]

The legal effects of adoption also include *the right of inheritance* (art. 199

120 Namely, in accordance to art. 27 para. 1 CFA, "blood relatives in the direct line, and in the collateral line, sister and brother, half-sister and half-brother, children with a sister or half-sister, or brother or half-brother of their parent, children of sisters and brothers and half-sisters and half-brothers cannot marry each other." In accordance to para. 2 of the same art., the provision applies to the relationship created by adoption.

121 Official gazette, Nos. 118/2012, 70/2017, 98/2019.

122 As S. Winkler puts it, "personal name is an integral element of every person's personality: it signifies the identity of its bearer and reflects it in the contemporary context". Winkler, 2013, p. 125.

CFA in connection with art. 8 of the *Inheritance act*[123]). Namely, adoption gives the adoptee and his/her descendants a right to inherit from the adopters, their blood relatives and relatives by adoption. Furthermore, adoption gives the adopter and her/his blood relatives and relatives by adoption a right to inherit from the adoptee and his/her descendants. The adoptee's right to inherit from his/her parents and other blood relatives must be terminated by adoption, except towards the parent who is a spouse or an extramarital partner of the adopter, and that parent's blood relatives and relatives by adoption.

One of the corollary consequences is also the *assistance and support after the establishment of adoption* (art. 216 CFA). Namely, the Croatian Institute for Social Work must secure advisory assistance and support to the adoptee and the adopter, as well as must monitor the adaptation of the child into the adoptive family and must compile a report on it upon the period of six months since the establishment of adoption. The particularities on this process are regulated by the already mentioned Bylaw on the manner of keeping registers and case files on adoption and the content of the report on the adaptation of the child in the adoptive family. In accordance with the art. 10 of this act, the report on the child contains the following information: on his/her health status; on his/her physical, emotional and social development; on his/her development of communication skills; on the development of the cognitive capabilities, socio-emotional development and behaviour in regards the age of the child, as well as the conclusion on the adaptation of the child into the adoptive family.[124]

The practical experiences and research in this field demonstrate that many adopters consider the lack of continuous support as one of the greatest challenges of adoption, since it seems that legislative provisions have not been fully accepted nor implemented in practice.[125] As a consequence, the comprehensive system of assistance has not yet been developed.

123 Official gazette, Nos. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019.

124 The adaptation usually depends mostly on the way the children evaluate the experience of adoption, as well as the personal characteristics of the child, such as cognitive development, self-respect, feeling of control and trust. Zurak and Laklija, 2019, p. 21.

125 Blažeka Kokorić, 2019, p. 5.

It should also be emphasised that the prospective adopters should consider the assistance and support as a part of "responsible and caring parenthood" and not "as a sign of weakness". It is even more so, when we take into consideration the fact that "the post-adoptive support is as equally important as the process of evaluation and the process of matching before the establishment of the adoption."[126]

The adoption in the Croatian legal framework establishes a relationship which is permanent and cannot be terminated. There is of course a "limitation *sui generis*", or rather a termination *sui generis*, in case of issuing the measure of deprivation of the right to parental care to the adopters.[127] Furthermore, since adoption procedure is by nature an administrative proceeding, an obvious violation of the procedure may lead to the annulment of the adoption decree, in accordance with art. 129 of the *General administrative procedure act*.[128] The *Administrative disputes act*[129] foresees the particularities of the procedures in which the administrative courts decide on the legality of the decisions of the public authorities of the rights, obligations and legal interests of physical and legal persons and other parties, as well as the legality of the procedures of public authorities in the field of administrative law (art. 1), which includes the adoption decrees, as well as the decisions of the competent ministry acting as an authority of the second instance. Such a system represents an additional safeguard for the implementation of the principle of legality as one of the most important principles of Croatian legal framework.

5. Balancing the interests with the aim of protecting the welfare of the child

"Adoption is doctrinally a simple institute, yet the one with far-reaching consequences, taking into consideration that it abruptly changes the life of the adopters and the adoptee".[130] It definitely includes "intertwined

126 Sladović Franz, 2019, p. 56.
127 Hrabar, 2008, p. 1121.
128 Official gazette, Nos. 47/2009, 110/2021.
129 Official gazette, Nos. 20/2010, 143/2012, 152/2014, 94/2016, 29/2017, 110/2021.
130 Hrabar, 2008, p. 1108.

or confronted interests of biological parents, adoptive parents and the child."[131]

Besides being a doctrinally simple institution, adoption is also a family law institution which "constantly causes increased public interest."[132] Indeed, as A. Korać Graovac emphasises – "the demands that are heard are often contradictory: on the one hand, there are pressures to fulfil the needs of an increasing number of potential adopters for children, and on the other hand, it is requested that, as far as possible, the biological families or the rights of the biological parents are protected. ... Opinions about the desirability of adoption are divided: on the outside, altruism, or the noble nature of the motivation for adoption, is emphasized, but when adoption is established, it is not uncommon to try to hide the fact that the child is adopted."[133]

Definitely "the legislator is in a quandary on how to reconcile different interests that are often opposed"[134] during adoption. Hence, as D. Hrabar points out, the most important question is – who does it favour – the adopters or the adoptee?[135] The decision is only one – it should favour the adoptee, since it is the "role of the law to reduce the interests of polarised persons within reasonable limits and to lead them to the highest aim, in adoption being the welfare of the adopted child".[136]

Although the mentioned issues might seem to be uncontroversial ones, it seems adoption should be re-thinked within the Croatian legal system – particularly its goals, means, competence for the procedure, as well as the demarcation lines in regards to other legal fields and institutions. An additional confirmation of this thesis is unfortunately provided by three recent procedures held before the Croatian courts.[137] Two procedures were commenced before the Constitutional court of the Republic of Croatia with the aim of assessing the conformity of the Foster care act with the Constitution, especially in regards to the sexual orientation of the foster parents and one

131 Ibid., p. 1127.
132 Korać, 2003, p. 63.
133 Ibid.
134 Ibid.
135 Hrabar, 2008, p. 1108.
136 Ibid.
137 V. Hrabar, 2021b, pp-24-34.

was commenced before the Administrative court for the establishment of foster care by partners of same-sex.[138]

As regards the first two procedures, the Constitutional court declined the request and the proposal for commencing the procedure, concluding that the Foster care act "in the existing normative content that is in force has a legitimate goal and in this respect is not in disagreement with the Constitution."[139] Nevertheless, it continued pointing out that "the courts and other authorities are obliged to interpret and apply the disputed legal provisions in a way that will enable all persons under equal conditions to participate in the public adoption service, therefore, regardless of whether the potential adopter lives in a life or informal life partnership".[140]

The Constitutional court passed another decision on rejection of the proposals for assessing the conformity of the Foster care act also in 2023,[141] mainly repeating the arguments of the previous decision. However, it should be reiterated that the CFA lists the potential adopters, being either heterosexual persons or single persons, and that the LPA does not regulate adoption. Therefore, as D. Hrabar emphasised, this decision "shook up the foundations of the principle of legality and separation of powers".[142]

The third procedure was commenced by filing an appeal against the decree by which competent administrative authorities rejected the same-sex partners as potential foster parents. The Administrative court quashed this decree.[143] The competent ministry lodged an appeal, however the High administrative court rejected the appeal and upheld the judgement of the lower court,[144] stating that the reasons that the ministry stated in the decree are "not acceptable from the point of view of the standards accepted in the judi-

138 The fourth, interrelated procedure was presumably commenced before the Croatian Institute for Social Work by the very same couple. It can be concluded from the media that they requested an opinion on their eligibility and suitability for adoption. However, since the official information on the presumed procedure are not available, which is logical taking into consideration the secrecy of the procedure, the particularities are mentioned only regarding the three procedures, being finally decided upon.

139 Para. 29 of the Decision no. U-1-144/2019 of 29 January 2020.

140 Para. 29.3 of the Decision U-1-144/2019.

141 Decision no. U-I/2165/2022 of 18 April 2023.

142 Hrabar, 2021 b, p. 27.

143 Decision of the Administrative court in Zagreb Uszp-43/20-7 of 21 April 2021.

144 Decision Usž 2402/2021-4 of 20 April 2022.

cial practice of the ECtHR, i.e. that in light of the application of the Convention, the refusal of public law authorities to carry out the procedure at the request of the plaintiff would lead to a violation of Article 14 in connection with Article 8 of the Convention."[145]

6. Final considerations on Croatian legislation and practice in regards adoption

Adoption is, in accordance with the Croatian family law, a special form of family-law providing for and taking care of the child without adequate parental care, which establishes a permanent relationship between parents and the child (art. 180 para. 1 CFA). Adoption can be established only if it is in accordance with the welfare of the child (art. 180 para. 3 CFA). Therefore, "the best interest of the child is not only one of the factors which should be taken into consideration, but it becomes the decisive factor, the standard that must take precedence,"[146] which concept recognises the legacy of the CRC.

"Adoption unifies two interests, two human goods, two aims which are complementary. In legal terms, it unifies two rights: the human right to establish a family on one hand and the right of the child to protection and care necessary for the welfare of the child, more precisely put, the right of the child to family and being brought up within a family, on the other hand."[147] In that regard, let us reiterate that the "right to adopt" or the "right to become a parent" do not exist.

Twenty years ago, A. Korać Graovac noticed that "two facts attract attention: the imbalance between the number of children in care and established adoptions and the fact that there are clearly far more requests for adoption compared to the number of established adoptions."[148] The situation unfortunately has not changed in the meantime. Since the entry into force of CFA in 2015, 920 children were adopted, which represents 30% of children who can

145 Para. 33 of the Decision Usž 2402/2021-4.
146 Jakovac-Lozić, 2021, p. 279.
147 Ibid.
148 Korać, 2003, p. 64.

be adopted since all the preconditions on their side are met. The most recent data confirms that in 2022, there were 574 children who could have been adopted and only 196 of them were indeed adopted, out of which cases, in 42 cases the parents gave their consent and in 20 cases the parental consent was replaced by a court decision.[149]

Twenty years ago, A. Korać Graovac also noticed that "there are certainly reasons for dissatisfaction, but it is questionable whether the reasons lie in insufficient and even poor application of regulations or in poor regulations themselves."[150] Today, we conclude that the reasons lie in both dimensions! Namely, it could be said that two dominant factors hinder the realisation of full potential of the institute of adoption: certain elements of the legislative framework (mostly of family-law nature) and the hesitant approach noticed in practice, both judicial and administrative.

As regards the legislative framework, it is time for the legislator to rethink this institute from the only valid perspective – the perspective of the protection of the welfare of the child. As D. Jakovac-Lozić emphasises, CFA in force „places emphasise on establishing adoption in special circumstances caused by the lack of parental consent (due to the deprivation of legal capacity and non-age); furthermore, it regulates a court procedure in which court can by virtue of its decision substitute the parental consent to adoption when legal preconditions are met ... in regards the preparation of the child for adoption, it introduces the realisation of contacts between the prospective parents and the child".[151]

In connection with the issue of consent, establishing adoption without the consent of the parent deprived of legal capacity, and even more so in regards of the parent deprived of the right to parental care, it is clear that a hesitant approach endangers the welfare of the child. Still it seems "as if the competent authorities show more consideration for the right to parental care of the biological parents than for the child's right to live in a family".[152]

149 Ministarstvo rada, mirovinskoga sustava, obitelji i socijalne politike (Ministry of Labour, Pension System, Family and Social Policy), 2022, p. 66.
150 Korać, 2003, p. 64.
151 Jakovac-Lozić, 2021, p. 276.
152 Hrabar and Korać, 2003, p. 116.

The possibility of replacing the parental consent by a court decision is only a "summary procedure of deprivation of the right to parental care".[153] The deprivation of the right to parental care is always *ultima ratio*, and its "substitution" by a court decision regarding adoption harms not only the interests of the child, but it challenges the principle of the rule of law in general. Namely, unlike the person deprived of the right to parental care, a person whose consent was replaced by the court decision could potentially apply for adoption of another child or be appointed as a guardian.

In connection to the issue of the contacts between the most suitable potential adopters and the child, in regards pre-placement, additional caution is needed, having in mind the possibility that the adopters decide to withhold from the procedure, hence causing another trauma to the child. Therefore, special education is needed for prospective adopters, but also for the experts in the Croatian Institute for Social Work, whose efforts have to be supported.

The constant change of legislative framework is one element that needs to be reconsidered . As D. Hrabar emphasises, "abundant recutting of legal acts, including the parts regarding adoption, leaves the addressees in doubts, often creates inequalities between the adopters, and – what is the most painful and unforgiving, between the children, who wait and wish, at least intuitively, to be adopted."[154]

As regards the practice, two issues deserve particular attention: the hesitative approach to adoption by the competent state authorities and the duration of the adoption procedures themselves.

In relation with the too-often recognised approach, we concur to the opinion that "... the system – both administrative and judicial, does not react promptly and decisively enough in terms of creating legal preconditions for the adoption of children."[155] Since adoption in most cases "entails permanent and irreversible breaking of family (biological) ties, the competent authorities are reluctant to initiate court proceedings and also to decide on the

153 Rešetar, 2022, p. 737.
154 Hrabar, 2008, p. 1137.
155 Hrabar, 2021b, p. 7.

deprivation of the right to parental care."[156] The efforts to preserve biological family have to be reasonable, so that the rights of children and the parents would not be breached.[157]

The duration of the procedure, is often to be said as the key challenge of adoption. It should be said that two perspectives on this matter are irreconcilable: on the one hand of the prospective adopters complaining that the procedure lasts too long and on the other hand the perspective of the experts in the competent authorities, in particular in the Croatian Institute for Social Work say that they do not have sufficient time to evaluate the potential adopters and to prepare the child for adoption.[158]

Therefore, although it is a general belief in Croatia, both within the professional community, as well as the public, that adoption procedures last too long. One should remember that the experts single out the administrative part of the procedure as the challenging one.[159]

Experts in this area, both in theory and in practice agree that the process of evaluating the suitability for adoption, as well as the matching, should by no means be rushed.[160] Namely, it should be done *lege artis*, "with the aim of preventing negative adoption outcomes, which can vary from the termination of commenced, yet legally still unestablished adoption due to the renouncement of the adopters, through problematic mutual relationships, to behavioural problems of the child or inadequate parental care, all the way to the relinquishing the child by his/her adoptive parents".[161] In case this unwelcomed scenario occurs, the regular measures are applied to protect the rights and interests of the child, as they would be used in the situation of biological parentage, the harshest of those being the deprivation of the right to parental care.

Furthermore, it should be reiterated that adoption is by far not the first adequate measure used to protect the welfare of the child, and beforehand different measures can be used so that the right of the child to family life

156 Ibid., p. 21.
157 Hrabar, 2019, p. 200.
158 *E. g.* Zurak and Laklija, 2019, p. 24.
159 Zurak and Laklija, 2019, p. 31.
160 Ibid., p. 24.
161 Sladović Franz, 2019, p. 45.

is secured.[162] Consequently, such an approach sometimes includes the repeated accommodation of the child in the system of alternative care for the children, which by all means "contributes to high developmental risk and represents repeated jeopardy of the welfare of the child".[163]

Nevertheless, we adhere to the conclusion by D. Hrabar that the system should evaluate more quickly whether the preconditions of adoption of each child are fulfilled and hence establish adoption in a short period of time; place children who are in institutional care with foster parents and at the same time support the construction of more foster homes; evaluate biological families and help them as much as possible in gaining parenthood capacities; strengthen the link between social welfare authorities and courts in terms of assessing the child's legal status.[164] To conclude, "the interests of children should be assumed *per definitionem legis* as preeminent and superior, thus strengthening the legal and life position of children without adequate parental care".[165]

162 Jurić and Blažeka Kokorić, 2019, p. 63.
163 Sladović Franz, 2019, p.45.
164 Hrabar, 2021 b, p. 38.
165 Ibid.

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able at: https://mrosp.gov.hr/strategije-planovi-programi-izvjesca-statistika/4165 (Accessed 1 December 2023)

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Sladović Franz, B. (2019) 'Procjena i uparivanje posvojitelja i djeteta (Assessment and matching of adoptive parents with children)' in Blažeka Kokorić, S. (ed.) *Posvojenje: različite perspektive, isti cilj (Adoption: different perspectives, same goal)*. Zagreb: Na drugi način, pp. 38 - 61.

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Regulation of adoption in the Czech Republic

Andrea GERŐCS-TÓTH*

„Every child deserves a loving family and a safe environment where they can grow up, discover the world, and develop their identity."[1]

1. Introduction

Ideally, the child is cared for by their biological parents. However, once a parent – due to any reason – is no longer able to fulfil this role, someone else must necessarily step in to protect the interests of the child. If a child cannot grow up in their family of origin, a complex system of social and legal child protection mechanisms is triggered, within which adoption plays a central role, alongside foster care as an alternative. There are, of course, situations in which adoption is legally precluded; even then, the child must be provided for in some appropriate manner. When placement with a foster family is not feasible either, institutional care in a residential setting may serve as an alternative. A particularly relevant and timely legislative development in Czech law is that, as of 1 January 2025, the placement of children under the age of three in institutional care is no longer permitted. This measure was introduced by an amendment to the Czech Child Protection Act[2] (hereinafter: Child Protection Act), adopted by the Czech Parliament in 2021, with the

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1 Náhradní rodinná péče: Cesta k podpoře dětí, Available at: https://nahradnirodina.cz/o-nahradni-rodinne-peci/adopce-neboli-osvojeni/#:~:text=Mezi%20osvojiteli%20a%20d%C3%ADt%C4%9Btem%20vznikaj%C3%AD,li%20osvojen%C3%AD%20v%C2%A0rozporu%20se%20z%C3%A1konem, (Accessed: 5.12.2024)

2 Act No. 359/1999 Coll., on the Social and Legal Protection of Children (Zákon č. 359/1999 Sb., o sociálně-právní ochraně dětí), Available at: https://www.zakonyprolidi.cz/cs/1999-359, (Accessed: 3.3.2025)

primary aim of promoting the upbringing of children in a family environment and reducing the number of institutional placements.

Adoption is generally perceived as an altruistic act serving the best interests of the child – an expression of care and support „for children who were not fortunate enough to grow up in a happy and loving family."[3] In such cases, a legal relationship is established between the adoptive parents and the child, which, by operation of law, mirrors that of a biological bond.

Under the first Czechoslovak law on adoption, enacted in 1928[4], adoption was permitted in the following cases: „A person who has no biological children from marriage or children considered legally equivalent (legitimate, adopted, or illegitimate with respect to the mother) may adopt another person as their own by contract." Thus, in principle, adoption was available to those without children of their own. However, an exception applied to „a father and his illegitimate child, where such a father could adopt his illegitimate child even if the standard conditions for adoption were not met."[5]

Today, it is widely acknowledged that, under Czech law, adoption must primarily serve the best interests of the child. Ensuring placement in a suitable family environment is considered a prerequisite for the child's proper physical, mental, and emotional development. The facilitation of family formation for childless couples is regarded only as a secondary objective. This was not always the case, as demonstrated by the previously cited provision of the 1928 Czechoslovak law, which prioritized the needs of the potential adoptive parent over those of the child.

Traditionally, Czech child protection was based on the principle that „the mother knows best what is good for her child."[6] This paradigm was only

3 Adopce – Oprevdu chtené dety, Available at: http://www.adopcemiminek.wbs.cz/, (Accessed: 5.12.2024)

4 Act No. 56/1928 Coll., on Adoption (Zákon č. 56/1928 Sb. o osvojení), Available at: https://www.aspi.cz/products/lawText/1/4579/1/2/zakon-c-56-1928-sb-o-osvojeni?vtextu=56/1928.%20z%C3%A1kon#lema0, (Accessed: 5.12.2024)

5 Vyskočil, F.: Právní analýza osvojení v České republice, STŘEDISKO NÁHRADNÍ RODINNÉ PÉČE, spolek Praha 2016., p. 6. Available at: https://www.nadacesirius.cz/soubory/ke-stazeni/nrp/Pravni_analyza_osvojeni_v_CR.pdf, (Accessed: 5.12.2024)

6 Gojová, A.; Gřundělová, B.; Cilečková, K.; Chrenková, M.: *Path toward a Child-Centered Approach in the Czech Social and Legal Protection of Children*. Sustainability 2020, 12(21), 8897. DOI: 10.3390/su12218897

seriously challenged in the 1990s, when the foundations of a new child protection system were laid, one that placed greater emphasis on the rights of the child. At present, it can be asserted that the child's interests have come to the forefront of Czech regulation, in line with the principles of the United Nations Convention on the Rights of the Child[7] and the Hague Convention on Intercountry Adoption[8]. This is reflected in the legal requirement to prioritize the child's best interests and to apply the principle of subsidiarity – specifically, that intercountry adoption may only be considered if a suitable domestic placement cannot be secured.[9]

2. Substantive aspects of adoption

Adoption (*osvojení* in Czech legal terminology), similarly to Hungarian law, constitutes one of the most significant institutions of family law. Its primary objective is to provide a familial environment for children deprived of parental care, while also establishing a legal relationship between the adoptive parent and the adopted child. The Czech adoption system is grounded in multiple legal sources, which together define the substantive and procedural framework of adoption, the competencies and procedures of child protection authorities, as well as the rules applicable to intercountry adoption.

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7 In the Czech Republic, the UN Convention on the Rights of the Child was promulgated by the following legislation: Notice No. 104/1991 Coll., Notice of the Federal Ministry of Foreign Affairs on the Conclusion of the Convention on the Rights of the Child (Sdělení č. 104/1991 Sb., Sdělení federálního ministerstva zahraničních věcí o sjednání Úmluvy o právech dítěte), Available at: https://www.zakonyprolidi.cz/cs/1991-104, (Accessed: 10.3.2025)

8 In the Czech Republic, the Hague Adoption Convention was promulgated by the following legislation**:** Notice No. 43/2000 Coll. int. tr., Notice of the Ministry of Foreign Affairs on the Adoption of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Sdělení č. 43/2000 Sb. m. s., Sdělení Ministerstva zahraničních věcí o přijetí Úmluvy o ochraně dětí a spolupráci při mezinárodním osvojení, Available at: https://www.zakonyprolidi.cz/ms/2000-43?text=Sd%C4%9Blen%C3%AD+%C4%8D.+43%2F2000+Sb.+m.+s., (Accessed: 10.3.2025)

9 Adoption in Czechia, Available at: https://mzv.gov.cz/consulate.newyork/en/visa_and_consular_information/czech_citizenship/adoption_in_the_czech_republic/index.html#:~:text=One%20of%20the%20most%20important,in%20the%20Hague%20Adoption%20Convention, (Accessed: 11.3.2025)

The principal legal sources are as follows: the Czech Civil Code[10] (*občanský zákoník*, hereinafter: Czech Civil Code), which governs adoption in Sections 794 to 845; the Child Protection Act (*zákon o sociálně-právní ochraně dětí*), already discussed above; as well as the Czech statutes promulgating the UN Convention on the Rights of the Child and the Hague Convention on Intercountry Adoption. The procedural framework is laid down in the Czech Code of Civil Procedure[11] (*občanský soudní řád*, hereinafter: Czech CCP), which regulates the court proceedings relating to adoption, including the submission of applications, the conduct of the proceedings, and the issuance of decisions.

Additionally, mention must be made of the implementing regulation[12] to the Child Protection Act, which governs, inter alia, the mandatory preparatory courses to be completed prior to adoption, the conduct of home studies, and the criteria for assessing the suitability of prospective adoptive parents.

2.1. The purpose of adoption

In the Czech Republic, the institution of adoption primarily serves to promote the upbringing of the child within a family environment, with a focus on the child's individual needs. Although the cited legal instruments do not contain an explicit definition of purpose, the legislative framework clearly reflects that the overarching aim of adoption is to ensure the child's well-being – specifically within the context of a family setting. According to the Czech Civil Code, adoption is defined as „*the acceptance of a person as one's own*."[13] The principal objective of adoption is therefore to serve the best interests of the child by providing a stable and loving family home for a child whose biological parents are unable to care for them. In line with this, the

10 Act No. 89/2012 Coll., Civil Code (Zákon č. 89/2012 Sb., občanský zákoník), Available at: https://www.zakonyprolidi.cz/cs/2012-89, (Accessed: 3.3.2025)

11 Act No. 99/1963 Coll., Code of Civil Procedure (Zákon č. 99/1963 Sb., občanský soudní řád), Available at: https://www.zakonyprolidi.cz/cs/1963-99, (Accessed: 3.3.2025)

12 Decree No. 473/2012 Coll., on the Implementation of Certain Provisions of the Act on Social and Legal Protection of Children (Vyhláška č. 473/2012 Sb., o provedení některých ustanovení zákona o sociálně-právní ochraně dětí) Available at: https://www.zakonyprolidi.cz/cs/2012-473, (Accessed: 3.3.2025)

13 Czech Civil Code (Act No. 89/2012 Coll.), hereinafter: Czech CC, Section 794.

law stipulates that the adoption of a minor may only be authorised if it is in the best interests of the child – i.e., if it aligns with the principle of the child's paramount interest.[14] The court must assess, in every decision concerning adoption, whether the proposed solution serves the interests of the child. This reflects the practical implementation of the principle of "the best interests of the child."

Czech law accordingly emphasises that the adoptive family must be capable of providing appropriate care and upbringing, and that adoption should create a lasting, loving, and fully-fledged familial bond between the adoptive parents and the adopted child. The prioritisation of the child's interests is likewise embedded in Hungarian law: the Hungarian Civil Code[15] also provides that adoption serves the interest of the child and aims to provide a family environment for them. It is a fundamental principle in Hungary as well that the child's best interests must be taken into account – thus, in this respect, Czech and Hungarian approaches are aligned.

The Czech legislature reinforced the child-centred approach to adoption through a reform adopted in 2014. As part of this reform, it established a legal obligation for adoptive parents to inform the child of their adoption status no later than the beginning of school age. This provision aims to ensure the development of the child's identity and awareness of their origins at an appropriate and early stage, taking into account the child's psychological well-being. Also guided by the child's best interests, the law introduced a right for the adoptee to access the documents related to their adoption upon reaching the age of majority. This right entitles the adult adoptee to obtain information about their origins. As of January 2025, this rule has been amended to allow children to access their adoption records from the age of 12. Taken together, these provisions reflect that the Czech model of adoption places the child's interests and well-being at the forefront of the legal framework.[16]

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14 See Czech CC, Section 795.

15 Section 4:121 (1) of Act V of 2013 on the Civil Code of Hungary, Available at: https://net.jogtar.hu/jogszabaly?docid=a1300005.tv, (Accessed: 6.3.2025)

16 For more information on this paragraph, see: Osvojení, adopce a změny od 1.1.2014, Available at: https://muj-pravnik.cz/osvojeni-adopace-zmeny-od-2014/#:~:text=Povinnost%20informovat%20o%20osvojen%C3%AD, (Accessed: 11.3.2025)

A significant and wide-ranging amendment to the adoption rules entered into force on 1 January 2025. The reform prohibits the institutional placement of children under the age of three and introduces the possibility for same-sex couples to adopt the biological child of one partner. „*In practice, this means that if one partner is the biological parent of a child, the other partner may adopt the child, thereby establishing a legal relationship between the child and both partners. This change is of crucial importance with respect to parental rights and obligations in the event of the death of one partner or in case of separation. It enables same-sex couples to provide legal stability and security for their children*."[17] However, the amendment does not yet allow for the joint adoption of a child from an orphanage or other institution by a same-sex couple.

These amendments likewise aim to enhance and strengthen the protection of children's rights and well-being, while promoting their upbringing in a family environment.

2.2. Material requirements for adoption

The substantive legal conditions for adoption are regulated by the provisions of the Czech Civil Code, which set forth the fundamental requirements applicable both to the prospective adoptive parent and to the child to be adopted. These conditions are intended to ensure that adoption may only take place if it is both lawful and appropriate for all parties involved – with primary consideration given to the best interests of the child. The following sections separately address the substantive legal criteria governing the suitability of the adoptive parent, as well as the conditions under which a child may be considered adoptable.

17 *Růžková*, V.: Amendment to the partnership law: equal status for same-sex couples from January 2025, Available at: https://www.arws.cz/news-at-arrows/amendment-to-the-partnership-law-equal-status-for-same-sex-couples-from-january-2025?utm, (Accessed: 11.3.2025)

2.2.1. Requirements concerning the adoptive parent

In the Czech Republic, an adoptive parent (*osvojitel*) may only be a natural person who has attained the age of majority – that is, who is at least 18 years old – and possesses full legal capacity. According to the applicable provisions of the Czech Civil Code, *„Only an adult and legally competent person may adopt, who, on the basis of their personal characteristics, way of life, and the reasons and motives for adoption, guarantees that they will be a good parent for the adopted child."*[18] This statutory language essentially sets forth the general requirement of the adoptive parent's suitability.

Although the law does not prescribe an upper age limit[19], the age difference between the adoptive parent and the child constitutes an important criterion. As a general rule, a minimum age gap of 16 years must exist between the adoptive parent and the adopted child. According to the Civil Code, this age gap may only be reduced in justified cases, where such a decision is in the best interests of the child and is approved by the child's guardian. The court may therefore authorize a smaller age difference if, notwithstanding the reduced gap, the prospective adoptive parent is still deemed suitable and the adoption serves the child's welfare. The purpose of the age difference requirement is to ensure that the adoptive parent is capable of fulfilling a genuine parental role. In practice, however, the age difference typically ranges between 25 and 40 years.[20]

In addition to being of legal age, the adoptive parent must possess full legal capacity. Accordingly, only individuals who are legally entitled to enter into legal transactions without restriction – that is, who are not subject to guardianship and who are capable of acting responsibly in their personal affairs – may be considered eligible to adopt.

The prospective adoptive parent must also exhibit, in accordance with the requirements set forth by the Czech Civil Code, the personal characteristics and lifestyle that ensure they will be a good parent for the child to be adopt-

18 See Czech CC, Section 799(1).

19 See Czech CC, Section 803.

20 Bubleová, V. – Vávrová, A. - Vyskočil, F. – Pokorná, P. – Landová, T. – Fišerová, V. DiS.: Základní informace o osvojení (adopci), Praha 2018, p. 7.

ed. During the adoption proceedings, the competent authorities assess the adoptive parent's living conditions and lifestyle. In addition, the adoptive parent's state of health must not substantially hinder their ability to care for and raise the child. The law explicitly states that the adoptive parent's health condition must not significantly limit their capacity to provide care for the child. In practice, this typically involves medical examinations; severe chronic illnesses or mental health conditions that would seriously impair the ability to care for a child may constitute grounds for disqualification.[21]

In terms of the family status requirement, it may be observed that adoptive parents in the Czech Republic may consist of married couples acting jointly; however, it is also permissible for single individuals to adopt (including widowed, divorced, or never-married applicants). Czech law does not exclude adoption by single persons. As expressly stated in the Civil Code: *„Adoptive parents may be spouses acting jointly, or one of the spouses individually; additionally, one cohabiting partner may adopt a child if the child's other parent is the other cohabiting partner."*[22]

Previously, the possibility of adoption by single persons was implied rather than explicitly regulated in statutory law, yet such adoptions were clearly permitted even prior to January 2025.

By contrast, registered partners (same-sex couples) were long prohibited from adopting, as the earlier legal framework explicitly excluded individuals in registered partnerships from eligibility to adopt. This restriction, however, was annulled by the Czech Constitutional Court in 2016 on the grounds of impermissible discrimination.[23] In its judgment[24], the Constitutional Court emphasized that "*a situation has arisen in which the legislature allows adoption by a person who is not married and does not impose any restric-*

21 For more information on this paragraph, see: Preuss, O.: All about adoption and adoption, Available at: https://dostupnyadvokat.cz/en/blog/about-adoption-adoption, (Accessed: 10.5.2025)

22 See Czech CC, Section 800.

23 Preuss, O.: Adoption in the Czech Republic: how the path to parenthood works, Available at: https://dostupnyadvokat.cz/en/blog/adoption-cz#:~:text=applicants%20suitable%20to%20become%20adoptive,possibility%20is%20prohibited%20by%20law%E2%80%A6%E2%80%9D, (Accessed: 10.5.2025)

24 Decision No. Pl. ÚS 7/15 of the Constitutional Court of the Czech Republic, Available at: https://nalus.usoud.cz/Search/ResultDetail.aspx?id=93271&pos=7&cnt=8&typ=result, (Accessed: 10.5.2025)

tion based on whether that person is heterosexual or homosexual. Yet at the same time, it prohibits adoption if the person lives in a registered partnership. As a result, an individual living with a same-sex partner may, without limitation, apply to be registered as a prospective adoptive parent, and such an application will be granted if all conditions are fulfilled. However, in a virtually identical case, if the same individuals enter into a registered partnership, the law prohibits them from adopting. This is discriminatory and must therefore be annulled."

At present, same-sex couples may also be registered as prospective adoptive parents; however, only as individual applicants, since joint adoption remains unavailable to them. Czech law continues to permit joint adoption exclusively by married couples.

Another personal requirement is moral and medical fitness. The prospective adoptive parent must have a clean criminal record; however, the commission of minor offences does not necessarily constitute an absolute bar to adoption, provided they do not affect the person's ability to raise a child. In principle, a criminal record – particularly in the case of serious offences or offences involving children – amounts to a practical disqualification, whereas older or less serious infractions may be subject to individual assessment by the authorities. During the adoption process, the health of the adoptive applicant is also assessed. Serious medical conditions are not automatically disqualifying, but adoption will only be approved if it can reasonably be expected that the applicant's health will not impede the long-term upbringing of the child. The law expressly states that the adoptive parent must be „*a person who will be a good parent for the child*,"[25] which implicitly includes the requirements of sufficient financial means, stable living conditions, and a balanced personality.[26] In practice, the verification of these factors is carried out during the administrative suitability assessment procedure, which will be addressed in detail below.

As part of the adoption process, the authorities also examine whether the prospective adoptive parent already has a child. Naturally, the mere fact that

25 See Czech CC, Section 799.

26 For more information on this paragraph, see: Preuss, O.: Adoption in the Czech Republic: how the path to parenthood works, Available at: https://dostupnyadvokat.cz/en/blog/adoption-cz#:~:text=applicants%20suitable%20to%20become%20adoptive,possibility%20is%20prohibited%20by%20law%E2%80%A6%E2%80%9D, (Accessed: 10.5.2025)

the applicant has a biological or foster child is not a ground for exclusion – having an existing child does not, in itself, preclude the possibility of adopting another.[27] However, the court is obliged to assess whether the adoption would conflict with the best interests of any existing children.[28] This means that, if the prospective adoptive parent has minor children within the household, the adoption must not pose a risk to their well-being, whether in financial, emotional, or other relevant terms.

It must also be noted that the existence of certain family relationships constitutes a statutory barrier to adoption. „*Adoption is excluded between lineal relatives and between siblings*."[29] Accordingly, for instance, a grandparent may not adopt a grandchild, and a sibling may not adopt another sibling. The legislation, however, does provide for an exception to this rule. In cases involving surrogacy, the law permits exceptional consideration, allowing for adoption between relatives under specific circumstances – such as when a child born through surrogacy is formally adopted from the birth mother who is a relative of the adoptive parent.

2.2.2. Requirements concerning the adoptable child

On the other side of the adoption process stands the child, who must also meet the statutory requirements in order to be eligible for adoption. According to the Czech Civil Code, „*only a minor who does not possess full legal capacity may be adopted*."[30] This means that, as a general rule, only minors (i.e. individuals under the age of 18) may be adopted.

It should be noted that, similarly to Hungarian law, under Czech law a minor may acquire full legal capacity through marriage. Thus, it is possible for a 16- or 17-year-old to attain majority status via legal marriage. However, such a minor is no longer eligible for adoption, since the statutory text

27 Adopce neboli osvojení, Available at: https://nahradnirodina.cz/o-nahradnirodinne-peci/adopce-neboli-osvojeni/#:~:text=nich%3B%20,jeho%20pe%C4%8Dovatelsk%C3%BDm%20a%20v%C3%BDchovn%C3%BDm%20schopnostem, (Accessed: 5.5.2025)

28 See Czech CC, Section 801.

29 See Czech CC, Section 804.

30 See Czech CC, Section 802.

explicitly ties adoptability to the absence of "*plná svéprávnost*" – that is, full legal capacity.

One of the notable innovations introduced by the 2014 amendment to the Czech Civil Code was the reintroduction of the possibility of adopting an adult. This specific form of adoption is governed by a distinct legal regime and will be addressed separately below.

A further requirement for a minor to be adoptable is that the child must be in a legally adoptable status. This status typically arises where the parents have consented to the adoption, or where, pursuant to the law, such consent is not required[31] (e.g., where the parents are unknown, deceased, or have been deprived of parental responsibility). The authorisation of adoption is conditional upon the child being *„legally free*"[32], i.e., no parental right may exist that would obstruct the adoption. Although this will be discussed in more detail in the procedural section, from a substantive legal perspective, the parents' consent – or a judicial decision dispensing with the need for such consent – is a fundamental prerequisite for the child to be declared adoptable.

The age of the child is also a significant factor in the adoption process. Adoption may take place from the newborn stage up to adolescence; however, an important condition is that, as of age 12, the child's own consent is required for the adoption to proceed.[33] This rule serves to ensure that the will of minors who possess sufficient maturity and judgment is duly taken into account in the proceedings. (If the child is under the age of 12 or is older but lacks the capacity to understand the meaning and consequences of adoption, the consent is given on the child's behalf by a guardian appointed by the court, after verifying that the adoption serves the best interests of the child. Naturally, in the case of an infant or very young child, the issue of consent does not arise; in such cases, it is the responsibility of the competent authorities to safeguard the child's interests.)

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31 See Czech CC, Section 818.

32 Preuss, O.: Adoption in the Czech Republic: how the path to parenthood works, Available at: https://dostupnyadvokat.cz/en/blog/adoption-cz#:~:text=applicants%20suitable%20to%20become%20adoptive,possibility%20is%20prohibited%20by%20law%E2%80%A6%E2%80%9D, (Accessed: 10.5.2025)

33 See Czech CC, Section 806.

2.2.3. Adoption of an adult

A noteworthy feature of Czech law is that, between 1950 and 2014, it did not allow for the adoption of adults (i.e. persons over the age of 18). It should be noted that, under current Hungarian law, such adoption remains impermissible.[34] However, the new Czech Civil Code reintroduced the institution of adult adoption in a revised form. The law distinguishes between two types of adult adoption, each carrying different legal consequences.[35] „*Czech family law provides two options for the adoption of adults. In the first case, the adopted adult acquires the legal status of a child of the adoptive parent and loses their inheritance rights in their family of origin. In contrast, where an adult is adopted outside the regime applicable to the adoption of minors, the adoptee retains inheritance rights both in their biological family and vis-à-vis the adoptive parent.*"[36]

The first type essentially mirrors the legal framework governing the adoption of minors. It typically applies in cases where, for example, a foster child approaching the age of majority is adopted despite already having turned 18, or where siblings are adopted together but one has already reached adulthood. The law permits the adoptive parent to adopt both siblings simultaneously, regardless of age.

The second type of adult adoption is a distinct legal construct tailored to situations where there is no traditional parental relationship between the adoptive parent and the adoptee. Rather, the purpose of such adoption is to maintain an emotional or supportive bond – such as where an elderly, childless individual adopts a younger adult who provides care or assistance. In this form of adoption, the legal ties to the adoptee's biological family are not severed. Consequently, the adoptee retains the right to inherit from their biological relatives while also acquiring inheritance rights from the adoptive parent.

In summary, Czech substantive law strictly defines who may adopt (based on age, legal capacity, lifestyle, and personal suitability), as well as who may be adopted (primarily minors, and in exceptional cases, adults in an appro-

34 Section 4:119 (2) of Act V of 2013 on the Civil Code of Hungary

35 See Czech CC, Section 846-854.

36 Westphalová, L.: *Örökbefogadás: Cseh Köztársaság* – in: Szeibert Orsolya (ed.), Családjogi változások Európában, ELTE Eötvös Press, Budapest, 2018, p. 69.

priate legal status). These conditions are subject to specific scrutiny by the competent authorities and courts during the procedural phase. Where any of the legal requirements are not fulfilled, the adoption cannot be authorised.

3. Procedural framework

The process of adoption in the Czech Republic is governed by a detailed and multi-stage procedural framework, designed to ensure that the substantive legal requirements outlined above are met and that the adoption serves the best interests of the child.

The procedural rules are set forth partly in the Czech Civil Code and partly in separate statutes, including the Czech Code of Civil Procedure and child protection legislation. The adoption procedure itself consists of several clearly distinguishable stages, namely: the assessment and registration of prospective adoptive parents; the legal declaration of the child as adoptable (e.g. through the collection of parental consents or the determination that such consent is not required); the matching of the child with an adoptive parent and the placement of the child into pre-adoptive care; and finally, the judicial authorisation of the adoption.

3.1. Assessment of suitability (selection and preparation of the adoptive parent)

Persons wishing to adopt must undergo a formal suitability assessment before they may be recognised as adoptive parents. Within this framework, the Czech authorities evaluate whether the applicant fulfils all the statutory requirements necessary to ensure that they may become a „*suitable parent*" for the child, as mandated by law.

The process is typically coordinated by the local child protection authorities, known as OSPOD (*Orgán sociálně-právní ochrany dětí* – Authority for Social and Legal Protection of Children)[37]. In addition, the Office for Interna-

37 Availability of the information portal: https://www.ospod.cz/

tional Legal Protection of Children (*Úřad pro mezinárodněprávní ochranu dětí*, UMPO)[38], based in Brno, plays a central role in cases involving international adoption.

The suitability assessment procedure[39] – detailed in the Czech child protection legislation and bearing many similarities to the Hungarian model – begins with the submission of an adoption application to the child protection authority with territorial jurisdiction over the applicant's place of residence. Along with the adoption application, the applicant must complete a supplementary questionnaire providing information regarding educational background, employment status, health condition, financial circumstances, and housing situation. The application must also include a statement outlining the applicant's motivation for adoption and their expectations regarding the child to be placed in their care.

A variety of supporting documents must be attached to the application to verify the applicant's personal, medical, financial, and family circumstances. These typically include a criminal record certificate (official proof of no prior convictions), a medical certificate attesting to the applicant's state of health, and documentation evidencing their financial situation (e.g., a certificate of income from their employer or a copy of their most recent tax return). In the case of foreign applicants (e.g., in international adoption proceedings), the Czech authorities provide a detailed list of the required documentation. This includes a social report (*homestudy*)[40], which must be prepared by the competent authorities in the applicant's country of residence and submitted to the Czech authorities accompanied by an official translation.

Once the applicant has submitted the required documentation, the authorities verify whether the formal statutory criteria are met (such as age, marital status, etc.), and subsequently subject the applicant to a compre-

38 Website availability: https://www.umpod.cz/web/cz

39 For the entire chapter on the suitability procedure in plain language, see: Adopce a pěstounská péče krok za krokem, Available at: https://www.adopce.com/zakladni-informace/adopce-a-pestounska-pece-krok-za-krokem/, (Accessed: 7.4.2025)

40 Adoption in Czechia, Available at: https://mzv.gov.cz/consulate.newyork/en/visa_and_consular_information/czech_citizenship/adoption_in_the_czech_republic/index.html#:~:text=One%20of%20the%20most%20important,in%20the%20Hague%20Adoption%20Convention, (Accessed: 11.3.2025)

hensive suitability assessment. This includes a psychological evaluation and mandatory preparatory training. „*Preparation for adoption is an essential part of the process... it includes mandatory psychological testing and preparatory courses*."[41] During the psychological assessment, specialists evaluate the applicant's personality, motivations, emotional stability, and their potential to cope with the challenges of raising an adopted child. This testing is often conducted in several stages, beginning with written psychological tests, followed by individual interviews with a psychologist. These interviews explore the applicant's lifestyle, methods of conflict resolution, and parenting philosophy. If the applicant is married or has a partner, the couple is evaluated together. In the preparatory phase, prospective adoptive parents are also required to attend training sessions. These take place over an extended period and are designed to familiarise participants with the adoption process, anticipated difficulties, and the needs of adopted children. They also provide opportunities for dialogue and experience-sharing with other adoptive candidates and professionals. The purpose of this preparatory process is to enable candidates to develop a realistic understanding of the responsibilities they are undertaking and to strengthen their commitment to adoption.[42]

As part of the suitability assessment process, the authorities also evaluate the applicants' living conditions. This typically involves a home visit by a social worker, who conducts a social assessment to evaluate the habitability, safety, and suitability of the home environment for raising a child. In addition, the applicants' family situation, the stability of their relationship, and the presence of any biological children are taken into consideration. The aim is to determine whether the prospective adoptive parent is capable of providing long-term emotional and financial security to an adopted child.

If the outcome of these assessments is positive, the applicant is declared suitable and entered into the official register of prospective adoptive parents. A formal administrative decision is issued and delivered to the appli-

41 Preuss, O.: Adoption in the Czech Republic: how the path to parenthood works, Available at: https://dostupnyadvokat.cz/en/blog/adoption-cz#:~:text=applicants%20suitable%20to%20become%20adoptive,possibility%20is%20prohibited%20by%20law%E2%80%A6%E2%80%9D, (Accessed: 10.5.2025)

42 See ibid.

cant. This register contains all approved adoptive candidates. It is maintained at the national level and allows child protection authorities across different regions to access information on potential adoptive parents.

Once included in the register, the applicant must wait until a child who matches their profile becomes available. The length of the waiting period may vary greatly – from a few months to several years – depending on the age and health condition of the child desired, and the flexibility of the applicant's preferences. „*The typical waiting period ranges from one to five years, depending on the expectations that adoptive parents have regarding the child. Waiting times are usually longer for healthy newborns, whereas a willingness to adopt older or special needs children may significantly reduce the wait*."[43] This matching process is ultimately designed to serve the best interests of the child. Authorities do not assign children strictly according to the order of application but rather assess which registered family would be the most suitable match for a particular child. Thus, the goal is not merely to find a child for a waiting parent, but rather to identify the most appropriate parents for a child in need. This approach clearly reflects the principle of the *best interests of the child* being the primary consideration in adoption proceedings.

It should be noted that the Czech authorities – similarly to those in Hungary – give preference to domestic adoptive applicants over international (foreign) adopters, in accordance with the principle of subsidiarity. A foreign national may adopt a child from the Czech Republic only if no suitable adoptive family can be found within the country. In such cases, international adoption must be mediated by the Office for International Legal Protection of Children and carried out in compliance with the provisions of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.[44]

43 See ibid.

44 Adoption in Czechia, Available at: https://mzv.gov.cz/consulate.newyork/en/visa_and_consular_information/czech_citizenship/adoption_in_the_czech_republic/index.html#:~:text=One%20of%20the%20most%20important,in%20the%20Hague%20Adoption%20Convention, (Accessed: 11.3.2025)

3.2. Authorisation of adoption (judicial proceedings and pre-adoption care)

Following the preparatory stages outlined above, the actual establishment of adoption in the Czech Republic requires a court decision.

In practice, the procedure is divided into two distinct phases: first, the child is placed with the prospective adoptive parents in a form of preliminary care (*péče před osvojením*)[45], followed by the finalisation of the adoption through a judicial decision. The underlying purpose of the legislation is to introduce a kind of probationary period prior to the definitive ruling, during which it can be assessed whether the adoptive parents and the child are able to live together harmoniously, and whether the adoption genuinely serves the best interests of the child. This period is thus intended to allow the development of a relationship between the adoptive parent and the child, while enabling the court to evaluate whether the adoption aligns with the child's welfare.

A comparable institution exists in Hungarian law, known as *pre-adoption care* (*örökbefogadás előtti gondozás*)[46], which similarly permits the prospective adoptive parent to care for the child for a prescribed period prior to the finalisation of the adoption.

The Czech Civil Code stipulates that, prior to the court's decision on adoption, the prospective adoptive parent must care for the child in their own household and at their own expense for a specified period of time. The minimum duration of this probationary period was increased from three months to six months by the 2014 amendment to the Czech Civil Code. It is worth noting that this period significantly exceeds the requirements under Hungarian law, as *„under Hungarian law, the prospective adoptive parent must care for the child in their home for at least one month*."[47]

45 See Czech CC, Section 829.

46 Section 4:128 of Act V of 2013 on the Civil Code of Hungary.

47 Sápi, E.: The Legal Background of Kinship as a Basis of Family Relationships, With Special Regard for the Regulation on Adoption in Central European Countries, Available at: https://ojs.mtak.hu/index.php/live/article/view/12550, (Accessed: 10.4.2025)

The six-month pre-adoption care period mandated by Czech law is intended to facilitate adjustment and bonding between the child and the adoptive parents. During this time, the parties live together, get to know one another, and the prospective adoptive parent has the opportunity to confirm the firmness of their decision. Similarly, public authorities monitor the child's situation during this phase – typically, child protection services carry out home visits, provide advice to the adoptive parents, and observe whether the integration process is successful. It is important to emphasise that the child's legal status does not change during this period; formally, the child is placed with the adoptive parent in a foster care-like arrangement. This placement is authorised by a separate court decision. In such cases, the prospective adoptive parents submit an application to the court requesting the child be placed in their care, and the court assesses whether the statutory conditions are met. Even at this stage, the court verifies the presence of all required consents (including parental and, where applicable, the child's), and evaluates whether the placement is in the child's best interests.

In practice, this is often a formality, since the matching process is typically prepared in advance by the child welfare authorities. Nevertheless, the court reviews the background of the prospective adoptive parent, the child's personality and health status, and the household environment into which the child will be placed. If all conditions are satisfactorily met, the court authorises the child's placement with the prospective adoptive parents for the duration of the probationary period.[48]

Following the completion of the cohabitation period of at least six months – commonly referred to as the probationary period – and provided that the intention to adopt remains in place, the adoption may be formally authorised. This decision is issued by the competent court having jurisdiction over the child's place of residence, through non-contentious proceedings.

The court, typically acting upon the recommendation of the child protection authority, assesses the outcome of the probationary period, includ-

48 For more information on this paragraph, see: Preuss, O.: Adoption in the Czech Republic: how the path to parenthood works, Available at: https://dostupnyadvokat.cz/en/blog/adoption-cz#:~:text=applicants%20suitable%20to%20become%20adoptive,possibility%20is%20prohibited%20by%20law%E2%80%A6%E2%80%9D, (Accessed:10.5.2025)

ing whether an emotional bond has been established between the child and the prospective adoptive parents, and whether the child has been properly cared for. If the court finds all relevant conditions to be satisfactorily fulfilled, it issues a decree granting the adoption. With the finality of this judicial decision, the legal effects of adoption take effect: the adoptive parent becomes the child's legal parent, and the child is considered, in legal terms, a full member of the adoptive family.

In the course of the judicial adoption proceedings, prior to rendering a decision, the court is obliged to exercise particular diligence in verifying that all required legal declarations – especially parental consents – have been duly obtained. Where any such consent is lacking, the court must first determine whether an exemption from the requirement may be granted, based on the grounds provided for by law.[49]

The court must also satisfy itself that the legally prescribed period of pre-adoption care has in fact elapsed.[50] Where the stability of the prospective adoptive relationship appears uncertain, the court may, in the exercise of its discretion, decide to extend this period.[51] Prior to reaching a decision, the court must further ascertain whether any circumstance has arisen – whether pre-existing or emerging during the proceedings – that would preclude the adoption. Such impediments may include, for instance, the lawful withdrawal of consent by a biological parent within the statutory time limit, or the emergence of new and materially relevant facts.[52]

If all statutory requirements are met, the court – acting in closed session – issues a decision authorising the adoption, thereby establishing the legal parent–child relationship.[53] It is worth noting at this point that some legal scholars argue that[54], in view of the paramount interest of the child, the

49 See Section 804 of the Czech CC; see also Sápi, op. cit., section 2.3.

50 See Czech CC, Section 829.

51 Králíčková, Z. (2022). *Adoption and International Adoption: The Czech Republic Experience*. ISFL Conference Paper, p. 4.., Available at: https://isfl.world/wp-content/uploads/2022/07/ADOPTION-and-INTERNATIONAL-ADOPTION-CZECH-REPUBLIC-article-ZDENKA-KRALICKOVA.docx, (Accessed: 1.4.2025)

52 See Section 817(1) of the Czech CC – the parent may withdraw consent within three months; see also Section 819.

53 See Section 116(2) of the Czech Code of Civil Procedure.

54 Králíčková, op. cit., p. 4.

Czech court may, in exceptional cases, finalise the adoption *prior* to the expiry of the prescribed probationary period. According to this view, although the Czech Civil Code stipulates a minimum six-month pre-adoption care period before the authorisation of adoption, it does not explicitly exclude the possibility of equitable exceptions.

Thus, acting within its margin of judicial discretion, the court may determine that a shorter period of care is sufficient if the circumstances – particularly the child's emotional attachment and developmental needs –warrant it. Such a circumstance may arise, for instance, where a foster parent who has continuously cared for the child since birth seeks to adopt a newborn. In such cases, the court may decide, in order to ensure emotional continuity and family stability, not to insist on a further six-month trial period, but rather to authorise the adoption earlier in order to protect the already established familial bond.

Czech law also provides the possibility for the adoption to be declared irrevocable even before the statutory three-year period has elapsed, if such a measure is deemed to be in the best interests of the child.[55] By default, adoption is not irrevocable until three years have passed from the date of the judicial decision.

Once the decision on adoption becomes final and binding, the competent authorities automatically notify the civil registry office, which proceeds to issue a new birth certificate. In this new document, the adoptive parent(s) are listed as the child's legal parents, and the original birth registration becomes inaccessible to the public. This provision serves as a guarantee of the confidentiality of adoption and aims to protect the child's right to privacy.[56]

The newly issued birth certificate contains no indication that an adoption has taken place, thereby concealing this fact from the outside world. Nonetheless, the fact of the adoption cannot be rendered entirely undiscoverable.

55 See Czech CC, Section 844.

56 See Czech CC, Section 837–839; and see: *Dostupný advokát* (2023): Adoption in the Czech Republic, Available at: https://dostupnyadvokat.cz/en/blog/adoption-cz, (Accessed: 15.4.2025)

3.3. Declaration of adoptability (parental consents and their waiver)

In the Czech Republic, one of the fundamental prerequisites for the authorisation of adoption is that the child must be legally adoptable. This means that there must be no legal impediment on the part of the biological parents – or, where applicable, other legal guardians or relatives – that would prevent the child from being placed in a new family environment. Czech law provides detailed regulation concerning the institution of parental consent, specifying when such consent is required, the form in which it must be given, and the circumstances under which it may be waived.

As a general rule, the Czech Civil Code provides that *„adoption requires the consent of the child's parents*."[57] This declaration may only be made in person before the court, in written form, with oral confirmation. The legislator establishes an important procedural safeguard for the protection of the mother: she may issue such a declaration of consent no earlier than the sixth week following childbirth. The father – if he acknowledges his paternity – may make the declaration immediately after the birth of the child.[58] Any statement made prior to this time must be disregarded. This ensures that the mother is granted both time and the right to physical and psychological recovery following childbirth, as well as the opportunity to reconsider her decision concerning such a significant matter.

Parental consent may take two forms:

- Specific consent, whereby the parent names a particular individual as the intended adoptive parent;
- General consent, which is not directed toward any specific person.[59]

The law stipulates that the validity of the consent is not affected by whether it is specific or general. However, in the case of specific consent, if the adoption by the designated person does not take place (for instance, due to withdrawal or court rejection), the consent loses its effect.[60] In contrast,

57 See Czech CC, Section 809.
58 See Czech CC, Section 813(1)–(2); and see. *Dostupný advokát* (2023).
59 See Czech CC, Section 814, 815.
60 See Czech CC, Section 815.

general consent remains valid for a period of six years; if no adoption occurs within that time, the declaration automatically lapses.[61]

On this basis, parental consent constitutes a legal declaration that is both time-limited and person-specific in its effect, and its existence and validity represent one of the essential preconditions for the authorisation of adoption. Accordingly, where such consent is absent, the court must conduct a separate procedure to determine whether the adoption may nevertheless be permitted without it.[62]

Czech law further protects the parent – particularly against hasty decision-making – by allowing the withdrawal of a previously given declaration of consent to adoption within a limited period of time. This provision serves to ensure that the parent – especially the mother – can make a decision that is well-founded both physically and emotionally. The three-month time limit strikes a balance between safeguarding the best interests of the child and affording the parent a meaningful opportunity to reconsider their decision.

However, the legislator specifies two exceptional cases in which the withdrawal of consent is permitted even after the expiration of the three-month period, if the adoption has not yet been finalised:[63]

- If the child has not yet been placed in the care of the adoptive parent(s);
- If the court, upon the biological parent's request, decides that the child may be returned to the parent, for instance due to changed circumstances (e.g., stable living conditions, housing, income).

These exceptions ensure that a parent – if genuinely capable of raising the child responsibly – may revoke their prior consent to adoption at any point until the court has granted authorisation of the adoption.

Under Czech law, there are also instances in which the consent of the biological parent is not required, as it would not be reasonable to expect such consent due to objective circumstances.[64] Parental consent may be dispensed with in three typical cases:

61 See Czech CC, Section 816.
62 See Czech CC, Section 821.
63 See Czech CC, Section 817(2).
64 See Czech CC, Section 818.

– The parent has been deprived of parental responsibility by a prior court decision, and consequently also of the right to consent to adoption;[65]
– The parent is unable to make a legally valid declaration due to psychological or mental incapacity – for example, in cases of psychiatric illness or intellectual disability;[66]
– The parent's whereabouts are unknown, and authorities are unable to contact them despite cooperation with other relevant bodies.[67]

In such cases, the court conducts a separate proceeding to determine whether the adoption may proceed without the parental consent.[68]

If a condition preventing consent to adoption exists with respect to both parents – such as when neither parent is legally entitled to give consent or both are of unknown whereabouts – the court shall appoint a guardian or an ad hoc representative (*kolizní opatrovník*) who may give consent to the adoption on behalf of the parents.[69] This also applies in cases where the child's parents are deceased, or, for instance, where the father is unknown and the mother has abandoned the child.

The Czech Civil Code provides a separate regulation for cases in which a parent demonstrably shows no interest in the child. This legal category holds particular significance, as such conduct effectively excludes the parent from participating in decisions concerning the adoption of the child.

Under Czech law, if a parent clearly fails to demonstrate interest in their child over an extended period, the court may, in the child's best interests, authorise the adoption without that parent's consent. Section 819(1) of the Czech Civil Code expressly states that the consent of a parent who manifestly shows no interest in the child is not required for the adoption to proceed. According to paragraph (2), such lack of interest is established where the parent persistently and wilfully fails to show genuine concern for the child, thereby seriously and culpably breaching their parental obligations.

65 See Czech CC, Section 818(1)(a).
66 See Czech CC, Section 818(1)(b).
67 See Czech CC, Section 818(1)(c).
68 See Czech CC, Section 821.
69 See Czech CC, Section 821(2); and see section 928.

The legislator also establishes a statutory presumption, as under Section 820 of the Czech Civil Code, a parent is presumed to lack interest in the child if at least three months have passed since the last genuine expression of parental involvement. In less severe cases – where serious neglect of parental duties cannot be clearly established – the child protection authority is required to issue a prior warning to the parent, notifying them that continued failure to engage may result in the loss of their right to consent to adoption. Following this warning, an additional period of at least three months must elapse, during which the authority must also provide counselling and assistance to the parent.

However, if the parent is of unknown whereabouts – having left their previous residence without providing a new address – the obligation to issue such a warning may be waived. In such cases, the court may consider the lack of interest to be manifest if the authorities have been unable to determine the parent's location for a period of at least three months.[70]

Once the above conditions are met, the court issues a decision in a separate proceeding declaring that the child may be adopted without the consent of the parent. This decision constitutes a necessary precondition for the child to be legally recognised as "adoptable" in subsequent judicial proceedings.

Once the child becomes legally adoptable – meaning that lawful consent has been provided by both parents, or the court has issued a final decision stating that the adoption may proceed without such consent – the child's data is entered into the Central Register of Children Suitable for Adoption („*evidence dětí vhodných k osvojení*").[71] From that point onward, the authorities – acting in cooperation with the child protection agency – initiate the search for suitable adoptive parent(s), selecting the most appropriate candidate from among registered prospective adopters, with primary consideration given to the best interests of the child.[72]

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70 See Czech CC, Section 820(2).

71 See: *Dostupný advokát* (2024): Jak probíhá osvojení v ČR. Available at: https://dostupnyadvokat.cz/blog/adopce, (Accessed: 20.4.2025)

72 See Act No. 359/1999 Coll., on the Social and Legal Protection of Children (Czech Republic), Section 20-27.

In respect of parental consent and the possibility of dispensing with it, notable similarities exist between the Hungarian and Czech legal systems. Hungarian law likewise establishes, as a general principle, that the consent of the biological parent(s) is required for adoption[73], and – as under Czech law – such consent may be withdrawn within a defined period.[74]

4. Types of adoption

The classification of adoption types is closely linked to the extent of contact maintained or established between the adoptive and biological parents during the adoption process, as well as to the degree of confidentiality surrounding the circumstances of the adoption. Although Czech law does not formally distinguish legal categories equivalent to the Hungarian terminology of "closed" (*titkos*) and "open" (*nyílt*) adoption, in practice, functionally similar models do exist in the Czech Republic.

4.1. Closed adoption

The vast majority of adoptions in the Czech Republic fall into this category. In such cases, the identities of the adoptive and biological parents remain mutually concealed, and the fact of the adoption itself is not disclosed to the child's immediate environment. The child is issued a new birth certificate listing the adoptive parent(s) as the legal parent(s), and no information about the biological parents is included.

Section 837 of the Czech Civil Code provides that the adoptive parent – or even the adopted child – may request that the adoption remain confidential. In such cases, the court may order that the child's biological family receive no information regarding the child's placement, and that all related data be sealed. The confidentiality of the adoption may only be lifted under exceptional circumstances.[75]

73 See Section 4:120 of Act V of 2013 on the Civil Code of Hungary.
74 See Section 4:125(2) of Act V of 2013 on the Civil Code of Hungary.
75 See: *Dostupný advokát* (2024): „Jak probíhá osvojení v ČR?"

According to Section 837 of the Czech Civil Code, „*the court may, upon the request of the adoptive parent or the adopted child, order that the adoption and its circumstances be kept confidential from the child's original family.*" This means that the biological parent is not entitled to know the whereabouts of their child and has no right to request such information. All documents relating to the adoption are handled in a sealed manner and are not accessible to biological relatives.

As noted above, the law permits the lifting of confidentiality only in exceptional cases – specifically, where the child's life or health is at risk. One such case may involve a serious medical emergency in which access to the biological family's medical history is indispensable. Beyond such circumstances, however, the fact and details of the adoption remain sealed at least until the child reaches the age of majority.

Czech legislation provides that, upon attaining the age of 18, an adopted person is entitled to access the records relating to their own adoption and may decide whether to initiate contact with their biological family. The aim of this legal framework is to protect the child's right to privacy and support their identity development, while at the same time ensuring that, upon reaching adulthood, the individual has the autonomy to make informed decisions regarding their origins and familial relationships.

4.2. Open adoption

Under Hungarian law, an adoption is considered *open* when the biological parent knows the adoptive parent and gives consent in favour of that specific individual. In contrast, Czech law does not use this terminology; however, Section 814 of the Czech Civil Code provides that parental consent may be either directed toward a specific person or given in general terms. When the parent designates a particular adoptive parent, this is referred to as *targeted consent*. A typical example would be when a mother selects an adoptive parent from her personal network – such as a distant relative, a friend, or a previously chosen and trusted stranger. The practical advantage of targeted consent is that the biological parent knows where their child will be placed. However, under Czech law, if the adoption does not take place (for instance,

due to the withdrawal of the adoptive parent or a court refusal), the consent becomes null and void.[76]

In addition to open and closed adoptions, there are also practical arrangements whereby some form of contact is maintained between the adopted child and their biological family even after the adoption has been finalised. Although Czech law does not formally recognise a right to contact once parental rights have been terminated, it does not prohibit the parties – particularly for psychological or social reasons – from maintaining a relationship. Such contact may take the form of correspondence, the exchange of photographs, or, more rarely, personal meetings. This is particularly common where the child is adopted at an older age or where the adoptive parent is the child's former foster carer.

This type of adoption may be described as a form of *open adoption*, which is essentially informal, not legally enforceable, and highly dependent on mutual trust and willingness to cooperate. Nonetheless, such arrangements are increasingly supported in Czech academic literature and among child protection professionals, particularly in light of their benefits for psychological stability and identity development.[77]

4.3. International adoption

In the Czech legal system, the regulation of international adoption is strictly guided by the best interests of the child and is carried out in accordance with international conventions and domestic legislation. Since 2000, the Czech Republic has been a party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which ensures that adoptions serve the paramount interests of the child and that child trafficking and other forms of abuse are prevented.[78]

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76 See Czech CC, Section 815.

77 For more information on this paragraph, see: O. Preuss (2024): Přímá adopce v České republice: možnosti, rizika a právní rámec, Available at: https://dostupnyadvokat.cz/blog/prima-adopce, (Accessed: 25.4.2025)

78 Intercountry adoption of a child from abroad to the Czech Republic, https://www.umpod.cz/web/en/intercountry-adoption-of-a-child-from-abroad-to-the-czech-republic?utm_source, (Accessed: 5.3.2025)

The authority responsible for coordinating international adoptions is the Office for International Legal Protection of Children (Úřad pro mezinárodněprávní ochranu dětí, UMPO)[79], which is the sole official body authorised to facilitate such adoptions. The procedure otherwise follows the same general framework as domestic adoptions. Prospective adoptive parents must submit an application to the UMPO, which then determines whether the application will be entered into the register of adoption requests. Applicants must demonstrate their suitability, including compliance with age requirements relative to the child, adequate health, stable income, and moral reliability. The UMPO places the child in pre-adoption care with the prospective adoptive parents and assesses the appropriateness of the adoption. The adoption is subsequently approved by the court, provided it is satisfied that the adoption serves the child's best interests.[80]

In recent years, the number of international adoptions in the Czech Republic has declined, as most children are successfully placed with adoptive families domestically. As a result, the UMPO has reduced the number of cooperating countries, and as of 2024, maintains active cooperation only with a limited number of states, including Italy, Spain, and Sweden.[81] Statistics from 2019 to 2023 reflect this trend: while there were approximately 350 domestic adoptions annually, only 94 international adoptions were processed over the five-year period. The majority of Czech children adopted abroad were placed in Italy and Spain (15 children each), followed by Germany and Iceland (13 each), Sweden (11), and Denmark (10).[82]

Given that Czech authorities make every effort to place children with adoptive families domestically, the 2020 Country Profile prepared in con-

79 See Act No. 359/1999 Coll., on the Social and Legal Protection of Children (Czech Republic), Section 3 and Section 35.

80 See: Adoption in Czechia, Available at: https://mzv.gov.cz/consulate.newyork/en/visa_and_consular_information/czech_citizenship/adoption_in_the_czech_republic/index.html#:~:text=One%20of%20the%20most%20important,in%20the%20Hague%20Adoption%20Convention, (Accessed: 11.3.2025)

81 ICC Newsletter - Facilitation of intercountry adoption from the Czech Republic abroad, January-February 2024. Available at: https://iss-ssi.org/storage/2024/03/Article_270January Ferbruary_2024_ANG.pdf, (Accessed: 15.5.2025)

82 For more information on this paragraph, see: Náhradní rodinná péče v číslech, Available at: https://www.adopce.com/zakladni-informace/nahradni-rodinna-pece-v-cislech/, (Accessed: 15.5.2025)

nection with the Hague Convention on Intercountry Adoption indicates that children made available for international adoption are typically older (over the age of 6), face medical or social challenges, or are part of sibling groups. These are children for whom finding adoptive families is generally more difficult through domestic channels. Adoptions of younger children through international procedures are relatively rare, and prospective adoptive parents must be open to addressing the child's special needs.[83]

5. Post-adoption monitoring, legal effects, and termination

5.1. Legal effects

Upon the finalisation of an adoption, a full legal bond is established between the child and the adoptive parent, which entails a wide range of legal consequences. Czech law expressly provides that: „*Adoption terminates the kinship between the adopted child and their original family, along with all rights and obligations arising from that relationship.*"[84]

Although adoption establishes a permanent legal relationship, certain responsibilities may still arise after its finalisation, and in exceptional cases, the adoption may be terminated or annulled. This section provides an overview of the principal legal effects of adoption – particularly in relation to parental responsibility, inheritance rights, surname usage, and the right to know one's biological origins – as well as the grounds and consequences of termination. Finally, it addresses post-adoption monitoring, that is, the question of official follow-up after adoption.

Once the adoption decision becomes final and binding, the child's legal family status is transformed. Under the legal fiction established by law, the adopted child is to be regarded as if born to the adoptive parent(s). This grants the adopted child equal rights in matters of family life, kinship, in-

83 COUNTRY PROFILE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION (2020), p 9., Available at: https://www.commissioneadozioni.it/media/uf1dqtbb/844afb08-16fd-4ee8-be97-82e7ea201206.pdf, (Accessed: 16.5.2025)

84 See Czech CC, Section 833(1).

heritance, and the use of surname. The Czech Civil Code states: „*A child adopted jointly by spouses, or by a spouse and the other spouse's partner, shall be considered their joint child; otherwise, the child shall have the status of the adoptive parent's child.*"[85]

The adoptive parent (or both adoptive parents, in the case of a married couple) becomes the full legal parent of the child. All rights and duties associated with parental responsibility – including care, upbringing, legal representation, and management of the child's property – are transferred to the adoptive parent. At the same time, the biological parents' parental rights are terminated, and they are released from any further obligation to provide child support, as they are no longer considered the child's legal parents.

The Czech Civil Code recognises adoption as having the same legal effect as biological kinship: the adopted child and their descendants are to be regarded as members of the adoptive family, while the child's legal status within the biological family is, as a rule, extinguished. A visible consequence of this transformation is that the child typically receives a new surname, usually that of the adoptive parent, which is assigned automatically. However, if the adopted child is of sufficient age to express their opinion – typically 12 years or older – and objects to the name change, the court may decide that the child may retain their original surname, with the adoptive parent's surname added as a second surname. This rule was introduced with the 2014 reform of the Czech Civil Code.[86] For adult adoptees, the surname does not change.

First names (*given names*) may also be changed in the case of young children, although this is not explicitly addressed in the Civil Code. In practice, however, it is not uncommon for adoptive parents to choose a new given name for an infant, which is then recorded in the new birth certificate by the civil registry office – always with due regard to the best interests of the child, for example, to prevent easy identification based on the original name.[87]

85 See Czech CC, Section 832(1).

86 See Czech CC, Section 835 and Section 860.

87 For more information on this paragraph, see: Osvojení, adopce a změny od 1.1.2014, Available at: https://muj-pravnik.cz/osvojeni-adopace-zmeny-od-2014/#:~:text=Povinnost%20informovat%20o%20osvojen%C3%AD, (Accessed: 11.3.2025)

The regulation of given names falls under separate legislation governing the use of names.[88]

In terms of inheritance rights, it is important to emphasise that the adopted child acquires full inheritance rights within the adoptive family, as if they were the adoptive parent's biological child. The adopted child is recognised as the legal heir of the adoptive parent and may inherit from their estate as a statutory heir. At the same time, the adopted child's inheritance rights within the biological family are, as a general rule, extinguished. This means, for example, that the child no longer qualifies as a legal heir of their biological parents or grandparents – nor may those relatives inherit from the child.

Czech law is unique in this regard in that, under the second form of adult adoption (i.e., when adoption does not follow the rules applicable to minors – see above), the law permits *dual affiliation*: the adopted person retains inheritance rights in their biological family while also acquiring such rights within the adoptive family. For this case, the Czech Civil Code expressly provides that „*the adopted person and their descendants do not lose their rights within their original family as a result of the adoption*."[89]

In the case of the adoption of a minor (as well as in the first type of adult adoption), the rule is straightforward: all familial legal relationships between the adopted child and their biological relatives are terminated. This, of course, does not preclude the possibility of testamentary disposition: if a biological parent, even after the adoption, wishes to bequeath something to the child by will, they may do so. However, the adopted child no longer qualifies as a statutory heir – in such a case, they inherit not by operation of law, but as a testamentary beneficiary.[90]

As previously mentioned, adoption generally entails a change of surname for the child, and sometimes also a change of given name. In addition, the adoptive parent's information must be registered in the relevant state re-

88 In Czech law, the change of the adopted child's given name during the adoption process is governed by the general provisions of Act No. 301/2000 Coll. (Zákon č. 301/2000 Sb.), which regulates civil registry matters, name usage, and amendments to certain related legal regulations. Available at: https://www.zakonyprolidi.cz/cs/2000-301, (Accessed: 25.4.2025)

89 See Czech CC, Section 849(2).

90 See Westphalová, op.cit.

cords. Once the court decision on adoption becomes final and binding, a new birth certificate is issued for the child, listing the adoptive parent(s) as the legal parents. The original birth entry is sealed and may only be accessed with special authorisation – or by the adopted person themselves, upon reaching the age of majority.

Since the 2014 reform of the Czech Civil Code, it has become recommended practice for adoptive parents to inform the child of their adoption status no later than the start of compulsory schooling. While this is not legally enforceable, child protection guidelines regard it as a psychological and ethical obligation.

5.2. Post-adoption monitoring

Czech law does not mandate general, routine post-adoption monitoring for all domestic adoptions; that is, once a domestic adoption is finalised, the adoptive family is not subject to systematic follow-up supervision. However, if the circumstances of the case warrant it, the court may order a period of supervision, which is carried out by the competent child protection authorities.[91] That said, adopted children are entitled to the same child protection services as any other child. If problems arise, the competent child welfare authorities (OSPOD) may intervene and provide support.[92]

In contrast, post-adoption follow-up is standard practice in the case of international adoptions. When a Czech child is adopted by a foreign family, the Office for International Legal Protection of Children (UMPOD) requires the foreign adoptive parents to submit regular reports on the child's situation. This obligation stems from the provisions of the Hague Convention[93], which requires central authorities to ensure that the child's well-being is monitored during the post-adoption period.

For example, in the case of adoption by an American family, it is common practice for the adoptive family – through their designated agency – to sub-

91 See Czech CC, Section 839.

92 See the Act on the Social and Legal Protection of Children, particularly Sections 5 and 10 – these provisions govern the possibility of child protection intervention.

93 See the Hague Convention Article 9(b), (c).

mit three reports within six months for finalisation purposes, and thereafter one report every three years until the child reaches the age of 18.[94]

Although there is no statutory post-adoption monitoring requirement for domestic adoptions in the Czech Republic, various follow-up programmes do exist. Numerous civil society organisations – such as adoption support foundations – offer services including psychological counselling, family support clubs, parental training, and peer support. These programmes aim to help maintain family stability and provide early intervention in the event of difficulties.[95]

5.3. Termination and annulment of adoption

Ideally, adoption is a lifelong bond. In the Czech Republic, as in many jurisdictions, the fundamental principle is that adoption is final and irrevocable. Under the pre-2014 Czech family law regime, the law distinguished between revocable adoption (*zrušitelné osvojení*), which could be annulled within a certain time frame, and irrevocable adoption. However, the reform introduced by the 2014 Czech Civil Code abolished this distinction. The new legislation explicitly *"abandons the division of adoption into revocable and irrevocable categories"*, and instead treats all adoptions uniformly.[96]

Nevertheless, the law still allows for the possibility of dissolution in exceptional cases – particularly during the early years following adoption. According to the Civil Code, an adoption may not be annulled once three years have passed. Within the first three years, however, annulment remains theoretically possible if there are compelling reasons.[97]

94 For more information on this paragraph, see: Christian Adoption Services: Czech Republic Program, Available at: https://www.christianadopt.org/adoption-czech-republic#:~:text=,until%20the%20child%20turns%2018, (Accessed: 17.5.2025)

95 See for example: https://www.pestouni.cz/about-us/, https://www.adopce.com/vzdelavani/akce-pro-zajemce-a-zadatele/ (Accessed: 17.5.2025)

96 Osvojení, adopce a změny od 1.1.2014, Available at: https://muj-pravnik.cz/osvojeni-adopace-zmeny-od-2014/#:~:text=Povinnost%20informovat%20o%20osvojen%C3%AD, (Accessed: 11.3.2025)

97 See Czech CC, Section 840.

Moreover, the law provides that, in exceptional circumstances, an adoption may still be declared void after three years if it violates legal provisions. In practice, this could include situations where a prohibited familial relationship is discovered between the parties, or where a serious procedural error has occurred. Before the three-year deadline, the court may dissolve the adoption upon request – subject to the best interests of the child. This might be the case, for example, if the relationship between the adoptive parent and child has irretrievably broken down, the adoptive parent is no longer able to provide care, or a serious issue arises that makes it more appropriate for the child to return to state care or be placed in another family.

Similar to Czech law, Hungarian law also permits the annulment of adoption in exceptional cases. According to the Hungarian Civil Code, the court may terminate an adoption upon request of either the adoptive parent or the adopted person, provided that, in the case of a minor, the annulment serves the child's best interests.[98] In summary, both legal systems favour the permanence of adoption and allow for termination only under exceptional and justified circumstances.

6. Rules on balancing interests

In adoption proceedings, the interests of several parties intersect – those of the child, the adoptive parent(s), and the biological parent(s). These interests may sometimes align, but often they are in tension. It is therefore the role of the legislator to establish a legal framework that balances these competing interests as equitably as possible. Czech adoption law contains several procedural safeguards designed specifically to maintain such a balance.

The *paramount guiding principle* is the protection of the child's best interests. Czech law places the child's welfare at the centre of the adoption process, requiring that every decision serve the child's well-being to the greatest extent. This principle is reflected in a number of specific procedural rules: for instance, a child may only be adopted without parental consent if the parents have consistently failed to care for the child – thus, the legal sys-

98 See Section 4:139 of Act V of 2013 on the Civil Code of Hungary.

tem does not deprive a child of their biological family unless clearly necessary. It is also in the child's best interest to be placed with suitable, prepared adoptive parents, as ensured by the assessment and training procedures. The child's psychological well-being is protected by requiring their consent from the age of 12, and by granting them, upon reaching adulthood, the right to access information about their origins. The pre-adoption placement (probationary period) likewise serves the child's interests, as it allows the court to withhold finalisation if the family dynamic proves unsuitable. Even the rules concerning the lifting of adoption secrecy in cases of life-threatening situations serve to protect the child's life and health over the privacy interests of the parents. The principle of the child's best interests clearly permeates Czech adoption law, and in cases of conflict, decisions typically favour the child.

At the same time, *the interests of adoptive parents* are also recognised. Prospective adoptive couples or individuals are understandably concerned with becoming legal parents as smoothly as possible. Clear eligibility criteria and legal timelines support this, for instance by limiting the revocation period for parental consent to three months, thereby preventing the possibility that a child might be reclaimed years after placement. Adoptive parents also benefit from procedural efficiency – the authorities are expected to find a suitable match within a reasonable time frame, although matching is never rushed at the expense of the child's well-being. The availability of *closed adoption* protects adoptive parents who do not wish to remain in contact with the biological family, allowing them to request court-ordered confidentiality. A further safeguard is the rule that adoptions cannot be challenged after three years, thereby ensuring long-term family stability. Finally, adoptive parents benefit from the fact that in domestic adoptions, post-adoption state interference is minimal – there is no continuous oversight, allowing them to raise the child as their own without feeling as though they are still under evaluation.

Biological parents, on the other hand, are often most concerned with not losing their child when there is still a realistic chance, they could raise them themselves. Czech law strictly limits the conditions under which a child may be adopted without parental consent and provides a window of time during

which parents may reconsider before the child is declared adoptable. For mothers, this is ensured through a six-week waiting period after birth before consent may be given, followed by a three-month revocation period. Should the parent consent to adoption, they may also wish to influence the child's future – Czech law permits this by allowing consent in favour of a specific adoptive parent. The system also respects the privacy of the biological parent – for example, it allows mothers to give birth anonymously and in secrecy. In line with Hungarian practice, *"baby boxes"* operate in the Czech Republic – special incubators located in hospitals and medical facilities, where newborns can be placed safely and anonymously. The first such baby box was opened in Prague in 2005, and more than 80 have since been established nationwide, saving the lives of hundreds of infants.[99]

Confidential adoption may also protect the biological parent by ensuring that their community does not become aware of the adoption, shielding them from social stigma. Finally, while the biological parent formally relinquishes all legal rights regarding the child, Czech law offers a form of delayed *reconciliation*: once the child reaches adulthood, they may choose to initiate contact with their biological family. This right is exercised by the adult adoptee, but it may serve the interests of the parent as well, offering an opportunity for explanation or closure – particularly if they regret the decision made in their youth.

In conclusion, Czech adoption law strives to balance the interests of all parties in a complex and sensitive legal context. While the child's best interests are clearly prioritised, the rights of the biological parent are not disregarded, and adoptive parents are provided with a stable and predictable legal environment. The aim of the legal framework is to ensure that no party suffers disproportionately in the process – that the child is placed in an appropriate family without unnecessary separation from their origins, that the adoptive parent is supported in their desire to form a family, and that the biological parent is afforded a real opportunity to return – provided that this does not come at the child's expense. While such a balance is always difficult to maintain in practice, Czech law lays the necessary foundations for adoption to be a sustainable and fair solution for all involved.

99 Machálek, E.: Baby boxes in the Czech Republic, Available at: https://www.babybox.cz/?p=english&utm_source, (Accessed: 30.5.2025)

7. Concluding remarks

This study has sought to present the Czech adoption system in detail, while also offering some points of comparison with Hungarian regulations. Although the Czech legal framework appears to be a well-developed institution that provides appropriate safeguards for adoptive parents, biological parents, and, most importantly, for children, it is evident that this area of law remains subject to ongoing change.

As of January this year, newly introduced rules concerning same-sex couples allow such couples to enter into registered partnerships and thereby gain access to a number of rights previously reserved for married couples. However, joint adoption by same-sex couples remains unavailable. Public debate surrounding adoption law in the Czech Republic is ongoing, and further legislative developments may be expected in the near future.

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Regulation of adoption in Hungary

Tímea Barzó* – Edit Kriston**

1. Introduction

The peculiarity of the legislation of the Hungarian family law is that it is located at the intersection of two major areas arising from the continental conception of law: public law and private law. This is especially true of the regulation of adoption, its significant part is based in private law rules, but due to the contributing authorities, we can also encounter a number of public law norms. For a long time, in addition, the legal institution primarily facilitated the settlement of the family status of children considered illegitimate. For a long time, the Hungarian law defined adoption as a type of inheritance contract, the content of which the parties were free to shape, thus enforcing legal relations of succession even in relation to children considered illegitimate without any confirmation or official approval. Later, however, its function in family law came to the fore. In the further stages of legal development, the need to provide offspring for the family, to prevent the extinction of the family and to allow the acquisition of certain ranks and titles came to the fore. In feudal Hungarian society, however, adoption was not such a socially accepted legal institution, since the characteristic interest was to keep property in the blood family of relatives.[1]

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1 Rékasiné Adamkó, A.: Az örökbefogadás a modern magyar családjogban 1861-től napjainkig. Novissima Press, Pécs, 2022. p. 36-37.; Barzó, T.: A magyar család jogi rendje. Patrocínium, Budapest, 2017. p. 323.

2. Purpose and conditions of adoption

The purpose of adoption in Hungary is to establish in dual form, on the one hand, family relationship between the parties, i.e. to create a bond of equal value to blood relatives between the adoptive and adopted children, with all its family law, inheritance law and private law consequences. The other goal is to raise the child in a family community. It is a fundamental moral need that the security and upbringing of the family should not only be possible for the biological descendant, but also for children whose parents died or are alive but are unable to raise their children properly. The upbringing of a minor child in a family can only be ensured if he or she is placed in a full family. This can be done by two people adopting a child, or by one adopting a child from their spouse. This is the institution of joint adoption in Hungary. However, it is not excluded that a single person may adopt a child.[2]

The Act V of 2013 on the Civil Code (hereinafter: Civil Code or CC), which also contains the family law rules currently in force, put special attention to the development of individualized principles characteristic of family law. One of the most important of these principles of the protection of the child's interests, on the basis of which the interests and rights of the child are better protected in family relationships.[3]This basic principle also includes that a child has the right to grow up in his or her own family, but if it is not available or possible, his or her upbringing in a family environment shall be provided in such a way that he or she can keep or maintain previous family relationships. These rights of the child may be restricted only in cases specified by law and only exceptionally in the interests of the child.[4] Even if a child were brought up in an environment where he or she would be exposed to danger, and if the child's own family members or relatives are unable to provide the appropriate environment, it shall still be possible for him or her to grow up in a suitable family environment. On the basis of the foregoing, it can be concluded

2 Barzó, T.: A magyar család jogi rendje. Patrocínium, Budapest, 2017. p. 323-326.
3 Civil Code 4:2. § (1)
4 Civil Code 4:2. § (2)-(4)

that those provisions are not only of a family law nature, but also of a child protection nature.[5]

The conditions of adoption are complex; the provisions of the Civil Code impose a number of requirements on both side of the adopted child and the adoptive parent. The first and most important condition is that only minor children can be adopted according to the rules in force. This is complemented by the requirement that children may only be adopted whose parents are not alive or whose parents are unable to raise them. There is a difference between the two cases as regards the circumstances of those concerned. Consequently, it may be adopted by persons who are completely strangers to the child, because, for example, both parents have died and there are no other known relatives of the child who can take care of him/her. However, it may happen that only one of the parents is dead or that the parent is unable to bring up the child properly, thus giving rise to adoption in relation to another relative or someone known to the child and close to him. These different life situations are also taken into account by the Hungarian legislation, which is why in cases where the adoption is carried out by a person known to or close to the child, the legislator helps such situations with a number of facilitation rules. It is specifically stated that an adopted child may be adopted by the adopter's spouse during the period of adoption but may also be adopted by another person after the adopter's death. In such particular cases, adoption by another person shall have the effect of terminating the previous adoption.[6]

The other side of the conditionality system is the examination of the adoptive persons. It is worth to separate the requirements into two parts. On the one hand, it is necessary to examine, what kind of legal conditions are imposed on the person concerned as adopter by the Hungarian legislation. In individual circumstances, we first encounter the issue of age. According to the rules in force, only a person over the age of twenty-five can adopt and the person concerned must have full legal capacity. A further requirement is that the adopter must be at least 16 years older than the child and not more than forty-five years

5 Szeibert, O.: A gyermekek érdekének fokozott védelme. In: Gárdos, P. – Vékás, L. (eds.): Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez (online legal database of Wolters Kluwer Hungary)

6 Civil Code 4:123. §

older than the child and be suitable for adoption based on his or her personality and circumstances. The age gap has recently been amended. In the Hungarian adoption system, a very large number of minors over the age of 3 are nowadays, but potential parents belonging to the younger age group are primarily waiting for younger children. The aim was to increase the number of potential adoptive parents, which resulted in the introduction of an increase in the upper limit of the age gap. On this basis, if the adoptive parent initiates the adoption of a child aged 3 years or older, the age difference between the child and the adoptive parents is capped at 50 years, considered that adoption is in the child's best interests. However, the age difference may be waived in cases where adoption by a relative or spouse takes place.[7] In the case of adoption as a joint child, another relief rule is that the age and age difference determined by law must exist only for one of the adopters. However, if the persons concerned adopt siblings, the age of the eldest sibling must be taken into account when checking the legal criteria.[8] As part of the legal requirements, we can also see exclusionary circumstances in the provisions. Such a rule is that the adoption of a person whose parental responsibility above his or her own child has been terminated by a decision of the court or in the case of persons who are the subject of a court judgment involving an exclusion from public affairs or whose child has been taken into foster care is excluded from adoption.[9] As regards the exclusionary circumstances, it can be stated that all three call into question the raising capability of the persons wishing to adopt. The judicial termination of parental responsibility can be regarded as a means of seriously culpable parental behaviour, as it may be ordered by the court if the fault of the parent seriously harms or endangers the child's physical, mental or moral development, and if the child has been placed with another person or taken into foster care and the parent refuses to change his or her behaviour through no fault of his/her own, for which foster care of the child had to be ordered.[10] Exclusion from public affairs is a criminal sanction according to the Act C of 2012 on the Criminal Code, a person who is sentenced to a term of imprisonment to be executed for committing an intentional crime and is unworthy to participate in their exer-

7 Civil Code 4:121. § (1)
8 Civil Code 4:121. § (2)
9 Civil Code 4:121. § (3)
10 compare with Civil Code 4:191. §

cise shall be prohibited from practicing public affairs.[11] Foster care is a child protection measure regulated by the Act XXXI of 1997 about the Protection of Children and Guardianship Administration (hereinafter: Gyvt.), the purpose of which is to ensure the child's home care and legal representation until

– family will be able caring for the child,
– may be appointed by a guardian under the measure of temporary family placement,
– the child is adopted,
– until the child reaches the age of majority, if the above is not possible.

A number of circumstances may give rise to an order for foster care, including the fault or unpropitious behaviour of the parents.[12]

However, not only do we find individual criteria in the provisions of the Civil Code regarding the adoptive parent, but the legislator also distinguishes between cases of adoption in accordance with the forms of couple relationships. The CC 4:121. § (1) states, as a main rule, that only spouses can adopt children. Exceptions to this are adoptions by relatives, or the parent's spouse, or exceptionally a single person. This provision of the Civil Code was introduced by the Act CLXV of 2020 on the amendment of certain acts relating to justice. The provisions express the intention of the legislator that adoption is primarily to support the joint adoption of the spouses. The explanatory memorandum of the Act states that, according to the legislator's view, adoption by spouses is preferred as the most appropriate form of care providing legal and emotional security for the child. The legislator makes this statement on the basis of social science research and empirical statistical facts, from which it can be shown that marriages are much more stable than other forms of partnerships. It emphasizes that it is in the best interests of children that they shall not be brought up in unstable and unpredictable conditions, but in truly lasting communion, so legal regulations strive to adapt to this natural need.[13] In summary, it can be stated that the amendment presented here eliminated the possibility of joint adoption of

11 Criminal Code 61. § (1)
12 compare with Gyvt. 78. §
13 Explanation to 100. § and 101. § of Act CLXV of 2020 on the amendment of certain acts relating to justice

de facto partners of different sexes, and made adoption by a single person subject to an additional condition, i.e. the permission of the minister, who is responsible for family policy. Later, when describing the procedural rules, we will mention that the authorisation of adoptions, i.e. the determination of suitability for adoption, is the competence of the guardianship authority. However, in the case of single adopters, in the absence of ministerial permission, the guardianship authority cannot determine suitability for adoption, i.e. the competence is not transferred to the ministry, only the granting of permission is subject to additional conditions.

In addition to all the conditions imposed on adopters, the Civil Code stipulates as a general condition that adoption requires the joint application of the persons intending to adopt and the legal representative of the child, reflecting the common, congruent will, and that the parents of the child to be adopted – and in the case of adoption as an only child, the spouse – consent.[14] If the child to be adopted has reached the age of fourteen, his/her consent is also required for the proceedings to take place, and the opinion of a minor under fourteen years who is nevertheless in possession of judgment must always be given due weight.

In connection with the child's judgment, the legal background therefore points out that the opinion of a child with judgment must be evaluated in all proceedings – as we have seen above, including adoption – however, the concept of judgment at the legislative level can only be found in the Government Decree 149/1997. (IX. 10.) on guardianship authorities and child protection and guardianship proceedings (hereinafter: Gyer.), 2. §(1a). According to this, a minor can be considered capable of judgment who, in accordance with his or her age, intellectual and emotional development, is able to understand the essential content of facts and decisions affecting him or her and to see their expected consequences during his or her hearing.

The application of this definition is also reflected in court cases. In addition, however, there is uniform jurisprudence on the issue that it is the responsibility of the competent bodies (court, guardianship authority, etc.) to examine the existence of judgment in proceedings. The practice of Hungarian courts has al-

14 Civil Code 4:120. § (1).

ready emphasised in its early rulings[15] that the provision of Article 12 of the Convention on the Rights of the Child leaves no doubt that, on the one hand, the child's statement must be assessed by the competent body in relation to other data and circumstances of the proceedings and, on the other hand, it must examine whether the child is truly judgmental, i.e. capable of expressing an opinion independently and without influence on the given issue.[16] The determination of the existence of judgment is therefore not a technical question, but is determined by the competent body on the basis of direct hearing, during which it must examine and evaluate the performance and wishes of the child capable of judgment with particular weight. Judgment can therefore be established by hearing the child indirectly with a contribution of a professional or directly by the competent body, or by applying them together, at the request of the parties, or by order and enforcement of their own motion.[17]

With regard to the Hungarian jurisprudence of judgment, the commentary literature mentions that the Hungarian solution differs from the modern approaches to children's rights, as the latter primarily tries to link the existence of a child's judgment to age limits.[18] However, this statement does not hold up in the light of jurisprudence, since jurisprudence also emphasizes that age cannot be a decisive factor in assessing judgment, and based on the circumstances of the case, in addition to the age of the child, the acting

15 According to Article 12 of the Convention on the Rights of the Child, states parties shall assure to the child who is capable of forming his or her own views the right to express those views feely in all matters affecting the child, the views of the child being given due wieght in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Convention on the Rights of the Child also declares in Article 13 the right of the child to express his or her opinion, which includes the freedom to seek, receive and disseminate all kinds of information and ideas, regardless of borders, in a form appropriate to the child's choice. That provision includes, inter alia, the regulatory obligation of States to ensure that children have a say in decisions concerning them and, more particularly, that they become active participants in proceedings concerning them by having their views heard and taken into account.

16 compare with BH1996.480., BH2020.11.

17 compare with BH2022.14., Pfv. II. 20.666/2020/11.

18 Szeibert, O.: A gyermek meghallgatása, véleményének figyelembe vétele. In: Gárdos, P. – Vékás, L. (eds.): Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez (online legal database of Wolters Kluwer Hungary)

bodies must evaluate his maturity, manifestations and even the influence of the parents.[19]

The Civil Code also emphasizes that during adoption one shall strive for desirable continuity in the child's upbringing, with special regard to the child's family relationships, nationality, religion, mother tongue and cultural roots.[20]

Among the statutory conditions relating to adoption, we find that it cannot be permitted if the adoption brings financial benefits to the parties or to persons or organisations involved in the adoption in excess of their reasonable costs[21]. This provision basically contains a stricter rule than the Convention on the Rights of the Child[22], as it prohibits unlawful profiteering, but the Hungarian provision considers all profiteering to be prohibited. Based on practical experience, the legislator intends to prevent adopters from receiving income, even as a cost. However, practice also shows that there are cost elements whose reimbursement by those intending to adopt may be considered legitimate. This could be the case, for example, costs incurred by public benefit purpose organisations facilitating adoption in connection with their services, such as telephone use, postage, the cost of using a car or even travel costs. The amount of the cost must be notified in writing to the person intending to adopt, but no cost may be charged for the services used by the biological parent or expectant mother. Depending on the agreement, costs may be accounted for in the form of flat-rate or itemised cost accounting, and if itemised accounting is used, reimbursement of costs may only be made against invoice or other proof of costs. The person intending to adopt shall pay the cost to the payment account of the public benefit purpose organization within eight days of written notification of its amount.[23] In addition, the guardianship authority has the right to consider whether the items accounted for as expenses were justified or not.[24]

19 Compare with Pfv. II. 20.609/2019/8.
20 Civil Code 4:120. § (3)
21 Civil Code 4:130. §
22 The Convention on the Rights of the Child Article 21 section (d)
23 Government ordinance 72/2014. (III. 13.) on the activities and licensing of public benefit organizations facilitating adoption and monitoring adoption 9. §
24 Katonáné Pehr, E.: Az örökbefogadás. In: Kőrös, A. (ed.): Polgári Jog – Családjog. Hvg-Orac Lap- és Könyvkiadó Kft., Budapest, 2013. p. 218-219.

Finally, as part of the conditionality, the Civil Code emphasizes or the guardianship authority only allows adoption under the conditions laid down by law if it is in the interest of the minor child.[25]

3. The rights of the biological parent and their limitations in adoption

As a main rule, Hungarian adoption rules make the adoptability of a child subject to the consent of the biological parent. Under Hungarian law, parental responsibility constitutes the whole set of rights and obligations of parents vis-à-vis the child.[26] The specific content of parental control is defined in CC 4:146. § (2). Based on this, parental responsibility includes the right and duty to determine, care, raise, determine the residence of a minor child, administer his or her property, legally represent him/her, appoint a guardian and exclude somebody from guardianship. This list is supplemented by the right of consent of the biological parent contained in the rules of adoption.[27] However, this right of consent can be regarded special considering other partial element of parental responsibility, as it may also be granted to the biological parent whose parental responsibility is suspended.[28] Therefore, in the case of adoptions, among the rules of adoption we find the limits of the biological parent's right of consent.

25 Civil Code 4:120. § (5)

26 Kriston, E.: Gyermekvédelem, Novotni Press, Miskolc, 2020. p. 21.

27 Compare with Civil Code 4:120. § (1)

28 The consequence of the suspension of parental responsibility is that, as a main rule, the parent may not exercise parental rights above the child during its existence, unless otherwise provided by law (see, e.g., 4:188. § of the Civil Code). However, the law contains several reasons for the suspension of parental authority. Accordingly, parental responsibility of a parent is suspended if:
a) the parent is incompetent;
b) the parent is a minor and of limited legal capacity, excluding the right and obligation of the minor parent over the age of sixteen years of caring for and upbringing the child;
c) the parent's capacity in respect of exercising rights of parental responsibility has been partially limited;
d) the parent cannot be located or effectively prevented in carrying out his/her parental responsibilities;
e) the guardian authority approved the child's placement with a family;
f) the parent has given consent for adoption of his/her child below the age of six weeks;
g) the guardian authority took the child under foster care and the parent's right of parental responsibility did not terminate or had not been terminated by court order;
h) the court ordered the placement of the child with a third party; or
i) the parent is under the force of an injunction for an offense committed against the child or any family member living with the child in the same household. Civil Code 4:186. § (1)

The consent of that parent is not required in adoption:

– who is the subject of a final court judgment terminating parental responsibility;
– whose foster child has been declared adoptable by the guardianship authority;
– who is incapacitated due to his young of age;
– whose identity is unknown or whose location is unknown and the efforts taken to trace her or him have failed;
– who leaves the child in a place designated by a medical institution with the intention to be raised by someone else without revealing his/her identity and does not apply for the child within six weeks; or
– who leaves the child in a medical institution immediately after the birth of the child and the she or other relatives of the child does not report for the child within six weeks.[29]

If, pursuant to the Civil Code, a child can be adopted without the consent of the parent, in order to facilitate his/her upbringing in the family, it is necessary to take immediate measures for the adoption of the child.[30] It can be seen that among the cases listed, there are reasons when the parent is unavailable, so it would not be in the child's interest and it would lead to delay if we had to wait for the consent of the biological parent. In other cases, the parent, due to his or her conduct or condition, is unable to properly raise the child and the cause of the incapability does not disappear within a short time. This is specifically the case when the guardianship authority may, in the absence of the consent of the biological parent, declare the child in foster care adoptable by decision. This can only happen if the child is raised in foster care because of the parent's behaviour or other circumstances. In the case of a child taken into foster care, the law stipulates as an additional condition that the guardianship authority may declare a child in foster care adoptable if, through no fault of his/her own, the parent has not had reg-

29 Civil Code 4:127. § (1)

In particular, the law states that the consent of the adopter's spouse is not required for adoption if the spouse is incompetent or cannot be located or the matrimonial relationship of the spouses was terminated. – Civil Code 4:127. § (2)

30 Gyvt. 75/B. §

ular contact with his/her child for eight months or maintained contact in any form for three months and changed his/her lifestyle or circumstances, therefore the foster care cannot be terminated with the child. A child in foster care may also be declared adoptable if, through no fault of his/her own, the parent changes his/her place of residence without leaving his/her new place of residence and the measures taken to detect it did not succeed within three months.[31]

In such cases, the guardianship authority suspends the parent's right of contact for the duration of the declaration of adoption, in order to adopt the child. The procedure for declaring the child adoptable is initiated at the request of the child protection guardian of the child in foster care or ex officio. The ex officio procedure may also be initiated by the special child protection service, an institution caring for the child or the child's rights representative at the guardianship office competent to conduct the procedure for declaring a child adoptable.[32]

The adoptable decision is valid for four years, which may be extended by a further two years in certain cases. This is the case if the child has not been adopted or there was no procedure for authorising an adoption and there is still a realistic chance of adoption of the child based on the child's age, state of health and other circumstances.[33] However, upon expiry of these time limits, the decision shall be ineffective.

The decision of the guardianship authority to conduct the procedure for declaring a child adoptable is communicated to the parent, the child protection guardian, the special child protection service, the institution caring for the child, the guardianship office competent to deal with the child's upbringing and, if the procedure was initiated at his/her request, to the child's rights representative.[34]

31 Civil Code 4:124. § (1)
32 Civil Code 4: § 124 and Gyer. 37. § (1) – (1a)
33 Civil Code 4:142. § (2) and Gyer. 37. § (9)
34 Gyer. § 37 (1c)

4. Types of adoption

Two forms of adoption are known in Hungary: open and secret adoption. Open adoption occurs when the biological parent consents to adoption in respect of a specific adopter known to him. On the other hand, adoption is secret if the biological parent consents to the adoption of his or her child without knowing the adopter's identity and personal data, or if the parent's consent is not required as exhaustively listed by the law.[35]

In both open and secret adoption, parents may withdraw their statement of consent within six weeks from the child's birth. The parent shall be explicitly informed of this possibility during the procedure. If the statement of consent is not withdrawn, the biological parent's right of parental responsibility ceases by operation of law when the child reaches the age of six weeks. In such cases, the termination of parental authority is determined by the guardianship authority.[36]Open adoption may take place with the cooperation of the regional child protection service or other organization facilitating adoption (e.g. „Gólyahír Alapítvány"), even with parental consent, except for adoption by relatives or joint adoption as children. In the case of secret adoption, the biological parent's statement of consent can be given before the birth of the child as well. So, in such cases the length of time when the parent can withdraw his/her statement of consent is really important. In the case of secret adoption, the approval of the guardianship authority is also required if the child has reached the age of six or suffers in any mental disorder. Age is justified by the fact that it may be more difficult for the parent-child relationship to develop and deepen between those affected. When the child suffers any mental disorder, the approval of the guardianship authority is necessary in order to carefully assess whether the parents will be able to bring up the sick child, are aware of the difficulties arising from the illness and consciously undertake it. In the case of secret adoption, the parent is not notified of the adoption and has no right of appeal against the decision on adoption, and the biological and adoptive parents are not informed of each other's identity data.[37]

35 Barzó, T.: A magyar család jogi rendje. Patrocínium, Budapest, 2017. p. 342.
36 Civil Code 4:190. § (1) b) point, Civil Code 4:125. §, Civil Code 4:126. §
37 Civil Code 4:126. §

In the case of open adoption, as already mentioned, public benefit organizations can help initiate adoption, connect the parties and, in some cases, also contribute to the follow-up of adoption. The law may carry out activities in accordance with the intention of assisting an expectant mother in crisis or at the request of the biological parent who intends to adopt a child. Services of public benefit organisations include:

- counselling and assistance within the framework of social assistance work for the child's upbringing in the context of social assistance to expectant mothers in crisis situations, in particular those who wish to conceal their pregnancy,
- organising, if so requested, access to care provided in temporary homes for families,
- preparing contact between the child to be adopted and the person intending to adopt, if the services referred to in point (a) have not been successful,
- keeping records of the person intending to adopt and the child to be adopted,
- providing assistance, counselling to the biological parent and the adoptive parent after the adoption has been authorised and facilitating contact with the biological parent of the adopted child upon request, if the guardianship authority or the court has provided the identity data of the biological parent.[38]

This is complemented by the establishment of a relationship between a Hungarian biological parent and a Hungarian person intending to adopt in case of mutual request and agreement of the parties. Based on this, it can be concluded that public benefit organizations cannot carry out activities related to international adoption. Service shall not include

- facilitating adoption of a foster child in child protection care,
- publishing the data of identity and image of the adoptee or the adopter by means of advertising,

38 Gyvt. 69/A § (2)

– assisting in proceedings for authorisation and termination of adoption, except as a witness.

Within the scope of the service, no activity may be carried out that violates children's rights or is incompatible with the goals of child protection defined by law. As a rule of conflict of interests' persons providing basic child welfare services, persons employed at institutions providing basic or special child welfare services or persons employed in a government service relationship at a guardianship authority shall not participate in the services of a public benefit organization.[39]

At the request of the service provider, the service licensing body decides on the issuance of the operating license. The body authorizing the service checks at least once every two years whether the service complies with the provisions of the legislation, the operating license and the professional program.[40] In order for either the adoptive parents or the biological parent to be able to use these services, it is necessary to draw up a written agreement with a specific content. The agreement may be terminated in writing by the parties at any time without giving reasons, but the service provider may only terminate it if, after its conclusion, it becomes aware of the existence of grounds for non-adoption, or if it becomes aware that the adoption is profitable, either for the parties or for other persons involved.[41]The payment of money or the provision of any other financial advantage to the service provider or a third party may not be requested or accepted from the recipient of the service on grounds other than bearing the costs previously specified, in particular as an intermediary or service fee. However, this provision does not prevent the service provider from obtaining revenue from the use of a certain part of personal income tax as provided for by the taxpayer.[42]

Further detailed rules on the operation of organisations are contained in the Government Decree 72/2014. (III. 13.) on the activities and licensing of public benefit organizations facilitating adoption and following adoption. From 1 September 2020, it has been regulated in the Gyvt. that the Minister

39 Gyvt. 69/B §
40 Gyvt. 69/C § (1)-(3)
41 Gyvt. 69/D § (2)-(3)
42 Gyvt. 69/E § (1)

responsible for adoption provides individual support for the performance of the tasks of an organisation holding an operating licence.[43]

5. The adoption procedure

The adoption procedure is initiated at the request of the person(s) intending to adopt or the legal representative of the child. The guardianship authority cannot initiate the procedure ex officio. The procedure itself consists of two parts, the procedure for declaring someone suitable for adoption and the procedure for authorising the adoption, usually separated in time. In the event of relatives, the parent's spouse or a person raising the child continuously in his/her own household (including a foster parent in child protection system) or a foreign person with the consent of the parent wish to adopt the child, the suitability of these persons is determined by the guardianship authority in the framework of the procedure for authorising adoption, i.e. in such cases the two stages are merged. [44]

The purpose of the pre-adoption (preliminary) procedure, i.e. the aptitude test, is to determine whether the adopter is suitable for adoption based on his or her personality and circumstances. The procedure is prepared at the request of the person who intends to adopt a habitual resident in the territory of Hungary by the special child protection service competent according to the place of residence or stay.

In the application submitted to the special child protection service, with the exception of 4:122. § (2) of the Civil Code, the person intending to adopt shall declare

- the reasons for adoption and the ideas about the child or children to be adopted,
- the number of children he intends to adopt and whether he will adopt siblings,

43 Deli, J. – Mannheim, G.: A közhasznú szervezet nyílt örökbefogadást elősegítő és az örökbefogadást utánkövető tevékenysége. In: Mattenheim, G. (ed.): Nagykommentár a gyermekek védelméről és a gyámügyi igazgatásról szóló 1997. évi XXXI. törvényhez (online legal database of Wolters Kluwer Hungary)

44 Civil Code 4:122. § (2)

– the age of the child to be adopted,
– whether he agrees to adopt a child with health problems,
– the outcome of the pre-adoption procedure initiated earlier,
– whether, if he is declared eligible, his consent to his data being processed by other child protection services in accordance with the legal provisions with the assistance of the national adoption agency in order to increase his chances of adoption,
– acknowledging that he is obliged to provide truthful information in relation to his circumstances, the absence of which must be assessed in order to form an opinion as to his suitability, and that eligibility for adoption is conditional on attendance of pre-adoption counselling,
– about the persons living in the same household, the relationship with them, and whether there is a person who takes care of the child temporarily if he intends to adopt alone.[45]

During the examination of suitability, the health status and mental condition of the persons wishing to adopt are assessed, an environmental study is carried out, and the adopters are interviewed personally. If the person intending to adopt does not appear at the aptitude test or counselling and does not excuse his absence, does not allow the preparation of an environmental study, or does not attach a certificate about his/her income situation not older than 30 days, the child protection service will consider the application of the person intending to adopt withdrawn and will not conduct the aptitude test. Within 60 days of submitting the application, the child protection service informs the person intending to adopt about the results of the aptitude test and, in the case of opinions on which eligibility is based, that he/she may attend the free preparatory course in order to base his/her decision.[46] The procedural rules differ in the case of adoption of a single person in that if the special child protection service proposes the suitability of the persons concerned for adoption and the guardianship authority agrees with this, it sends the documents together with the proposal to the Minister responsible for child and youth policy via the designated guardianship office. On the

45 Gyer. 38. § (3)
46 Gyer. 38. § (5)-(6)

basis of the documents sent, the Minister shall declare within 15 days of receipt whether he/she consents to the guardianship authority's determination of the suitability of the person intending to adopt alone. In such cases, the guardianship authority may determine the suitability of the person intending to adopt.

The decision of the guardianship authority determining suitability for adoption is valid for four years. If no adoption takes place within those four years and the circumstances under which eligibility was established have not changed it may be renewed once for a further year. If no adoption takes place by the expiry of the extended period, the pre-adoption procedure shall be repeated. If, on the other hand, the person intending to adopt is determined unsuitable for adoption, h/she cannot initiate proceedings to establish a new suitability for adoption for the period laid down by law. No new proceedings cannot be initiated within 3 years of the decision determining unsuitability becoming final if. When the adopter determined unsuitable for adoption no new proceedings can be initiated within one year from the decision becoming final.[47]

In connection with the courses, it is worth mentioning that the psychologist of the competent regional child protection service holds them according to specific professional guidelines. The aim of counselling is to enable the person intending to adopt – based on their personality and family structure – to make an informed decision together with the expert on whether they are suitable for adoption or not. During the adoption course, participants will learn about the social and legal background of adoption, the special situation of adoptable children and ways to deal with the conflicts associated with adoption. The duration of the course is 40 hours, which includes one hour of the summary discussion at the end of the course to qualify the completion of the course. The aim, syllabus and knowledge control system of adoption courses are detailed in the Decree of the Ministry of Health, Social and Family Affairs 29/2003. (V. 20.) on professional and examination requirements for the training of alternate parents, foster parents and family day-care operators, as well as on pre-adoption counselling and preparation courses. However, from January 1, 2023, the legislator finished compulsory attendance at courses, so

47 Gyer. 39. §

today it is only optional for parents intending to adopt. The detailed rules for the course have been repealed from the decree, while the state bodies operating the course and the non-profit organizations will carry out the trainings in accordance with the previous regulations. The other big change is that earlier the costs of attending the course had to be reimbursed to those concerned, despite the fact that participation in the course was compulsory, but now participation in the course is free of charge.[48]

If there is a change in the circumstances of the adopter specified by law and this comes to the attention of the guardianship authority, the guardianship authority shall immediately review the suitability of the person intending to adopt and, in the event of a change of competence, transfer the documents to the competent guardianship authority. If, as a result of the review, the guardianship authority finds that the adoptive person is still suitable for adoption, the effect of the decision on the original suitability remains unchanged, otherwise the child protection service will record the fact of incompetence in the uniform adoption register and notify the person intending to adopt.[49]

It is also important to examine whether an appropriate relationship has been established between the person intending to adopt and the child to be adopted, and whether the child has managed to integrate into the adoptive family. Therefore, the person intending to adopt shall provide care for the child in his/her home for at least 1 month. Before authorising adoption, the guardianship authority must ensure that the child is integrated into the family during the period of care before adoption.[50]

Adoption may be authorized without the period of caring before adoption if:

– the adoptive parent and the biological parent are married,

– the adoptive parent, with the consent of the biological parent, has been caring for the child in his/her own household for at least one year,

48 For details on adoption courses, see Decree No 29/2003. (V.20.) on professional and examination requirements for the training of alternate parents, foster parents and family day care operators, as well as on pre-adoption counselling and preparation courses. 13-14/E §; text version before 1 January 2023.

Gyer 39. § (2f)

49 Gyer. 39/A §

50 Civil Code 4:128. §

– the child taken into care is adopted by the child protection foster parent who has been caring for and bringing up the child for at least one year,
– if the child under six weeks of age who is to be adopted and has been caring for the person concerned in his/her own household for one month,
– the child is adopted by a guardian from temporary family placement and has been providing for the appropriate care of the child in his/her own household for at least one year,
– the child is adopted by a relative.[51]

It is important that before placing the child in care, the designated guardianship authority carries out an environmental study of adopter or contacts the special child protection service to carry out an environmental study, if an environmental study is not available from not more than one month ago prepared by the special service. In addition, it obtains a certificate from a general practitioner or specialist about the child's state of health, diseases affecting their development, as well as documents on the child's family background and, in the case of a child over 3 years old, a professional opinion on their personality. Finally, it ascertains that the public benefit organisation facilitating open adoption involved in the adoption has an operating license to continue its services.

Based on the documentation obtained, the available documents and the application, the designated guardianship authority decides on placement in compulsory care within fifteen days, or within eight days in the case of a child under six weeks of age. The designated guardianship authority shall take into account the starting date of actual care when calculating the period of care when ordering placement in compulsory care.[52]

The person intending to adopt is obliged to take care of and support the child placed with them for adoption at their own expenses, but is entitled to family support benefits due to the child under the law.[53]

A child placed with the intention of adoption may remain with the person intending to adopt until the adoption procedure is completed, even after the

51 Ptk. 4:128. § (2) and Gyer. 45. § (5)
52 Gyer. 45. § (1)
53 Gyer. 45.§ (6)

period established in the placement order for the mandatory care period order of the designated guardianship office has successfully elapsed.[54] After that, only the decision authorising the adoption will be made, the mandatory content of which will be determined by the Gyer. 46. §. The scope of adoption is not affected if the authorisation decision becomes final after the adoptee reaches the age of majority.[55]

6. Effects of adoption

The most important legal effect of adoption is that the adoptee is granted a new family status. The adoptee has the status of the biological child of the adoptive parents, and the adopters have the rights and obligations of the biological parents. In addition, a kinship relationship arises between the adopter and his relatives and the adoptee, to which the establishment of the inheritance relationship is also closely linked. During the period of adoption, the adoptee inherits as lineal descendants by blood of the adopter after the adoptive parent and their blood relatives, as a main rule, if the adoption is effective at the time of the opening of the succession. The Civil Code also stipulates that adoption shall not affect the adoptee's right to inherit under intestate succession after his or her biological relatives, provided that the adopted person was adopted by his lineal ascendant or sibling or another descendant of his lineal ascendants.[56] In accordance with the rules of intestate succession primary heirs of an adopted person shall be

– his descendants and his spouse,
– his spouse and adoptive parents if the adopted person has no descendants,
– his adoptive parents and the blood relatives of his adoptive parents if the adopted person has no descendants.[57]

54 Gyer. 45. § (7)
55 Gyer. 47. § (1)
56 See for details: Barzó, T.: A magyar család jogi rendje. Patrocínium, Budapest, 2017. p. 357-368.; Civil Code 7:72. §
57 Civil Code 7:73. § (1)

However, an additional condition for the succession of adoptive parents and their relatives is that the adoption continues until the opening of the succession.

However, if the persons mentioned above do not inherit after the adoptee, his intestate heirs shall be his biological relatives in accordance with the rules of intestate succession, provided that the adopted person was adopted by his lineal ascendant, sibling or another descendant of his lineal ascendant.[58]

Upon adoption, the rights and obligations pertaining to parental responsibility and relatives' maintenance arising from lineal kinship shall terminate, unless either spouse adopted the other spouse's child.[59] However, in exceptionally justified cases, in the event of an open adoption, the guardianship authority may grant contact rights to the biological parent who consented to the adoption of his or her child by the spouse of the other parent.[60] Whose parental responsibility rights terminated upon his granting consent to the adoption of the child by an unknown person or for his leaving, without revealing identity, the child in a place designated for this purpose in a healthcare institution with a view to having the child brought up by others, and does not claim the child within six weeks, and the child has not been adopted.[61]

With regard to naming, the CC stipulates that, as a main rule, the adopted child bears the family name of the adopter, but exceptionally the guardianship authority may allow him or her to keep his or her own family name he has borne that far. However, changing the child's given name is only possible in exceptional cases. The given name shall be determined by the adoptive parents. The adopted child's family and given name shall be determined simultaneously with the authorisation of the adoption.[62]

In the case of a successful adoption, the birth of the child is thus re-registered, which means that the adoptee acquires the status of the biological child and his or her actual origin remains hidden. If the child has been

58 Civil Code 7:73. § (2)
59 Compare with Civil Code 4:133. §
60 Civil Code 4:133. § (4)
61 Civil Code 4:178. § (4) point c)
62 Civil Code 4:134. §

adopted by spouses, the data of both biological parents must be deleted from the birth register and the adopters must be registered as biological parents. If the adopter adopts the child of his spouse, the details of the spouse remain unchanged and the details of the adopter are registered in place of the other parent. There are special rules for adoption by a single person: the adopter must enter in the child's birth certificate as one parent, but the other parent will be registered as an imaginary person.[63]

The legal provisions also guarantee the right to know the origin in accordance with the Convention on the Rights of the Child. In Hungarian law, the possibility of knowing the origin, unlike in other countries, is solved not by viewing the original civil status register or both certificate, but by requesting information about the guardianship authorities.[64] The adoptee may request information from the guardianship authority on whether he was adopted, if his biological parent is alive, if he has any siblings and, if he has attained fourteen years, the natural personal identity data of his biological parent and siblings as well. The child who has attained the age fourteen years may submit this application without the consent of his statutory representative. The above mentioned biological relatives must be informed of this during the adoption procedure. However, in order to provide information, the law requires the biological parent and sibling to be heard and, in the case of a minor applicant, the adoptive parents or, if the applicant has another legal representative, to be heard. However, there is no need to be heard the biological parent, sibling, adopter or other statutory representative if his whereabouts are unknown or he cannot be heard due to irremovable obstacles. The natural personal identification data of the biological parent and the sibling shall not be disclosed to the adoptee if:

– it was not possible to hear the biological parent, the sibling, the adopter or other statutory representative due to their unknown whereabouts or irremovable obstacles;
– the biological parent, the sibling declares that his/her natural personal identification data cannot be disclosed; or

63 Gyvt. 128/A §
64 Katonáné Pehr, E.: Az örökbefogadás. In: Kőrös, A. (ed.): Polgári Jog – Családjog. Hvg-Orac Lap- és Könyvkiadó Kft., Budapest, 2013. p. 224.

– it is contrary to the interests of the minor child, in particular if the parental responsibility of the biological parent was terminated by the court because of the fault of the parent has seriously harmed or endangered the interests of the child, in particular his or her physical well-being, mental or moral development.

The situation is different with regard to the medical data of the biological parent, because if it is relevant for the child's health (e.g. genetic diseases), this data can be provided for the adopted child without disclosing the natural personal identification data of the biological parent.[65]

7. Ineffectiveness, termination and legal declarations relating to adoption

Adoption becomes ineffective if the adopter acknowledges the adoptee as his child in a declaration of paternity with full effect or if, as a result of a final and binding court judgment, the adopter is to be considered the father or mother of the adoptee. In such cases, the adoption shall be deemed not to have taken place. Becoming ineffective means, that no separate decision on becoming ineffective is required, it is an ipso iure consequence.[66]

Adoption is terminated by the guardianship authority upon mutual application by the adopter and the adoptee. The fact that the adoptee is still a minor does not prevent the termination by mutual consent, but it is only permitted if the termination is in the interest of the minor. During the procedure, the guardianship authority may hear the biological parents of the adopted child, unless irremovable obstacles prevent this hearing.

The adoption shall be terminated upon the decision of the guardianship authority becoming final. If either party dies during the proceedings and the conditions are met, the effects of the adoption cease to exist retroactively to the date on which the application was lodged. The termination affects the adopters, adopter's relatives, the adopted child and the descendants of

65 Civil Code 4:136. §
66 Civil Code 4:137. §

the adopted child.[67] The decision to terminate the adoption shall be communicated by the designated guardianship authority to the body that pays family support benefits and, if necessary, orphan benefits.[68]

If there is no mutual consent about the possibility of termination between the parties, the adoption is terminated in court on the basis of a unilateral request. The court shall terminate the adoption if either the adoptive parent or the adopted child engages in a conduct due to which sustaining the adoption became unbearable to the other party. If the adopted child is a minor, the adoption can be terminated at the request of the adopter only in exceptionally justified cases.[69]

The court must carefully examine these circumstances whether these are permanent and truly make the adoption relationship difficult, or these are temporary problems creating some difficulties. According to judicial practice, only morally or legally culpable behaviour results in termination of adoption. However, the divorce of the parents cannot be regarded as a circumstance that would permanently frustrate the adoption relationship, but rudeness and abuse towards the adoptive parent can.[70] The Curia of Hungary has also pointed out in several cases that, according to consistent judicial practice, the relationship between parent and child may entail conflicts even in the case of blood descent after the children become adults, which are expected to be resolved on both sides.. However, the mere fact of conflicts, especially where the applicant for divorce also involved in causing them, cannot lead to the termination of the adoption.[71] According to judicial cases, the interests of the adoptive parent must also be taken into account. In this context, the Curia emphasizes that part of the parent-child relationship is that the adult child takes care of the elderly adopter.[72]

67 Civil Code 4:138. §

68 Gyer. 48. § (4)

69 Civil Code 4:138. § - 4:139. §

70 The termination of an adoption is justified if its maintenance has become intolerable for the multiple injured and remnant minor adoptee due to the conduct of the adopter, which also constitutes a criminal offence. - BH2015.68.

Adoption may not be determinated on the grounds that the marriage of the adoptive parents has been determinated by the court and the separated adoptive parent does not wish to have contact with the minor child. – BH2010.185.

71 BH2000.19., Pfv.II.20.749/2019/6.

72 BH2001.323.

The termination of adoption by court may be requested by either party. In the interests of a minor adoptee, the guardianship authority representing the child may also initiate the court procedure of the termination. Adoption terminates on the day when the court's judgement terminating it becomes final and binding. The termination of an adoption terminates the legal effects of the adoption for the future. A judgement on terminating adoption has shall be effective against all.[73] After the termination of adoption, the adopted child and his descendants shall not continue to bear the family name taken up upon the adoption. However, the guardianship authority or the court may, upon request, authorise the persons concerned to continue to bear the surname adopted by adoption.[74] The termination of adoption shall not affect rights acquired by an adopter who died before guardianship proceedings or proceedings were brought. In this case, the inheritance already transferred cannot be reclaimed. In addition, an important legal effect is that the dissolution of adoption revives rights and obligations arising from kinship based on descent that ceased to exist with the adoption, but parental responsibility rights and obligations are not restored.[75]

Finally, it should be mentioned that the Civil Code provides the means of Juridical acts regarding adoption in a separate chapter[76]. On this basis, juridical acts regarding adoption shall, in principle, be made in person. A minor with limited legal capacity may also make their juridical acts in person, without the consent of their statutory representative. An exception is the declaration of rights of persons partially restricted in their legal capacity with regard to family law declarations, which requires the consent of the legal representative. Only the legal representative may act instead of an incapacitated person. A minor under the age of fourteen who is in possession of judgment must be heard by the guardianship authority.

73 Civil Code 4:140 §
74 Civil Code 4:142. §
75 Civil Code 4:143. § and Civil Code 4:144. §
76 Civil Code 4:145. §

8. Follow-up of adoption

The follow-up of adoption shall be ordered, which involves monitoring the child's integration into the adoptive family and assisting the adoptive family with counselling. The mandatory duration of follow is 6 months, but if necessary, it can take up to one and a half years. The follow is carried out by public benefit organizations participating in the adoption or authorised to follow up, as well as by specialist child protection services.[77]

The institution of follow of adoption was introduced by 4:131. § (2) of the Civil Code with effect from 15 March 2014. According to 34. § of Act CLXXVII of 2013 on transitional and enabling provisions related to the entry into force of Act V of 2013 on the Civil Code, the provisions of the Civil Code relating to adoption shall apply to adoption proceedings initiated after the entry into force of the Civil Code, so the guardianship authority may order follow in the case of adoptions started after 15 March 2014.

Based on the provisions of the Civil Code, the purpose of follow is primarily to monitor and assist the situation and living conditions of the adopted child. The follow can be carried out by an organization specified by law or by the regional child protection specialist service, its duration is maximum 5 years from the date on which the decision authorising the adoption becomes final. In addition to regional child protection services, the Gyvt. 69/F § (1) authorizes public benefit organizations licensed to provide follow services. The regional child protection service is always obliged to undertake and perform follow activities, but the public benefit organization may decide in certain cases whether to undertake the follow.[78]

As a main rule, the maximum follow period is 5 years.[79] 62/C. § (3)-(3b) of the Gyvt. establishes mandatory and voluntary follow within a maximum period of 5 years.

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77 Gyer. 47/A §

78 Deli, J. – Mannheim, G.: A közhasznú szervezet nyílt örökbefogadást elősegítő és az örökbefogadást utánkövető tevékenysége. In: Mattenheim, G. (ed.): Nagykommentár a gyermekek védelméről és a gyámügyi igazgatásról szóló 1997. évi XXXI. törvényhez (online legal database of Wolters Kluwer Hungary)

79 Civil Code 4:131. § (2)

The follow of adoption takes place for the first time six months after the authorisation of the adoption becomes final, and thereafter – with the exception of adoption by relatives or spouses – one and a half years after the authorisation of the adoption becomes final. At the request of the adoptive parent, the regional child protection service may provide follow at any time during the period of mandatory follow outside the aforementioned dates. Within the framework of voluntary follow, the regional child protection service provides follow at the request of the adoptive parent for three and a half years after the end of the mandatory follow.

The task of the specialist child protection service within the framework of the follow of adoption

- monitoring the child's integration into the adoptive family and new environment, and
- assisting in the child's upbringing in the adoptive family by providing personal counselling. [80]

After the mandatory follow period has elapsed, the non-profit organization may undertake the voluntary follow of the adoption at the request of the adoptive parents, even if the mandatory follow was carried out by another public benefit organization or the regional child protection service. In this case, the organisation undertaking the voluntary follow-up shall inform the organisation carrying out the mandatory follow. Voluntary follow takes place on the basis of an agreement concluded with the public benefit organization, and the public benefit organization makes a record of its occurrence and experiences.[81]

80 Gyvt. 62/C §

81 Deli, J. – Mannheim, G.: A közhasznú szervezet nyílt örökbefogadást elősegítő és az örökbefogadást utánkövető tevékenysége. In: Mattenheim, G. (ed.): Nagykommentár a gyermekek védelméről és a gyámügyi igazgatásról szóló 1997. évi XXXI. törvényhez (online legal database of Wolters Kluwer Hungary)

9. International adoption

Adoption cannot only take place within national borders. International adoption is defined as the adoption when the adoption permanently moves the child to another country, regardless of the nationality of the adopter and whether or not the child's nationality changes. With the exception of adoption by relatives and the parent's spouse, adoption abroad is permitted only in the case of a foster child declared adoptable, provided that the adoptable child taken into foster care has not been adopted domestically because the measures taken to adopt him or her have failed.[82] The details of international adoption in Hungary are regulated by bilateral or multilateral international agreements, the Hague Adoption Convention and Act XXVIII of 2017 on Private International Law (hereinafter: Nmjt.). The relevant provision of the Nmjt. states that adoption can only be valid if the conditions for adoption are met according to the personal rights of both the adopter and the person to be adopted at the time of adoption. The legal effects of adoption, the termination of adoption and its legal effects shall be governed by the personal law of the adopter at the time of adoption or its termination.

If the adopters are spouses, the legal effects of adoption, termination of adoption and its legal effects

- the law of the State of which the spouses are joint nationals at the time of adoption or termination, failing this,
- the law of the State in whose territory the spouses had their common habitual residence at the time of the adoption or its termination, failing that
- the law of the forum State

shall be applied.[83]

The procedural rules related to adoption are similar to the provisions of domestic adoption, the derogations are set out in the Gyer. 49-52/B §. Among these, it should be noted that, in the case of international adoption, the application must be submitted to the Minister responsible for child and youth

82 Civil Code 4:129. §
83 Nmjt. 33. §

policy, unless the person submitting the application is habitually resident in a state which does not fall within the scope of the Hague Adoption Convention. In such cases, the application may also be submitted to the consular officer of the Hungarian embassy, who forwards it to the Minister responsible for child and youth policy by diplomatic courier post.

The documentation for the aptitude test is also different[84], and if the adoption has not taken place within 2 years of the application, the aptitude procedure must be repeated.[85]If the measures for the adoption of an adoptable child in Hungary have not been successful, and there is a person intending to adopt with habitual residence abroad in the uniform adoption register who is expected to be able to establish a suitable parent-child relationship with the child, the Minister responsible for child and youth policy shall decide whether to establish personal contact taking into account the opinion of the competent child protection service possibility. If there are several persons intending to adopt, the date of registration shall also be taken into account.[86]

10. Final thoughts

It can be stated that the Hungarian regulation of adoption definitely meets international standards and expectations. The study revealed that there are many provisions in different pieces of legislation that follow the requirements of the Convention on the Rights of the Child. The fundamental essence of the legal institution of adoption is the right to raise a child in a family. During the development of the rules on adoption, the Hungarian legislator tried to ensure that it is primarily in the interests of the child that prevails during and through the procedure, but we have also seen examples of giving due weight to the rights of adoptive parents and biological parents. Recent legislative amendments have definitely helped to reduce the number of children waiting for families and parents in the adoption system through successful adoptions. The fact that the legislator has expanded the circle of

84 Gyer. 50. § (1)
85 Gyer. 50. § (2)
86 Gyer 50.§ (3)

potential adoptive parents by amending individual adoption requirements is certainly to be welcomed. Moreover, from the point of view of children's rights, the shortened procedural deadlines and waiting periods for taking various measures are of great importance.

According to statistical data, 949 authorized adoptions took place in Hungary in 2000, while in 2022 there were 1254. The number of successful adoptions has therefore certainly increased. However, there has been a decrease in the number of registered adoptable children in recent years. In 2004, 2161 children were waiting to be adopted, while in 2022 only 1741 children were registered in the system. Of these, 441 were children with disabilities or long-term illnesses, 410 were children under three years of age, and 625 were over 10 years of age. The number of registered adoptive persons is also interesting. While in 2004, there were 1184 people seeking adoption, by 2022 this number has increased to 3016. Comparing the number of potential adoptive parents with the number of children waiting for adoption, it can be observed that the former is higher, while the latter is slightly more than half, which leads to the conclusion that social factors also prevent children waiting for adoption from entering a family environment as soon as possible.[87]

There are many reasons for the people considering adoption why they come to the decision to go through the procedure. Most spouses choose adoption because of infertility, while singles see adoption as a solution because of their living situation. In these cases, the youngest possible children are the first to come, and healthy children are the priority. The number of people who decide to adopt primarily for charitable reasons is negligible, and they are typically the ones who have older, disabled or chronically ill children.[88]

87 All statistical data is available here: https://www.ksh.hu/stadat_files/szo/hu/szo0014.html (Accessed: 28.11.2024)

88 Bátki, A.: Amikor a gyerekek és a szüleik egymásra találnak – Az örökbefogadó családok. In: Bátki, A. - M. Ribiczey, N. (eds.): Családhatározó – A sokszínűség pszichológiája. Opten Press, Budapest, 2021. p. 220-221.

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Acts and Decrees

Convention on the Rights of the Child

Act CLXV of 2020 on the amendment of certain acts relating to justice

Act XXVIII of 2017 on Private International Law

Act V of 2013 on the Civil Code

Act CLXXVII of 2013 on transitional and enabling provisions related to the entry into force of Act V of 2013 on the Civil Code

Act C of 2012 on the Criminal Code

Act XXXI of 1997 about the Protection of Children and Guardianship Administration

Government Decree 72/2014 (III.13.) on the activities and licensing of public benefit organizations facilitating adoption and following adoption

Decree No 29/2003. (V.20.) on professional and examination requirements for the training of alternate parents, foster parents and family day-care operators, as well as on pre-adoption counselling and preparation courses

Government Decree 149/1997 (IX.10.) on guardianship authorities and child protection and guardianship proceedings

Decisions of the Hungarian Courts

BH2022.14.

BH2020.11.

BH2015.68.

BH2010.185

BH2000.19.

BH2001.323.

BH1996.480.

Pfv.II.20.666/2020/11.

Pfv.II.20.749/2019/6.

Regulation of adoption in Poland

Márta Sarolta Deák*

1. Introduction

Adoption is an institution that can fundamentally alter lives. Its purpose is to create a stable, loving environment for a child to grow up in and create a family. It is a corrective measure in the case of suboptimal circumstances such as inadequate, incapable or even abusive parenting and other situations putting children at risk.

In Poland, adoption is regulated by an excessive legal framework designed to ensure the wellbeing and rights of both the adopted children and the adoptive parents. Understanding this legal framework is crucial for anyone concerned. The process involves people of many different occupations from the child up for adoption to prospective adoptive parents and the professionals such as legal experts, social and healthcare workers and also state administrators. There is also a broad scale of adoption cases. The most common cases are the adoptions of children under 2 years of age, including newborns and infants as the most favoured group of children up for adoption.

The present article aims to provide a clear, comprehensive introduction to the legal aspects of adoption in Poland. The Polish adoption system is influenced by both national legislation and international agreements. The legal landscape of adoption in Poland is complex, involving not only the procedural aspects of adopting a child but also the principles of children's rights, parental rights, and the importance of ensuring the best interests of the child.

The necessary requirements and conditions will be outlined in this article. Additionally, we will explore each step of the adoption journey, from the

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initial application process through to final adoption orders, offering a step-by-step breakdown of the legal procedures, necessary documentation, and further remarks from the legal practice and literature.

2. The legal framework of adoption

To understand the nature of the adoption procedure in Poland, one has to consider many different approaches laid down by the broad Polish legislation. The legal framework is particularly diverse, the relevant legal acts are plenty. It is important to highlight that the legal framework surrounding adoption in Poland is heavily influenced by the principle of the best interests of the child. This principle is central in decision-making at every stage of the adoption process, from initial evaluations to post-adoption monitoring. This means that each adoption case has to be carefully monitored by courts and authorities to ensure that the adoption in that case would be a suitable and beneficial decision for the child's well-being, emotional stability, and development. Adoption has an objective and subjective side and both are equally important.

2.1. International law

Pursuant to Article 9 of the Constitution of the Republic of Poland[1] (hereinafter referred to as the Constitution), Poland shall respect international law binding upon it. Therefore the relevant international agreements that have been ratified by Poland must be taken into consideration.

International conventions have recognized every child's fundamental right to be raised in a loving family that provides a supportive environment and security for their mental, physical and spiritual development. In addition to being brought up in his or her own family, this fundamental right also includes the right to substitute protection.[2] A striking example to this

1 The Constitution of the Republic of Poland.

2 Substitute protection under Article 20 of the UN Convention on the Rights of the Child includes placement with a family, guardianship under the kafalah of Islamic law, adoption, or placement in appropriate children's institutions if necessary.

is the case of a child who for some reason cannot be cared for in his or her own family.

According to the UN Convention on the Rights of the Child (hereinafter referred to as the UN Convention) states have an obligation to undertake to provide protection and care to the child as is necessary for his or her wellbeing. The Geneva Conventions on armed conflicts also highlight children as an especially vulnerable group and establish special norms concerning them.

Furthermore, some international conventions are specifically aimed to regulate adoption. Amongst these the most important ones are the European Convention on the Adoption of Children[3] (hereinafter referred to as the Strasbourg Convention) and the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter referred to as the Hague Convention) in force since 1 October 1995[4]. Both have been ratified by Poland therefore binding.

2.2. The Constitution

The Constitution has a large number of relevant articles. To understand the nature of adoption it is necessary to unpack each significant article and the related legal interpretation. The Constitution itself underlines the basic purpose of the Republic of Poland which is being the common good of all its citizens.

Article 18 recognizes marriage as the union of a man and a woman. Furthermore, takes it under the protection of the Republic of Poland. This constitutional protection extends to the family, motherhood and parenthood as well. This means that marriage bears a heterosexual character[5], same-sex unions are not recognized by the Constitution. The use of singular nouns also indicates the principle of monogamy[6]. However, it must be noted that the institutions mentioned in the rest of the article remain undefined. The concept of 'family' (*rodzina*) does not have an exact definition in Polish

3 European Convention on the Adoption of Children, 2008.

4 Konwencja o ochronie dzieci i współpracy w dziedzinie przysposobienia międzynarodowego, sporządzona w Hadze dnia 29 maja 1993 r. (Dz. U. z 2000 r. Nr 39, poz. 448 z późn. zm.).

5 Garlicki, 2016, art. 18.

6 Banaszak p. 147.

constitutional provisions. This suggests that family is rather a sociological notion, not a legal one. This leads to the conclusion that the constitutional concept of family refers to any permanent relationship between at least two persons, usually but not necessarily based on marriage, consanguinity or other kinds of socially recognized affiliations. Family cannot be treated as a separate, self-contained subject of constitutional rights because these rights are vested only in its individual members[7]. Considering there is no such rigid constitutional definition of family as in the case of the institution of marriage, there are no explicit constitutional limitations on family placement in adoptions.

Article 47 recognizes everyone's right to legal protection of his or her private and family life. Coinciding with the previously mentioned absence of the exact definition of 'family', the present article also omits precise wording and leaves much to interpretation.

The following articles establish parental rights such as the right to rear their children in accordance with their own convictions. Nevertheless, it is also mentioned that such upbringing must reflect the child's freedom of conscience and belief and also his or her convictions. The degree of the maturity of the child must be taken into consideration. Additionally, Article 53 on freedom of conscience and religion recognizes the parental right to provide their children a moral and religious upbringing and teaching in accordance with their convictions. Upbringing (*wychowanie*) also lacks a constitutional definition however, legal literature recognizes this as a general process of the formation of the human personality. Furthermore, it is important to highlight that Article 48 does not evaluate upbringing as good or bad[8], therefore it is not possible to make the distinction between parental practices on a constitutional level.

Paragraph 5 of Article 68 emphasizes the public authorities' obligation to support the development of physical culture, particularly amongst children and young persons.

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7 See Wyrok TK z 4.09.2007 r., P 19/07, OTK-A 2007, nr 8, poz. 94. and Wyrok TK z 9.09.2003 r., SK 28/03, OTK-A 2003, nr 7, poz. 74.

8 Sarnecki art. 48.

Article 70 concerns the right to education and establishes compulsory education to 18 years of age. Anyone under the age of 18 must be given the opportunity to attend a public school, unless their parents or guardians choose to attend a non-public school. The right to choose schools for their children other than public ones is reserved to the parents.

Subsequently, the following articles regulate the basics of some fundamental family law matters.

The provisions of Article 72 mirror the parental rights laid down by preceding paragraphs, specify children's rights, parental and State obligations. As a general rule the protection of children's rights is guaranteed in the Republic of Poland and everyone has the right to demand the state to protect children from violence, cruelty, exploitation and actions which undermine their moral sense. Furthermore, the article provides substitute protection establishing that a deprived of parental care shall have the right to care and assistance provided by public authorities. It is also noted that the public authorities and other responsible persons shall consider and give priority to the views of the child if he or she is capable to express his or her opinion.

Moreover, Article 72 establishes the institution of the Ombudsman for Children's Rights (*Rzecznik Praw Dziecka*). The Ombudsman shall take measures to ensure the full and harmonious development of the child, with respect for his or her dignity and individuality. The Ombudsman shall protect children's rights in particular (1) the right to life and health protection, (2) the right to be raised in a family, (3) the right to decent social conditions and (4) the right to education.[9]

2.3. Family Code

Following the articles of the Constitution, the relevant other provisions regulate the more objective rules in connection with family law and adoption. Adoption (*przysposobienie*) is outlined by the regulations of Section II of Title II of the Family and Guardianship Code (*Kodeks rodzinny i opiekuńczy*) of 25 February 1964[10] (hereinafter referred to as the Family Code).

9 Ustawa z dnia 6 stycznia 2000 r. o Rzeczniku Praw Dziecka.
10 Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy.

Article 114 of the Family Code states that only a minor shall be adopted and only for his or her sake, thus highlighting the purpose of adoption, which serves the best interests of the child. The minority requirement must be met on the date of the adoption application. It is not possible to adopt adults. However, apart from defining the conditions, the Family Code also misses the chance to define family or adoption itself. Therefore outlining the nature of these institutions is left for the legal practitioners and scholars.

2.4. Other sources of national law

Additional provisions on adoption proceedings are laid down in the Law of 9 June 2011 on Family Support and the Foster Care System (*Ustawa z dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej*[11], hereinafter referred to as the Family Support Act) and in the Code of Civil Procedure (*Kodeks postępowania cywilnego*).[12]

The detailed rules on the adoption training course are set out in the Regulation of the Minister of Labour and Social Policy (*Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 9 grudnia 2011 r. w sprawie szkolenia dla kandydatów do przysposobienia dziecka*)[13]. In addition to the above-mentioned legislation, the Polish Civil Code (*Kodeks cywilny*)[14] and the Law on Family Status (*Prawo o aktach stanu cywilnego*)[15] also contain provisions relating to the legal effects of adoption.

2.5. The purpose of adoption in the legal framework

To conclude the overview of the legal framework concerning adoption in Poland, it is clear that the purpose of adoption is to ensure that the child's best interests prevail. To safeguard the rights and concerns of the child bear

11 Ustawa z dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej.
12 Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego.
13 Rozporzadzenie Ministra Pracy i Poliyki Społecznej z dnia 9 grudnia 2011 r. w sprawie szkolenia dla kandydatów do przysposobienia dziecka.
14 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny.
15 Ustawa z dnia 28 listopada 2014 r. Prawo o aktach stanu cywilnego.

a strategic relevance to the states considering that on the long run, a harmonious upbringing proves to bring benefits on many fields of interest e.g. economy and innovation. The basic function of adoption is to provide the child with a substitute, permanent (stable) family environment when the child is deprived of parental care (natural family environment) because he or she has no parents (he or she is a natural orphan) or when they are unable to provide him or her with such an environment (he or she is a social orphan).[16] It is widely noted that the Polish adoption system strongly empowers the adoptive child and focuses on his or her welfare.[17]

Through the eyes of the law, adoption is an optimal institution. Let us take a more detailed view of the procedure to evaluate the legal framework.

3. The conditions of adoption

The Family Code provides a broad description of the requirements to be met in order to conclude a successful adoption procedure. The subject of these conditions are the adoptive children, the prospective adoptive parents and miscellaneous involved persons. In the following paragraphs we attempt to outline these objective and subjective requirements.

3.1. The adoptable child

The Family Code recognizes four conditions on the part of the adoptee who may:

– be a minor at the time of the adoption (Article 114);

– being alive at the time of the adoption (Article 117);

– give consent to the adoption or be heard in the procedure (Article 118) and

– be the primary beneficiary of the adoption.

These requirements have a lot of different elements to unpack.

16 Bagan-Kurluta, 2023, art. 114.
17 Bagan-Kurluta, 2023, art. 114.

3.1.1. Minority

Firstly, as stated before, Polish law only recognizes the adoption of a minor. This is a cardinal requirement on the adoptive child's part. It is only possible to adopt a person under 18 or 16 years of age. The latter strictly concerns the case of women whose marriage has been authorised by the guardianship court (*sąd opiekuńczy*). The term 'minor' is not explicitly defined by law but can be deducted by the Civil Code that establishes that an "adult is one who has reached the age of eighteen."[18] When looking for a definition for the term 'minor', one has to look further to the 1st Article of the Convention on the Rights of the Child to conclude that "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[19]

The application for adoption should be filed before the prospective adoptee comes of age. Nevertheless, reaching the age of majority after the submission of the application is not an obstacle to the ruling of adoption. The purpose of the institution of adoption is not to create a family environment only until the child reaches the age of 18 but for a longer period of time.

It must be noted that statistics show that the most common type of adoption is of children under 7 years old, with most children adopted before the age of 2. The figures show that the chances of adoption decrease radically with age.

3.1.2. Being alive

Secondly, only the living could be adopted. This provision concerns mainly inheritance issues, but it is important to highlight nevertheless.

Moreover, Article 117 of the Family Code states that in the case of the adoptive parent's death it is possible to readopt, thus making it possible for the adopted child to enter into another adoption if the adoptive parent dies before the child comes of age.

18 See Article 10 of the Civil Code.
19 See Article 1 of the Convention.

3.1.3. Consent

Generally, the consent of the child is not an obligatory element in adoption proceedings. In many cases it is not possible to obtain expressive consent due to the child's age. However, pursuant to Article 118 of the Family Code, successful adoption requires the consent of the child to be adopted if he or she has reached the age of 13. The court may also decide to grant an opportunity for a younger child to express his or her views on the adoption. This may only be permitted if the child is younger that thirteen and is completely aware of the significance and consequences of the adoption. The right of the minor to be heard in proceedings stems from the Constitution and the Hague Convention.[20] This provision is also highlighted by Article 4a of the Family Support Act, emphasizing its importance.

The consent of the child should be expressed during the adoption proceedings in court. It should be performed in person. Written consent is only permissible as an exception.[21] Therefore, consent cannot be given through a legal representative. It must be noted that the consent should be given freely, clearly, unambiguously and in the state of a sound mind.

3.1.4. The best interests of the child

The principle of the best interest of the child is a key element in adoption. This has been emphasised many times by the Supreme Court. There are many aspects to this principle to consider ranging from the place of residence to the adoption of siblings. The Polish legal system does not provide a definition for the 'best interests of the child', but the Polish legal doctrine and legal literature have made numerous attempts to form this doctrine.

The principle of the child's welfare could be derived from Article 72 of the Polish Constitution which establishes the State's obligation to protect the rights of the child.[22]

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20 Jędrejek, art. 118.
21 Bagan-Kurluta, 2023, art. 118.
22 Stadniczeńko 172.

The doctrine of the best interests of the child in the adoption process consist of three main characteristics:

– it is an accumulation of values of an intangible and material nature necessary to ensure the proper physical and spiritual development of the child, preparing him or her for adult life in accordance with his or her talents;
– it is based on the security of ensuring the full and harmonious development of the child's personality, realised by upbringing in a family environment, in an atmosphere of happiness, love and understanding;
– it is evaluated by the situation of the child postulated in the light of the moral doctrine prevalent in our society and further defined in the legal provisions and established in the jurisprudence of the courts, and an idealistic model.[23]

Both the practice and the legislation generally follow the principle that the adoption of siblings should be sought jointly. Under Article 166a of the Family Support Act, siblings should, as a general rule, be placed with a single adoptive family. An exception to this principle shall be made if the adoption centre responsible for the qualification of the child for adoption in the country considers that the placement of the child with the siblings in an adoptive family is not in the best interests of the child, or if the adoption centre responsible for the qualification of the child for domestic adoption has not found a family either in the Republic of Poland or outside the territory of the Republic of Poland which would adopt the siblings together, taking into account the best interests of the child. In such cases the competent adoption agency shall initiate a search for candidates for sibling adoption. The only possibility of separating the siblings is therefore in the best interests of the children.[24] Article 165 of the Family Support Act also establishes that if a sibling of a previously adopted child becomes adoptable, the adoptive family must be informed immediately, thus opening up the possibility of the brothers and sisters growing up together. In such cases, adoption centres have a duty to help the family already adopting a sibling to become open to adopt the sibling, provided that this does deter the interests of the adopted child and the other biological children of the adoptive parents.

23 Bagan-Kurluta, 2023, art. 114.
24 Benyusz, 2023, p. 245.

Another element to consider is the best interests of the child in the case of an international adoption. In this process the child is taken out of a familiar environment into an unknown one. Pursuant to Article 167 of the Family Support Act, a child may be qualified for international adoption if this is the only way to provide a suitable substitute family environment for the child, unless there is a relationship of consanguinity or affinity between the adopter and the adopted child, or if the adopter has already adopted a sister or brother of the adopted child.

3.2. Adoptive parents

Concerning the prospective adoptive parents, many conditions had been laid down by the Family Act. Subsequently, adopters may:

- be alive at the time of the adoption (Article 117);
- express his or her will to adopt (Article 117);
- obtain the spouse's consent to the adoption insofar the adopter is married (Article 115 and 116);
- be of an appropriate age, which generally concerns and adequate age difference between the adoptive parent and the adopted children (Article 114^1);
- be legally fully capable (Article 114^1);
- bear personal qualifications that justify the assumption that he or she will duly fulfil the duties of an adoptive parent and
- have a qualification and a certificate of completion of a training course organized by the adoption centre.

3.2.1. Being alive

It is clear that only persons that are alive are fully capable of adequately fulfil the role of an adoptive parent. Furthermore, Article 117 of the Family Code has to be referred again as it states that in the case of the adoptive parent's death it is possible to readopt.

3.2.2. Expressed will

In order to commence adoption proceedings, the expressed will to adopt needs to be explicitly declared by the adopter. The law does not specify this requirement further.

3.2.3. The spouse's consent

Joint adoptions are only possible for spouses. By definition, marriage is an institution between a man and a woman, therefore other social arrangements (e.g. civil partnerships, same-sex relationships) are excerpt from the possibility to adopt regardless of the circumstances (e.g. exclusivity, duration, etc.) of the relationship. Taking a look at the practice, it is clear that the adoption agencies favour adoptions into families of married couples. In this case it is compulsory to obtain the consent of the spouse, unless he or she lacks legal capacity or there are insurmountable obstacles to communication.

3.2.4. Legal capacity

Under Article 114[1] the possibility to adopt is reserved for persons with full legal capacity. Accordingly, a minor or a person with limited legal capacity cannot become an adoptive parent. There are no exceptions from this rule.

3.2.5. Age

Following up on the abovementioned provisions, it is clear that the law does not permit minors to adopt. Therefore, there is an age limit of adoptive parents which is 18 years of age. An exception to this is the instance when someone comes of age by marriage in which case the age limit is 16 years of age.

Adoptive parents must be at least 18 years older than the child, but generally, the upper age limit for adoption is not strictly defined, though courts may assess the ability of older individuals to raise a child effectively. For

further clarification, one must firstly refer to the Strasbourg Convention which notes the unacceptability of a too small age difference. Pursuant to Article 9, a "child may be adopted only if the adopter has attained the minimum age prescribed by law for this purpose, this minimum age being neither less than 18 nor more than 30 years. There shall be an appropriate age difference between the adopter and the child, having regard to the best interests of the child, preferably a difference of at least 16 years." However, there are no rigid limits set forth by Polish law other than the expressed legislative intent was to recreate the relationship in a natural family setting. In a widely debated decision, the Supreme Court ruled that the age difference of 54 years cannot be considered adequate which is a highly interesting example.[25]

3.2.6. Official qualifications

In order to ensure that qualified persons become adoptive parents, it is obligatory to complete a course. The details of the programme and the evaluation are set forth in the Regulation on the Schooling of Adoption Candidates.

The Regulation establishes a training course which requires active participation. The curriculum of the course is scheduled in accordance with Article 2 of the Regulation. Candidates gain knowledge in family law, basic knowledge on medical issues concerning children and methods on ensuring a healthy development of the child. The course also aims to strengthen the right motivation for adoption and filter out the candidates with wrong ambitions. The Regulation frequently indicates that the training should take form in a workshop, thus highlighting the active and cooperative way of educating the candidates. The organization of the training courses falls within the scope of the various Polish adoption agencies.

25 Postanowienie SN z 13.02.1980 r., III CRN 181/79, OSNC 1980, nr 10, poz. 193.

3.2.7. Personal qualifications

Apart from the objective qualifications listed above, there are several subjective, personal requirements for the adoptive parents. These are not explicitly defined or specified by the legislator. The catalogue of these personal qualifications is quite open as it could be derived from the provisions of Article 96 of the Family Code. Accordingly, parents are obliged to take care of the child's physical and spiritual development and to prepare him or her properly to work for the good of society according to his or her talents. Therefore, when evaluating the competence for adoption, adoption centres review the candidates' capability to perform these tasks.

In accordance with the legal interpretation, the catalogue of such merits consists of the following:

– upright character, ethics and education;

– adequate mental and moral maturity;

– good mental and physical health;

– personal belief system which does not pose a threat to the child (e.g. eliminating practices that refuse certain medical treatment);

– no indication of paedophilic tendencies or homosexual orientation;

– adequate housing and financial status that will provide a stable environment for the child.[26]

Furthermore, adoption centres investigate the real motivation behind the adoption. It is crucial to discover as this tends to influence the attitude towards the adopted child. An adoptive parent is likely to treat a child slightly differently if expects some things from him or her, e.g. saving the marriage or provide assistance in old age. Such expectations could easily deter the child's psychological development.

Additionally, there are some more subjective personal characteristics which are usually favoured by Polish adoption agencies. In terms of life and relationship status, married heterosexual couples and female singles

26 Bagan-Kurluta, 2023, art. 114(1)

are more likely to be selected as adoptive parents. Catholic or Christian religious views are also preferred.

3.2.8. Exclusions

The law makes some exclusions amongst prospective adoptive parents. Therefore, individuals convicted of certain crimes or suffering from severe mental disorders or a history of substance abuse make a person ineligible to adopt. The absence of a criminal record is a highly important aspect of the personal qualifications of the adoptive parents. What's more, convictions for an offence of sexual or immoral nature are immediately followed by exclusion.

Adoption for same-sex couples is impossible. Poland does not recognize the union of same-sex couples the same way as married ones. There are certain institutions linked to marriage which are not available for homosexual partnerships, for example tax exemptions based on family structure or spousal succession without a will. According to the parties' submissions in the case of Przybyszewska and others v. Poland[27] the applicants argued that same-sex partners could not adopt a child of one partner, even if they were raising the child together. Furthermore, some "of the applicants had taken mortgages together and were raising children, while fearing that in the event of the death of one of them, their children could be removed from the family and placed in public care." The applicants claimed that the exclusion of same-sex couples from marriage and its benefits poses a risk to their lives and has measurable consequences.

Nevertheless, the so-called rainbow families are present in Poland. It is difficult to determine the exact number as the reports are somewhat inconsistent. According to the Rainbow Families' Foundation (*Fundacja Tęczowe Rodziny*) there are 150 thousand of children living in rainbow families, being raised by same-sex couples. There are many different situations as some of the children are biological children from a previous heterosexual relation-

27 Case of Przybyszewska and Others v. Poland https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-229391%22]} (Accessed: 10.2.2025)

ship or by artificial insemination. A large number of children in rainbow families are adopted. In this case, it is legally not possible to adopt as a couple. Only one of the partners will become the parent with all of the rights and obligations deriving from this relationship. The other partner has no legal relationship with the child.

In a recent case, the adoption application of a same-sex couple was dismissed. The couple had married in the USA. However, Polish law recognizes marriage as a relationship between man and woman, therefore a same-sex marriage under foreign law shall not bear the same rights and obligations as a marriage under Polish law. One of the partners had a child from a previous relationship and upon returning to Poland, the couple started the adoption proceedings so the other partner could also become a parent. The application was dismissed. The ruling of the Supreme Court pointed out that national and international law provide no basis for assuming that the general clause of the best interests of the child can determine the admissibility of adoption by persons of the same sex.[28] Subsequently, one could argue that adoption by same-sex couples could not have the same favourable effect on the best interests of the child, as other environments.

It must be noted that there is an ongoing political discourse concerning gay rights and other social issues. As the Polish society is traditionally conservative, drastic changes are not likely to happen, but one should keep an eye on the developments, nevertheless.

3.3. Others

There are other persons involved apart from the adoptee and the adoptive parents. Such persons are the birth parents of the child, the guardian of the child and the spouse of the adoptive parent. Mindful of some exceptions, those listed above could also have to meet requirements in order to successfully conclude the adoption.

28 I CSK 2467/24, Rozumienie małżeństwa na gruncie art. 121(1) § 1 k.r.o. - Postanowienie Sądu Najwyższego. https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/i-csk-2467-24-rozumienie-malzenstwa-na-gruncie-art-121-523869166 (Accessed: 10.2.2025)

The consent of the child's biological parents is typically required unless the parents' rights have been terminated by the court (in cases of abuse, abandonment etc.). A child may be adopted if his or her birth parents have consented to the adoption[29] unless the parents have been deprived of parental authority or are unknown, or if there are insurmountable obstacles to communication with the birth parents.

Polish law recognizes the institute of the 'blanket consent' (*zgoda blankietowa*) established by Article 589 of the Code of Civil Procedure. Accordingly, parents may consent to the future adoption of their child without naming an adopter. Parents who have given such consent shall not have parental authority and the right of contact with the child. They may revoke this consent by declaration before the guardianship court, but no later than before the initiation of the adoption procedure. The provisions on adoption by parental consent without naming the adopter shall apply *mutatis mutandis* if one of the parents has given such consent and the consent of the other parent is not necessary for the adoption or if the parents of the adoptee are unknown or deceased.

If the child is under guardianship, the consent of the guardian is required for adoption. However, the guardianship court may, due to special circumstances, decree adoption even in the absence of the guardian's consent, if the welfare of the child requires it.

It also must be repeated that if a child is under the age of 13, the consent of the child may also be needed, depending on the child's maturity. For further reference, see section 3.1.3. of the present article.

4. Types of adoption

In Poland there are many different types of adoption. Firstly, one has to consider domestic adoption and its three different forms. Secondly, international adoption (*przysposobienia zagraniczne*) is also an important factor to assess.

29 See Article 119 of the Family Code.

4.1. Domestic adoption

Domestic adoptions involve the adoption of children within the Republic of Poland. This is the most common type of adoptions in the country and is governed by domestic law. Polish law recognises three types of domestic adoption. Depending on the legal effects of adoption, a distinction is made between (1) full adoption (*przysposobienie pełne*), (2) incomplete adoption (*przysposobienie niepełne*) and (3) so-called complete adoption (*przysposobienie całkowite*).[30] Full adoption is considered the main type of adoption, it is of primary and fundamental importance, it is adjudicated always, except for two situations expressly indicated in the Family and Guardianship Code.[31] In principle, therefore, the full adoption relationship arises ex lege, in the absence of the exceptions.

4.1.1. Full adoption

A full adoption, as regulated by Article 121 of the Family Code, is the most common form of adoption and legally creates the same relationship as the one between parents and their biological children. The provisions of the Family Code have to be assessed with the Strasbourg Convention which provides a more general and broad regulation.

The legal effects and basic characteristics of a full adoption are as follows:

- a relationship arises between the adopter and the adoptee such as between parents and children (artificial kinship);
- the adoptee acquires the rights and obligations arising from kinship in relation to the adopter's relatives;
- the adoptee loses his rights and obligations towards his blood relatives, and the same applies to the rights and obligations of the blood relatives towards the adoptee (e.g. alimony, inheritance, maintenance, parental rights and obligations);

30 Regulska, 2019, p. 213.
31 Bagan-Kurluta, 2023, art. 121.

– the effects of the adoption shall extend to the adopted person's descendants;
– as a general rule, it is assumed that the adoptee should be able to acquire the adopter's surname or add his surname to his own;
– if the adopter adopts the child of his or her spouse, parental custody is shared from the moment of the adoption.

The full adoption is an open adoption which means that the biological parents participate in the process of placing the child in an adoptive family. It is also possible to maintain contact with the biological parent(s).

The consequence of adoption is the severance of the legal-familial ties of the adoptee with the biological family and the establishment of a legal relationship (artificial kinship) with the adoptive parent's family, which applies to both private-law relations arising from kinship (e.g., inheritance, alimony) and relations regulated by public law. Full adoption results in the creation of a maintenance obligation, to which the relevant provisions of the Family Code apply (Articles 128, 129 and 133). The effect of adoption is to create a family relationship between adopters and the adoptee that imitates the natural relationship existing between biological parents and their child. Accordingly, the adoptee and his relatives are obliged to provide maintenance, and if necessary, the means of upbringing, to the adoptee, and vice versa – the adoptee is under a maintenance obligation to them.

In matters of inheritance, the law grants a child from a marriage the right to inherit from the father or mother, the adopted child shall be treated in this respect as if he were the adoptive parent's biological child. The rules of succession applicable in the case of a full adoption are set out in Article 936 of the Polish Civil Code. Accordingly, the adopted person and his descendants inherit from the adoptive parents and the adoptive parents' relatives in the same way as the biological child. However, neither they nor their descendants inherit from their biological parents or their relatives and *vice versa*. In the case of a child being adopted by only one member of the couple, the effects of the adoption do not extend to the other spouse.

In the case of a full adoption, in order to keep the adoption secret, the law on the registration of marital status provides for two ways of amending the child's birth certificate. Firstly, at the request of the adopted child aged 13 or

over, the guardianship court may order a new birth certificate to be issued in which the adopters are listed as the parents of the adopted child, and secondly, in the absence of a court decision, an amendment may be added to the birth certificate naming the adopters as parents. In this case, the adoptive parents are listed as the child's parents on the abbreviated version of the birth certificate.[32]

The decree of full adoption is constitutive, it has effects *erga omnes* and for the future (*ex nunc*). The adoption decree enters into force when it becomes final. Such a decree cannot be modified or revoked by the guardianship court.

Ultimately, it is possible to dissolve adoption for justified reasons. However, the principle of the best interests of the child must be taken into consideration in this case too. The termination shall not be permissible if the adopted minor would suffer from the consequence.

4.1.2. Incomplete adoption

Incomplete adoption is very rare and only performed when it serves the best interests of the child. At the request of the adopter and with the consent of the persons whose consent is necessary for the adoption (e.g. biological parents), the guardianship court shall rule that the effects of the adoption shall consist solely in the relationship between the adopter and the adopted person. This means the incomplete adoption creates a kinship only between the adoptive parent and the adopted child. Furthermore, it has no effect on the other blood relatives of the adopter, so the relatives of the adoptive parents do not automatically become relatives of the adopted child. To illustrate this situation with a practical example, the adopted child receives a share of the estate of the adoptive parent in the same way as the adoptive parent's biological children but has no rights in relation to the estate of the adoptive parent's relatives.[33] Nevertheless, the effects of the adoption shall extend to the adopted child's descendants.

32 Benyusz, 2023, p. 249.
33 Benyusz, 2023, p. 250.

Contrary to complete adoptions as specified in the next chapter, a new birth certificate is never issued in incomplete adoptions. The adoption certificate must be attached to the original birth certificate as a supplement. It is a simplified certificate listing the biological parents as the parents of the child. However, on the request of the adopted child the court may switch the listing and register the biological parents on the supplement certificate.

Pursuant to Article 124 of the Family Code, the request of the adopter and with the consent of the persons whose consent is necessary for the adoption, the guardianship court may change the incomplete adoption to a complete one. This is only possible if at the time of the request the person subject to the adoption is still a minor.

With respect to inheritance matters in incomplete adoption cases, pursuant to Article 937 of the Civil Code, the adopted child shall inherit from the adoptive parent like biological children. However, the adopted person and his descendants shall not inherit from the adoptive parent's relatives, and the adopter's relatives shall not inherit from the adoptee and his descendants.

With regard to the termination of an incomplete adoption, the provisions regulating the dissolution of a full adoption shall apply.

4.1.3. Complete adoption

Finally, the provisions regulating the so-called complete adoption are laid down by the Family Code. This type of adoption is the most powerful one in terms of its legal effects. The subjects are usually newborn children and infants.

Pursuant to Article 124 of Family Code in complete adoption cases the biological parents agreed before the guardianship court to give the child up for adoption without naming the adoptive parent. A complete adoption is only an adoption in which the parents have consented to the future adoption of their child without naming the adopter, i.e. blanket consent.[34] This type of unconditional consent can be given from the 6th week after the birth of the

34 Bagan-Kurluta, 2023, art. 124.

child. In practice, the consent is usually given by single mothers.[35] After the conclusion of a complete adoption it is not permissible to determine the origin of the adopted person by acknowledgment of paternity, judicial determination or the denial of his or her origin, determination of the ineffectiveness of the acknowledgment of paternity. This method completely eliminates the 'natural origin' of the child. This is due to the blanket consent by the biological parents which makes the adoption complete and irreversible, severing the existing family ties.

As the adoption is secret, the adopted person cannot keep the original surname. He or she will be given the same surname as the adoptive parents. Additionally, adoptive parents can change the child's first name too in some cases. Because of these fairly drastic changes, the adopted child immediately receives a new birth certificate listing the adoptive parents as the parents thus making it impossible to trace the biological origin of the child.

The characteristics of complete adoption are as follows:

– the adopted person loses his or her previous civil status;
– the child is permanently integrated into the new family and acquires the rights and obligations arising from kinship (in this respect it is practically the same as a full adoption);
– the adopted children acquire a new identity which is expressed mainly by the changes in his or her name;
– the previous civil status of the adopted child is deemed inadmissible, it is impossible to make claims based on the previous civil status;
– the total secrecy of the adoption procedure, meaning the severance of any contact between the adopted child and the biological relatives at any stage of the proceedings.

Pursuant to Article 125[1] of the Code of Civil Procedure, complete adoption cannot be dissolved under Polish law. Since the decision on adoption is a constitutive decision, the final decision on the legal nature of this adoption as complete is binding on the criminal court and cannot be challenged in the course of criminal proceedings.[36]

35 Benyusz, 2023, p. 249.
36 Bagan-Kurluta, 2023, art. 124(1)

4.2. International adoption

When Polish citizens adopt children from other countries, they must comply with both Polish law and the legal requirements of the child's country of origin. The Hague Convention is a key element in ensuring these adoptions are conducted in the best interests of the child and in accordance with international standards. One has to distinct between international adoptions to Poland and international adoptions from Poland.

In the latter case, Article 114^2 of the Family Code emphasises the importance of the best interests of the child. This principle dictates that international adoption which results in a change of the adopted child's previous place of residence in the Republic of Poland to a place of residence in another country may take place if this is the only way of ensuring a suitable substitute family environment for the him or her. The law notes an exception from these rules which shall not apply if there is a relationship of kinship or affinity between the adopter and the adopted person, or if the adopter has already adopted a sister or brother of the adopted person.

5. The procedure

During the adoption procedure, many extremely sensitive issues are dealt with. Therefore it is highly important to make sure that the process is as seamless as possible. Nevertheless, it can be lengthy, sometimes be delayed due to complications in the legal procedures, such as parental consent issues or difficulties in matching children with adoptive parents.

Adoption proceedings are generally carried out by adoption centres (*ośrodek adopcyjny*) guided by the welfare of the child and respect for the child's rights in carrying out its tasks. Adoption centres cooperate with the local environment, in particular with other competent entities supporting the family and the foster care system, organisational units of social assistance, courts and their subsidiary bodies, educational and medical institutions as well as churches, religious associations and social organisations.

While dealing with many responsibilities concerning the adoption process, adoption centres perform their tasks free of charge.

NGOs have a role to play in encouraging, assisting and supporting adoption and protecting children waiting to be adopted. Some NGOs take over the tasks of the competent adoption centres in the voivodship and receive state support to carry out this task. One organisation worth mentioning is the 'Pro Familia' Association of Adoptive and Foster Families[37] (*Stowarzyszenie Rodzin Adopcyjnych i Zastępczych 'Pro Familia'*). A very important criteria for NGOs working in the field of adoption is that they cannot accept financial compensation from either the adoptive parents or the birth parents, as this is a criminal offence under Polish law.[38] Another one is the Adoptive Families Foundation (*Fundacja Rodzin Adopcyjnych*) which operates the so-called Intervention Preadoption Centre (*Interwencyjnego Ośrodka Preadopcyjnego w Otwocku*). There are other organizations not explicitly specified in adoption matters but linked to it due to the nature of their activities.

5.1. Preliminary evaluation

In the preliminary stage of the adoption process, the main actors are the adoption centres which have exclusive competence to declare a child adoptable and to confirm the suitability and registration of adoptive parents.

Pursuant to Article 160 of the Family Support Act, adoption centres shall cooperate with adoptive candidates preparing them for the adoption. Such assistance shall be given particularly in the areas of pedagogical and psychological diagnosis of children and families and evaluating the development of the child. Prospective adopters undergo a home study conducted by a social worker or adoption agency. This study involves interviews, background checks, financial assessments, and home visits to determine whether the parents are suitable to adopt. Candidates also have to complete the previously mentioned training course on all things that concern adoptions.

37 https://profamilia.pl/ (Accessed: 10.2.2025)
38 Benyusz, 2023, p. 235.

Adoption agencies also prepare a complex analysis on the legal, medical, behavioural and educational background of the child as well as basic information such as the name of the child and the date of birth. The qualification for domestic adoption includes a psychological evaluation (particularly on the capability to create an emotional bond and on the relationship with the closest persons), determination of possible special needs, assessment on the legal situation of the siblings and an overall analysis on the child's situation. Within 30 days from the date of concluding the file on the child, the adoption centre shall decide whether to qualify the child for domestic adoption. Furthermore, adoption centres have an obligation to review the child's situation in every three months and update it if necessary.

Children declared adoptable are awaiting adoption in foster care (foster families or family foster homes) or in state-governed institutional care (e.g. various types of foster care institutions, intervention „pre-adoption" centres run by NGOs) while the adoption centre matches them up with potentially suitable adoptive candidates. This is typically where the first meeting between the child and the potential adoptive parents takes place.

5.2. Match

Once a child has been declared adoptable, the adoption centre selects a suitable parent for the child from the register of adoptive parents. Prior to the personal meeting, the adoption centre discloses the child's file for the potential adoptive parents to decide whether they want to meet the child. The meeting shall take place at a familiar environment in order to lessen the amount of stress for the child. It is advisable for the first meeting to take place at the foster parent's place. After a successful first meeting, other regular encounters should be organised. The purpose of these appointments is to build a relationship based on trust and develop a bond between the child and the potential adoptive parent.

5.3. Application

The adoption process shall commence with an application submitted to the local Family Court or adoption authority, which assesses the prospective adoptive parents. Pursuant to Article 585 of the Code of Civil Procedure, the guardianship court shall initiate proceedings at the request of the adopter which must be submitted to the guardianship court with jurisdiction over the adopter or the person to be adopted. The choice of court is up to the applicant.[39] The adoption application must indicate the adoption centre where the preliminary adoption proceedings were conducted. Upon the application the court requests the indicate adoption centre to provide a certificate proving that the prospective adoptive parent has completed a training course for candidates for adoption. Furthermore, the adoption centre shall issue an opinion on the candidate.

The application must express the will of the applicant to adopt. Additionally, other statements indicating consent may be needed, e.g. from the spouse, the biological parent or the child. In this case, it is necessary to attach these to the application. The court has exclusive jurisdiction to accept the consent of the birth parents, to designate the adoptive parent(s) and to authorise the adoption.

5.4. Court proceedings

After matching the adoptive parents with the child, a court hearing is held to ensure all legal requirements are met. The court has the competence to evaluate whether the adoption serves the child's best interests. Pursuant to Article 586 of the Code of Civil Procedure, the guardianship court shall decide on the adoption after a hearing. Consequently, it is not possible to skip this step, issuing a court hearing is absolutely necessary. Adoption cases at first instance shall be heard by the court with one judge and two jurors.[40] The court shall summon the adopter and the persons whose consent is required to the adoption.

39 Kuchnio, 2024, art. 585.
40 Kuchnio, 2024, art. 586.

As a rule, the hearing of the minor should be conducted in the presence of an expert psychologist, and the court also may order for it to take place outside of the courtroom in a safe location. This has been highlighted by the Supreme Court stressing that the obligation to hear the child does not have to be implemented exclusively in the form of a direct hearing of the child before the court, especially in the courtroom. In view of the fact that a direct contact with the court often has a detrimental effect on the child's psyche, the adjudicating court has the opportunity to learn about the child's position by means of its auxiliary bodies, such as the probation officer or the opinion of a diagnostic and consultation centre, or an expert psychologist.[41]

If everything is found to be in order, the court issues an adoption decree. Decisions made during the adoption process, including the refusal of adoption applications or the termination of parental rights, can be contested in court. The parties involved have the right to appeal certain decisions.

5.5. Post-adoption

Once an adoption is finalized, the court or relevant authorities may monitor the adoptive family for a period after the adoption to ensure that the new situation indeed serves the child's best interests. Pursuant to Article 160^2 of the Family Support Act, adoption centres assist the adoptive parents along the way by solving their difficulties concerning upbringing and care after the adoption. Adoptive parents can request counselling, therapy (either individually or as a family), pedagogical, psychological and legal assistance concerning family law issues. The specific framework and timeframe of the follow-up is determined by each adoption centre. Support for families can also take a number of other forms: individual or group counselling sessions, parent training. Group counselling sessions are an opportunity for adoptive parents not only to meet professionals from the adoption centres, but also to exchange experiences with other adoptive parents facing similar problems. Such guidance may be particularly needed if the adopted child has previously experience trauma or has special needs. Adoption centres also offer

41 Postanowienie SN z 16.12.1997 r., III CZP 63/97, OSNC 1998, nr 6, poz. 108.

assistance and help, on request, for adults growing up as adopted children and are having difficulties in finding out their origins and identity.

5.6. Termination of adoption

There are certain situations in which the termination of adoption seems to be the necessary step to take. In case such situation should arise, the court always examines the best interests of the child. The grounds for termination of adoption fall within the same category as the termination of parental rights. Therefore the main reasons for termination of adoption are abusive or neglectful behaviour, alcoholism or substance addiction, refusal to fulfil parental responsibilities or committing a crime against the child.

However, it is not always clear if the situation is indeed harmful to the child. In a recent case, the court ruled that difficult relations in the adoptive family do not justify the termination of adoption.[42] In such cases a careful and thorough investigation of the circumstances is absolutely necessary and the Polish judicial system supports this by emphasizing the importance of the best interests of the child.

6. Conclusion

Concluding our analysis on the legal aspects of adoption in Poland it is evident that the focus is on the best interests of the child. The legal framework is designed to protect the rights of children and ensure that the adoption process is carried out in a fair and transparent manner.

42 Partyk, 2018

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Regulation of adoption in Romania

Zsolt Fegyveresi* – Kinga Illyés**

1. Regulatory framework

In Romania, the rules on adoption are set out in Articles 451-482 of the Civil Code[1], Law No. 273/2004 on the Adoption Procedure (*hereinafter*: the "Adoption Act")[2] and the Methodological Rules for the Implementation of Law No. 273/2004 on the Adoption Procedure[3]. The Civil Code provides for the material conditions, legal effects, and termination of adoption. Articles 453 and 454 para. (2) of the Civil Code specifies that the procedure for adoption and the conditions and procedure for international adoption are governed by a separate law. Thus, the adoption procedure is regulated primarily by the Adoption Act already mentioned and, supplementing it, by Act No. 272/2004 on the Protection and Promotion of the Rights of the Child.[4]

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1 Civil Code of Romania, https://lege5.ro/App/Document/gi2tsmbqhe/codul-civil-din-2009 (Accessed: 26.5. 2025)

2 Law No. 273/2004 on adoption procedure, https://lege5.ro/App/Document/gezdqojygm4a/legea-nr-273-2004-privind-procedura-adoptiei (Accessed: 26.5.2025)

3 Methodological rules for the implementation of Law No. 273/2004 on adoption procedure, https://lege5.ro/App/Document/ha3tmmzxgm4a/normele-metodologice-de-aplicare-a-legii-nr-273-2004-privind-procedura-adoptiei-din-28072021 (Accessed: 26.5.2025)

4 Law No. 272/2004 on the protection and promotion of the rights of the child, https://lege5.ro/App/Document/gm4tcnrtha/legea-nr-272-2004-privind-protectia-si-promovarea-drepturilor-copilului (Accessed: 26.5.2025)

At the institutional level, the Government Emergency Ordinance No. 11 of 2014[5] established the National Authority for the Rights of Persons with Disabilities, Children and for Adoptions (*hereinafter*: "Adoption Authority")[6], which is responsible for the protection and promotion of the rights of children and persons with disabilities in Romania. At the county level, these tasks are performed by the General Directorate for Social Affairs and Child Protection (*hereinafter*: "General Directorate").[7] Domestic adoptions can also be facilitated by private organizations with a valid operating license. The above-mentioned legislation is complemented by a number of other secondary legislation, most notably Government Decision No. 233 of 2012, which regulates the services and activities that private organizations in Romania can perform in the framework of the internal adoption procedure.[8]

In Romania, adoption is regarded as a familial legal institution. As per the country's legal framework, adoption is the legal procedure through which filiation link is created between the adopter and the adoptee, as well as kinship links between the adoptee and the adopter's relatives.[9] The legislator defines adoption from the point of view of the purpose for which it is carried out, namely the creation of the bond of civil filiation between the adopter and the adopted person, as well as the bond of civil kinship between the adopted person and the adopter's relatives, from the date on

5 Government Emergency Ordinance No. 11/2014 on the adoption of some reorganization measures at the level of central public administration and for amending and supplementing some normative acts, https://lege5.ro/App/Document/ gm4tgmbygi/ordonanta-de-urgenta-nr-11-2014-privind-adoptarea-unor-masuri-de-reorganizare-la-nivelivelul-admi nistratiei-publice-centrale-si-pentru-modificarea-si-completarea-unor-acte-normative (Accessed: 26.5.2025)

6 National Authority for the Rights of Persons with Disabilities, Children and Adoptions ("*Autoritatea Națională pentru Drepturile Persoanelor cu Dizabilități, Copii și Adopții*"), http://andpdca.gov.ro/w/ (Accessed: 26.5.2025)

7 General Directorate of Social Assistance and Child Protection ("*Direcția Generală de Asistență Socială și Protecția Copilului - D.G.A.S.P.C.*"), https://www.dgaspc-cluj.ro/ (Accessed: 26.5.2025)

8 Decision No. 233/2012 on the services and activities that may be carried out by Romanian private bodies within the framework of the internal adoption procedure, as well as their authorization methodology, https://lege5.ro/ App/Document/ge2tenbwhaza/hotararea-nr-233-2012-privind-serviciile-si-activitatile-ce-pot-fi-desfasurate-de-catre-organismele-private-romane-in-cadrul-procedurii-adoptiei-interne-precum-si-metodologia-de-autorizare-a-acestora (Accessed: 26.5.2025)

9 Stoica and Ronea (Avram), 1993, p. 36-39.

which the court decision granting the adoption becomes final.[10] Adoption establishes a familial connection between the adopted person and the relatives of the adopter. Notably, this familial connection formed through adoption is not predicated on the biological circumstances of the child's birth, namely the conception by the birth parents. Instead, it is founded on the expressed will of individuals who, in accordance with the law, consent to the establishment of this familial bond, creating a civil and sociological kinship.[11] The basic aim of adoption legislation is to ensure that the child is brought up in a family.

Before the entry into force of the Civil Code in 2011, the rules on adoption were contained in the Family Code 1954. Until its amendment in 1997, the Code recognized two types of adoption: limited and full adoption. A limited adoption was an adoption where the adoptee and his descendants were legally related to the adopter, while retaining their family ties to their natural (blood) relatives. A feature of a full adoption is that the adoptee and his or her descendants are related to the adopter and his or her relatives in the same way as the natural child of the adopter, and the family ties between the adoptee and the natural parents and their relatives are severed.[12] Government Emergency Ordinance No. 25 of 1997 on adoption[13], and subsequently the Adoption Act, regulated only one type of adoption, namely full adoption.

2. Types of adoption

2.1. National and international adoption

Depending on the existence of the element of foreignness, the Civil Code and the Adoption Act recognizes two types of adoption, national and international adoption. An adoption is a national if both the adopter or the adoptive family (spouses) and the adoptee have their habitual residence in Roma-

10 Art. 469 of the Civil Code.
11 Popescu, 1960, p. 125.
12 Albu, Reghini and Szabo, 1977, p. 23-25.
13 Government Emergency Ordinance No. 25 of 1997 on adoption, https://legislatie.just.ro/Public/DetaliiDocumentAfis/11122 (Accessed: 26.5.2025)

nia.[14] International adoption is characterized by the adopter's or adoptive family's habitual residence differing from that of the adoptee.[15] Although the Civil Code does not explicitly delineate this distinction, Article 453 delegates the formulation of conditions and procedures for international adoption, as well as its implications on the child's nationality, to a special law. International adoption is generally understood in a broad sense, as an adoption that includes one or more foreign elements. The concept of international adoption in private international law, interpreted from the perspective of conflict of laws, may give the impression that an adoption would be international if a foreigner adopts a child who is a citizen of another state. This view, although correct from the point of view of private international law, is not appropriate from the point of view of the need to protect the child in an international adoption. In this respect, it follows from Article 2 para. (1) of the Hague Adoption Convention that an adoption is international if the habitual residence of the child and the adoptive parents is in different States. This is so because in this situation it is justified to apply special rules and additional safeguards for the protection of the child to ensure that the child is not wrongfully moved abroad. For example, the adoption of a child of Romanian nationality residing in Romania by a person residing abroad, even if the adopter is of Romanian nationality or even a first-degree relative (grandparent) of the adoptee, is considered as an international adoption.[16] On the other hand, if a child of Romanian nationality residing in Romania is adopted by a foreign nationality person residing in Romania, the adoption is national, even if the foreign element of nationality is present and, in this

14 Art. 2 (c) of the Adoption Act. Under Romanian law, the term habitual residence of the adopter or adoptive family (as clarified by Law No 99/2024) denotes a stable geographic and social presence in Romania. For Romanian citizens (including those with multiple citizenships), it requires a legal domicile in Romania and continuous, effective residence in the country for at least six months before filing the certification request. Temporary absences do not break continuity when they (i) total no more than three months, (ii) arise from maritime-sector employment contracts, (iii) result from work assignments abroad, or (iv) stem from duties performed in the interest of the Romanian state or under Romania's international obligations. The same concept also covers EU/EEA citizens and other foreign nationals who hold permanent residence or, as applicable, a permanent stay right in Romania, thereby adopting an inclusive approach to both domestic and international adoptions.

15 Art. 2 (d) of the Adoption Act.

16 Avram, 2016, p. 425.

respect. The Adoption Act expressly enshrined the meaning of international adoption as derived from the Hague Adoption Convention, eliminating the disagreement at the conceptual level that had existed in previous legislation on this issue. The practical importance of the distinction between national and international adoption lies in the fact that the two forms of adoption have different legal rules in many respects.[17]

2.2. Adoption of a minor - Adoption of an adult

Adoption is usually a child protection measure. Under Romanian law, a child may be adopted up to the acquiring of full legal capacity.[18] Acquisition of full legal capacity happens either on reaching the age of 18[19], or on the marriage of the minor[20] (the law exceptionally allows the marriage of a minor of at least 16 years), or on the emancipation of the minor (the law exceptionally allows to the court the power to recognize full legal capacity for a minor of at least 16 years).[13] However, exceptionally, Romanian law allows the adoption of an adult person if the adoptee was raised by the adoptive parent as a minor.[21]

3. Basic principles of adoption

Article 452 (a) to (d) of the Civil Code, coupled with Article 1 of Adoption Act, distinctly articulate foundational principles governing adoption.[22] Key principles include the child's best interests, the commitment to providing a family environment for the upbringing and education of the child, maintaining continuity in the child's education while respecting their ethnic, cultural, and linguistic background. Additionally, the principles of informing the child and considering their views, expeditiousness in adoption procedures,

17 *Idem*, p. 426.
18 Art. 455 para. (1) and Art. 40 of the Civil Code.
19 Art. 38, 40 of the Civil Code.
20 Art. 39 of the Civil Code.
21 Art. 455 para. (2) of the Civil Code.
22 Sztranyiczki and Voicu, 2021, p. 347.

and maintaining confidentiality regarding the identity of adoptive and natural parents underscore the ethical and procedural facets of the adoption process.[23]

First, because adoption is primarily a child protection measure, central to these principles is the paramount consideration of the best interests of the child, establishing not only a condition for adoption but also a fundamental guiding precept. In the legal literature, an attempt has been made to explain the content of the best interests principle, stressing that, following adoption and compliance with this principle, the interests of the child are to be satisfied at a qualitatively better level than before the adoption was granted, both in material and moral terms.[24] The regulations on adoption reflect the legislator's concern to respect the principle of the best interests of the child, including by imposing substantive conditions on the adoption of the child.[25] The term 'best interests of the child' acknowledges the existence of other interests within the adoption process, such as those of the adopter and the birth parents. However, when weighing these interests, the best interests of the child take precedence, necessitating their prioritization in adoption considerations. However, in the doctrine, it has been considered that the interest of the adopter must be considered by the bodies involved in the entire adoption procedure.[26]

Indeed, the legislator gave a more important role to the child's interest than to the adopter's interest. Unquestionably, Adoption Act does not raise the adopter's interest to a higher level than the adoptee's interest. Thus, there is not a full concordance between the two interests. The interest of the adoptee must be promoted to a higher level, the interest of the adopter or of the adopting family (spouses), in the absence of statutory provisions, is subject to the requirements of common law, i.e. it must be legitimate and moral. The guardianship court is responsible to grant approval for adoption only if it aligns with the child's best interests and fulfills all other statutory conditions.[27] This emphasis on the child's best interests is not only

23 Avram, 2016, p. 427.
24 Bodoaşcă, 2006, p. 604.
25 Toncean Luieran, 2020, p. 79.
26 Bacaci, Dumitrache and Hageanu, 2012, p. 227.
27 Art. 454 para. (1) of the Civil Code.

a domestic legal condition but also a foundational principle enshrined in international agreements to which Romania is a party. In interpreting the content of this principle, certain essential elements come to the fore. The best interests of the child primarily pertain to personal, rather than material, considerations. Adopters are obligated to create an environment conducive to the child's physical, moral, and overall development, emphasizing the child's well-being over any wealth-related considerations. While the child's material interest is not disregarded, it is secondary to the paramount consideration of the child's best interests. Ensuring the best interests of the child is further extended to in-country adoption, where a legal framework is imperative to prevent the sale and trafficking of children. The sole purpose of taking a child abroad should be to secure a more stable and harmonious home environment.[28]

The principle of bringing up and educating children in a family environment emphasizes the need for the child to be brought up and educated in a family where he or she receives care and protection like that which should be available to him or her in the biological family.[29] The principle of bringing up a child in a family environment is covered by the European Convention on the Adoption of Children (*hereinafter:* "European Convention").[30] Thus, according to Article 4 para. (2) of this Convention, the competent authority shall, in each case, give particular importance to ensuring that the adoption provides the child with a stable and harmonious environment. The Adoption Act does not regulate the meaning of the expression 'educating the child in a family environment'. In this regard, the content of the principle of bringing up and educating the child in a family environment should be referred to Articles 35-38 of Act No. 272/2004, which clarifies the notion of family environment.[31] Specifically, the adoptive family must have regard to the child's best interests and ensure the child's material and spiritual well-being, in particular by caring for the child, maintaining personal relations with the child, ensuring the child's upbringing, education and main-

28 Avram, 2016, p. 428.
29 Robu, 2006, pp. 203-204.
30 European Convention on the Adoption of Children (Revised), Strasbourg, 04 May 2009, https://rm.coe.int/1680084823 (Accessed: 26.5.2025)
31 Bodoaşcă, 2006, pp. 15-16.

tenance, as well as by legally representing the child and administering the child's property.[32] The adoptive family is also obliged to supervise the child, to cooperate with the child and to respect the child's privacy, intimacy and dignity, to inform the child of all acts and facts that may affect him or her and to take into account the child's opinion, to take all necessary measures for the realization of the rights of their child.[33]

Applying the principle of continuity in the education of the child provides children with a sense of stability and security in their development. Continuity in the child's intellectual, physical, and moral development is a balance designed to give the child security. This principle is also applied considering the child's ethnic, cultural, and linguistic background. In line with the legal scientific literature, the principle of continuity in the child's upbringing also ensures the child's right to his or her own identity. Placing the child in a family with the same ethnic, cultural, and linguistic characteristics will contribute to the development of the child's identity within the same environment of origin. In application of this principle, at the stage of placing the child for adoption, the child's physical and psychological capacity to adapt to the new family environment shall be analyzed in relation to the socio-professional, economic, cultural, linguistic, religious and any other such elements characteristic of the place where the child lives.[34] The subsidiary nature of intercountry adoption is a consequence of the application of this principle, because both domestic and international regulations enshrine this character. Specifically, the Hague Adoption Convention provides for the need to ensure continuity in the child's education, closely linked to his or her ethnic, religious, linguistic, and cultural origin. Thus, international adoption can only be granted after the competent authorities have considered the possibility of placement of the child in his or her State of origin.[35] The legislator gives priority to the domestic adoption procedure precisely to facilitate the child's upbringing and education within a family in his or her country of origin. Also, the specific conditions for granting international adoption support the continuity of the child's upbringing and

32 Art. 36 para. (2) of Law No. 272/2004.
33 Art. 37 of Law No. 272/2004.
34 Art. 43 para. (2) of the Adoption Act.
35 Art. 4 (b) of the Hague Adoption Convention.

education in an environment that is connected to the child's place of origin. Thus, international adoption may be granted in the following situations: the adopter or one of the spouses of the adopting family is a relative up to and including the fourth degree with the child; the adopter or one of the spouses of the adopting family is also a Romanian citizen; the adopter is the spouse of the natural parent of the child whose adoption is requested.[36]

The principle of informing the child implies, on the one hand, informing the child of the fact that he or she is adopted and, on the other hand, the obligation to listen to the child who has reached the age of ten in the adoption procedure. In application of this principle, the Adoption Act establishes the obligation of adopters to inform the child of his or her adoption. The information is gradual and, if necessary, with the assistance of the adoption department of the General Directorate or through authorized private bodies, individual offices, associated offices or professional civil societies of social assistance and/or psychology that have concluded agreements with the Adoption Authority.[37] In the legal literature, it has been stressed that the purpose of informing the child is to express his/her opinion on the fate of the adoption and, ultimately, to decide whether the adoption will continue or not.[38] Indeed, only in this way can the child's opinion be taken into account. It has been concluded that the involvement of the child in the adoption procedure is imperative.[39] Indeed, according to Art. 29 para. (2) of Act 272/2004, in any judicial or administrative proceedings concerning him/her, the child has the right to be heard. At the same time, according to Article 29 para. (3) of the of Act 272/2004, the right of the child to be heard gives the child the possibility to request and receive any relevant information, to be consulted, to express his or her views and to be informed of the consequences of his or her views and of the consequences of any decision affecting him or her. The principle is made effective by making appropriate provisions in both international and domestic law.[40]

36 Art. 60 para. (1) of the Adoption Act.
37 Art. 81 para. (2) of the Adoption Act.
38 Bodoaşcă, 2006, p. 626.
39 Florian, 2016, p. 217.
40 Toncean Luieran, 2006, pp. 83-84.

The principle of celerity in the performance of any act relating to the adoption procedure is established to remove as quickly as possible the situation in which the child is inadequately cared for or deprived of parental care.[41] The aim is thus to resume the child's upbringing as soon as possible in an appropriate family environment.

The principle of guaranteeing confidentiality is enshrined in Article 474 of the Civil Code. According to this article, information concerning adoption is confidential. The Adoption Act also explicitly enshrines the application of this principle.[42] Thus, the adoptee does not have access to information relating to the identity of the natural parents until after acquiring full legal capacity, according to Article 76 para. (1) of the Adoption Act. Before this deadline, the identity of the natural parents may be disclosed only for medical reasons.

4. Adoptable child

4.1. Conditions and characteristics of adoptability

In Romanian law, adoption is the legal act by which a relationship of descent is established between the adopter and the adoptee, as well as kinship relations between the adoptee and the relatives of the adopter.[43]

According to Article 455 para. (1) of the Civil Code, a child may be adopted until he or she has reached full capacity. Article 455 para. (2) revises the rule in para. (1) by providing that a person who has acquired full capacity to act may also be adopted if he or she was raised by the adopter during the time when he or she was a minor (adult adoption). According to the case-law, the concept of raising a child must be understood not only to mean the provision of financial maintenance of the adoptee during his or her minority, but also to mean the existence of a continuity of the relationship between them like that of a parent-child relationship. Although the exception

41 Ciocoiu, 2009, p. 66.
42 Toncean Luieran, 2006, pp. 87-88.
43 Art. 451 of the Civil Code.

seems to disregard the purpose of the adoption, it is nevertheless justified by an anticipated achievement of the adoption - evident in fact - due to the protection of the adoptee during minority. Moreover, it is assumed that emotional bonds have been created between the adoptee and the adopter, which establish the premises for the achievement of an adoption.[44] It follows that the material maintenance of the adoptee is not sufficient for the application of this exception.[45] Children-raising also implies the existence of lasting and continuous relationships.[46] As for the duration of 'minority raising', no minimum period has been set by the legislator. Whether or not the person or family adopting the child has 'without title' taken on parental care, and whether special emotional ties have been established between them and the adopted person, are matters of fact which cannot be determined by measuring the length of time. Obviously, the time factor is a criterion, but it does not exhaust the entire content of the condition relating to the upbringing of the child during minority. One thing is certain: it is not required that the adopter(s) must have raised the child for the entire period of minority, but that the child must have been raised for a sufficiently long and continuous period to exclude the idea of occasional upbringing for purposes other than the care of the child.[47]

4.2. Statistical data regarding domestic adaptation

The ages of adoptable and adopted children are known from data published on the Adoption Authority's website. The Adoption Authority publishes statistical data on a calendar year basis.[48] The most recent data available is for the year 2023.

44 Albu, Reghini and Szabo, 1977, p. 36.
45 Filipescu, 1989, pp. 374-375.
46 Supreme Court of Justice, Civil Section, Decision No. 22/1982 in *Romanian Law Review* No 11/1982, p. 64.
47 Avram, 2016, p. 429.
48 https://copii.gov.ro/1/date-statistice-copii-si-adoptii/ (Accessed: 26.5.2025)

Number of domestic adoptions between 1 January and 31 December 2023:

Number of domestically adopted children during the period January 1, 2023 – December 31, 2023	**No** *Gender*		**Age** *Age group*				**Total.**
	Girl	**Boy**	**0 - 2 years** years old	**3 - 6 years** years old	**7 - 13 years** years old	**14 - 17 years** years old	
	687	**669**	**170**	**645**	**507**	**34**	**1356**

Number of adoptable children on 31 December 2023:

Number of adoptable children on December 31, 2022	**No** *Gender*		**Age** *Age group*				**Total.**
	Girl	**Boy**	**0 - 2 years** years old	**3 - 6 years** years old	**7 - 13 years** years old	**14 - 17 years** years old	
	2971	**4086**	**216**	**795**	**4117**	**1929**	**7057**

4.3. The process of being declared adoptable - Authorization of adoption

In Romania, only children who are registered in the registers of the General Directorate are eligible for adoption. It is up to the county's General Directorate to decide whether a child is adoptable. For each child on the register, the General Directorate appoints a case manager who will prepare an individual protection plan for the child, considering the best interests of the child, with priority given to the child's reintegration into the family. Where this is not possible, the case manager will propose the opening of the do-

mestic adoption procedure. The reintegration of the child into the family as the objective of the individual protection plan will be determined after mandatory consultation with the parents and any family members who may be available, while adoption as the objective of the individual protection plan will be determined without consultation.[49]

The case manager plays an important role in determining adoption within the context of the individual protection plan under specific circumstances. The decision whether a child is adoptable hinges on various factors, including the duration following the implementation of a special protection measure and the level of cooperation from the child's biological parents. For instance, if one-year elapses after introducing the special protection measure, and the child's biological parents, unable to provide care for reasons beyond their control, fail to collaborate with authorities on reintegrating the child, adoption may be considered.[50] Similarly, if six months transpire after the initiation of the special protection measure and the child's biological parents, not at fault for the inability to care for the child, do not engage with authorities in the steps toward reintegrating the child, adoption becomes a potential course of action. [51] Another scenario involves a period of six months since the special protection measure was instated, and the biological parents remain untraceable.[52] Adoption may also be considered in situations where the child's parents are unknown at the time of registration[53] or when, after the establishment of the special protection measure, natural parents over the age of 18 who have declared in writing that they do not wish to take charge of the upbringing and care of the child do not retract their initial declaration within 45 days.[54]

These nuanced conditions guide the case manager's decision-making process in the formulation of an individual protection plan, emphasizing the child's welfare and considering the circumstances surrounding the biological parents' ability or willingness to participate in the child's reintegration

49 Toncean Luieran, 2006, p. 167.
50 Art. 28 para. (1) a) of the Adoption Act.
51 Art. 28 para. (1) b) of the Adoption Act.
52 Art. 28 para. (1) c) of the Adoption Act.
53 Art. 28 para. (1) d) of the Adoption Act.
54 Art. 28 para. (1) e) of the Adoption Act.

process. The case manager's proposal is forwarded to the adoption department of the General Directorate for Adoption, after approval by his/her superior. Within 30 days of receipt of the case manager's proposal, the General Directorate must refer the case to the court for adoption proceedings.[55] At the end of the non-adversarial procedure, the court will issue a decision authorizing or refusing the adoption procedure.

4.4. Simultaneous adaptation of siblings

Whenever siblings are both adoptable, the priority is to keep them together through adoption by the same person or family (spouses), presumed to be in the best interest of each sibling. Adoption granted in such a form has the advantage of preserving the natural kinship between the siblings and of contributing, by sharing the same family development, to the fulfilment of the principle of upbringing and education in a family environment, as well as the principle of continuity in the upbringing and education of the child.[56] The hypothesis refers to the situation where siblings, regardless of sex and without distinguishing between siblings who have one or both parents in common, are equally adoptable. Although it is not specified, it is beyond doubt that the adoption of siblings who are children is envisaged, thus the rule cannot apply, at least not with the same force, if one or some of the siblings have acquired full legal capacity.

The separate adoption of siblings by different persons or families is not prohibited, but it presupposes that such a solution is consistent with the best interests of the children concerned. For example, if, in the case of divorced parents, only one of the siblings lives with the remarried parent, his or her adoption by the spouse of the natural parent may justify a derogation from the rule that siblings be adopted by the same adopter.[57]

55 Art. 31 para. (1) of the Adoption Act.
56 Article 452 (b) and (c) of the Civil Code.
57 Art. 456 of the Civil Code.

5. Adoptive parent

5.1. Conditions for becoming an adoptive parent

According to Article 459 of the Civil Code, persons who do not have full legal capacity, as well as persons with mental illness and mental disabilities, cannot adopt. Under Article 7 of the Adoption Act, a person who has been finally convicted of an offence against persons or property, pornography or trafficking in human beings or drugs may not adopt. Nor can a person whose parental rights have been terminated by a final court judgment or whose child is under special protection measures (foster care). Similarly, a person whose spouse is psychiatrically ill, mentally handicapped or has been convicted by final judgment of one of the offences listed above cannot adopt.

The adopter or the adoptive family must provide the moral safeguards[58] and material conditions necessary for the upbringing, education, and harmonious development of the child.[59] The existence of moral and material conditions is verified during the examination of the adopters' suitability. There is no specific provision in the legislation regarding housing and income. The adopter must meet the moral guarantees and material conditions necessary for the harmonious upbringing, education, and development of the child. The fulfilment of these conditions must be certified by the competent authorities in accordance with the Adoption Act.[60] The Romanian legislation does not require mandatory counselling or preparation of prospective adopters before assessing their suitability for adoption. The Methodological Rules for the Implementation of the Adoption Act provide for the prior information of persons expressing their intention to adopt. According to the Methodological Rules, adopters may apply for prior information to the General Directorate of the county where they reside or to a private organization facilitating the adoption. At the information session, held in person or online, the persons intending to adopt can be informed about the characteristics of children who can be adopted in Romania, the stages and

58 Bucharest Court of Appeal, Decision No. 2000/2001.
59 Art. 461 of the Civil Code.
60 Sztranyiczki and Voicu, 2021, p. 348.

deadlines of the domestic adoption procedure and the procedure for obtaining the certificate of suitability. The preliminary information is provided by a social worker or psychologist from the institution providing the information. The information activity is recorded in a document in duplicate, signed by the applicant and the person carrying out the activity.

In addition to this, it can be said that, from the legislator's point of view, at no time in history has adoption been considered a 'private affair', but it has been subject to conditions imposed by the interests of the child deprived of parental care, of the state or at least of a logic of common sense. For example, one of the conditions imposed by Roman law during the reign of Emperor Justinian for adopter was that he had to be 18 years older than the adoptee.[61] In the present this legal provision was preserved in Romanian law, as it stipulates that the adopter must be at least 18 years older than the adoptee.[62] This condition ensures that the age difference between the adopter and the adopted person is similar to the age difference between parents and children in general. Exceptionally, for good reasons (e.g. if the adopter is the spouse of the biological parent),[63] the judicial authority responsible for guardianship may approve the adoption even if the age difference between the adopter and the adopted person is less than 18 years but not less than 16 years.[64] For example, an adoption may be authorized if a woman who married before the age of 18 wishes to adopt a child. Except for the age difference requirement, the law does not impose any minimum or maximum age requirement for the adoptive person or adoptive parents.

The European Convention stipulates that the adopter must be at least 21 years of age, but not older than 35 years[65], but these provisions are not applicable in Romanian law because, having ratified the Convention above mentioned[66] made a reservation to Article 7 of the Convention. Thus, regarding the minimum age of the adoptive parent, it is 18 years, as a general

61 Oancea, 1998, p. 169.
62 Art. 460 para. (1) of the Civil Code.
63 Florian, 2016, p. 475.
64 Art. 460 para. (2) of the Civil Code.
65 Art. 7 of the European Convention on the Adoption of Children
66 The European Convention on the Adoption of Children was ratified in Romania by Law no. 15/1993.

rule – 16 years - in exceptional situations[67] – and there is no indication as to the maximum age beyond which it is no longer possible to grant adoption.[68] Faced with the same problem under previous legislation, the courts have decided to reject the application for adoption or to terminate the adoption, finding that, given the advanced age of the adopter, the adoption measure would not be in the child's best interests.[69]

All in all, as a general rule it can be stated, that an adopter is an individual who is at least 18 years old, possesses full legal capacity, and satisfies the adoption criteria outlined in the legal framework, without being subject to any disqualifying factors. Notably, in Romania, the eligibility for adoption by a spouse remains unaffected by the duration of time the spouses have lived together or the length of their marriage. In other words, the longevity of the marital union does not impact the eligibility of a spouse to adopt in Romania.

5.2. Prohibition of simultaneous adoption by several persons

Adoption in Romania faces a consistent constraint regarding simultaneous adoption by multiple individuals. The general rule asserts that two individuals cannot adopt together, either concurrently or successively, unless they are legally recognized as spouses.[70] This implies that unmarried individuals have the potential to adopt individually, and life partners are precluded from adopting jointly. It follows that unmarried persons may not adopt jointly.

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67 Art. 455 para. (1) corroborated with Art. 38 and 40 of the Civil Code.

68 Art. 2 of Law no. 15/1993 declares that accession to this Convention is subject to the following reservation:

„Pursuant to the possibilities conferred by Article 25, paragraph 1, of the Convention to make not more than two reservations in respect of the provisions of Part II, Romania declares that it will not apply the provisions of Article 7, according to which the minimum age of the adopter may not be less than 21 years nor more than 35 years, the minimum age under Romanian law being 18 years, without any maximum limit."

69 Supreme Court of Justice, Civil Section, Decision No. 2144/1985, in Romanian Law Review No 9/1986, p. 65.

70 *Ibidem*.

However, exceptions are acknowledged under specific circumstances. Firstly, if the adoptive spouse or spouses pass away, a second adoption can be authorized. In such cases, the prior adoption is considered dissolved from the date of the finalization of the court decision approving the new adoption. This approach deviates from the earlier legislation before Adoption Act, which required the termination of the previous adoption before authorizing a new one. This procedural formality drew criticism for its complexity, involving two distinct processes: dissolving the prior adoption and authorizing the new adoption. In response to this critique, Adoption Act adopted a more streamlined approach, enabling the granting of a new adoption while considering the previous adoption terminated upon the approval of the new adoption.[71]

Secondly, a new adoption may be authorized if the previous adoption concludes for any other reason. Additionally, in situations where the adopted child has a single parent who is unmarried and is in a stable relationship with an unmarried individual of the opposite sex, unrelated to the adopted child up to the fourth degree, a new adoption can be authorized. Crucially, the single parent must provide a notarized statement attesting that the new adopter has been directly and consistently involved in the upbringing and care of the child for a minimum of five years.[72] These nuanced exceptions acknowledge specific scenarios where a second adoption can be considered, considering various familial and legal considerations.

5.3. Same-sex adoption

In Romania two persons of the same sex may not adopt jointly.[73] Marriages between Romanian or foreign citizens of the same sex contracted abroad cannot be recognized in Romania. Moreover, Romania does not recognize civil partnerships concluded or contracted abroad between Romanian or foreign nationals of the opposite or the same sex.

71 Avram, 2016, pp. 434-435.
72 Art. 6 para. (2) c) of the Adoption Act.
73 Art. 462 para. (3) of the Civil Code.

5.4. Adoption by two spouses

In practice, this form of adoption is the most common and the most effective, as it provides the child with a suitable family environment similar to that of the family of origin. Romanian law does not impose any specific condition regarding the minimum duration of the marriage, regardless of whether the spouses have other children from the marriage or even adopted children. The adoption of a child may be carried out by two spouses at the same time or successively.[74]

5.5. Adoption by two unmarried persons

Traditionally, Romanian law prohibits adoption by more than one person, unless it is carried out by husband and wife at the same time or successively. The purpose of this prohibition is to avoid creating chaotic family relationships that do not resemble the natural family framework.[75] In other words, the Romanian law does not allow two partners living together to adopt a child, under the sanction of the absolute nullity of adoption.

Article 462 para. (1) and (2) of the Civil Code explicitly prohibits joint adoption by two individuals of the same sex. In alignment with the provisions of the European Convention, national law may permit the adoption of a child in specific circumstances.[76] These circumstances include adoption by two individuals of different sexes who are married to each other or, if a registered partnership is recognized, by those in such a partnership. The Romanian law at this moment does not recognize registered partnerships. Additionally, adoption by a single person is also permissible under the provisions of the Convention.

Article 7 para. (2) affirms that States are free to extend the scope of the Convention to same sex couples who are married to each other or who have entered into a registered partnership together and that States are also free

74 Art. 6 para. (1) of the Adoption Act, Art. 462 para. (1) of the Civil Code.
75 Florian, 2016, p. 215.
76 Art. 462 para. (1) of the Civil Code.

to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship. Therefore, the European Convention has 'relaxed' the conditions for adoption by opposite-sex couples, while Romanian law has retained the traditional solution of adoption by a family consisting exclusively of a husband and wife.

Law No. 233/2011 was a step forward when it regulated the possibility of adopting the child of one partner in a civil partnership between persons of different sexes.[77]

5.6. Special conditions for the adoption of a child of the other spouse/partner

Act No. 233/2011 amending the Adoption Act established a special condition for the presumption that the wife adopts a child born out of wedlock whose paternity has been established by acknowledgement. Pursuant to the provisions of Article 7 para. (4)-(5) of the Adoption Act, a child whose paternity has been established by a court decision accepting the father's acknowledgement or confirming the agreement of the parties, without the application having been examined on its merits, may be adopted by the father's wife only if the paternity confirmed by the result of an expert report carried out by the following method using serological DNA. In the case where the child is adopted by the spouse of the person who has acknowledged the child born out of wedlock, the court will only grant the adoption application if paternity is confirmed by the result of the DNA serological method of the parenting expert, the costs of which will be borne by the adopter. If the adopter does not have the necessary financial resources, these are paid for by the state budget.[78]

Act No. 233/2011 amending the Adoption Act also regulates the special hypothesis that allows one partner to adopt the natural/adopted child of the other partner. Article 6 para. (2) (c) states that a child may be adopted if he or she has only one parent who is unmarried and lives in a stable relationship with an unmarried person of the opposite sex who is not related

77 Art. I point 3 of Law No. 233/2011.
78 Avram, 2016, p. 438.

to him or her in the fourth degree and who has declared in a notarial deed that the new adoptive parent has been directly and immediately involved in the upbringing and care of the child for at least five uninterrupted years. In this situation, the legal provisions applicable to the adoption of the child by the spouse of the parent by blood or by the adoptive parent, as well as the legal provisions on name, residence, rights and obligations between parents and child, exercise of parental authority, inheritance rights, identity documents, shall apply mutatis mutandis to a child born out of wedlock and related to both parents. The existence of a durable relationship and cohabitation shall be verified by the court hearing the applicant for adoption and may be proved by any means of evidence.[79]

5.7. Prohibition of adoption between a natural parent and his or her child

Although the law does not expressly provide for it, adoption between a natural parent and his or her child is not allowed. However, the implicit barrier arises from the legal requirement that the natural parent must consent to the adoption of his or her child, which presumably means that the adopter is not the natural parent. In practice, of course, the problem may arise where a child registered as born of unknown parents is adopted by the natural parent who subsequently acknowledges him or her or whose parentage is subsequently established by a court order. In such cases, the adoption would cease.[80]

5.8. Adoption between siblings

Article 457 of the Civil Code prohibits adoption between siblings. The provisions prohibiting adoption between siblings are of public policy. Adoption between siblings approved by a foreign authority, cannot be recognized in Romania. [81]

79 *Idem*, p. 439.
80 Avram, 2016, p. 439.
81 Roșu and Rădulescu, 2011, p. 291.

It makes no difference whether they are brothers or sisters by marriage or out of wedlock, whether they are good brothers or sisters, or whether they are brothers or sisters only through the mother or only through the father. The rationale is to prevent filiation (civil, adoptive kinship) relations incompatible with natural kinship relations between siblings.[82]

The impediment is of strict interpretation, therefore, adoption between other natural relatives is allowed with the constant and unanimous clarification in the doctrine concerning the adoption of one's own natural child which, although not expressly prevented by the provisions of the new Civil Code, is an impediment implicitly resulting from the provisions concerning the persons whose consent is required for adoption[83], from which it follows that the natural parents and the adopter or adopters are different persons.[84]

5.9. Barriers due to spousal status

Article 458 of the Civil Code expressly provides that adoption by two spouses or former spouses from the same adopter or adoptive family, as well as adoption between spouses or former spouses, is prohibited. This obstacle is justified on the grounds that the relationship between spouses/former spouses is incompatible with the relationship between parents and life partners or with the relationship between siblings.[85] Spousal status in itself is not an impediment to adoption, it does not make adoption by any adoptive parent impossible, but it does prevent adoption by spouses together, concurrently or successively, as well as adoption by the adopter who, in relation to the adoptee, would have the status of spouse or ex-spouse, even adoption by both spouses is possible, but only by different adopters or adoptive families and, of course, subject to compliance with the requirement that the person wishing to adopt should grow up during minority, given the full capacity of the adopter to act.

82 Filipescu, 2002, p. 437.
83 Art. 463 Civil Code.
84 Bacaci, Dumitrache and Hageanu, 2012, p. 237.
85 *Ibidem*.

As regards adoption between spouses or between former spouses, this would be a possibility with minimal chances of 'passing the test' of the substantive requirements and of accessing the analysis of the impediment to adoption consisting in the status of spouse or ex-spouse, given the particular condition of growing up during minority, which must be verified whenever the adoptee is a person of full age or with full capacity to act[86], which is unlikely to be met in the present case. Following the same logic of the impediments given by the status of spouse, it would also be inadmissible to grant adoption in the hypothesis, not expressly provided for, of the adoption of one of the spouses by the natural parent or parents of the other spouse.

5.10. The process of becoming an adoptive parent

Following the preliminary information, the adoptive person/family applies to the General Directorate of the county of residence for the opening of the eligibility assessment. The application must be accompanied by a copy of the applicant's identity card, birth certificate, marriage certificate/decision of divorce, proof of residence, a certificate of good character, proof of income, a certificate of health issued by the general practitioner. The assessment of suitability for adoption is carried out by the General Directorate of the county or by the private organization facilitating the adoption.

According to Article 18 para. (1)-(2) of the Adoption Act, the suitability assessment is aimed at determining the parental skills, moral and material conditions that are relevant to the child's development and upbringing. The assessment may also be extended to the adopters' extended family (e.g., the adopters' parents or persons with whom they live). The suitability for adoption is assessed by an assessment team consisting of a psychologist and a social worker. The assessment consists of a social assessment, a psychological assessment, a medical assessment and preparation for adoption. The assessment team takes notes of these meetings. The psychological assessment will include at least four assessment/counselling sessions and the results of the psychological assessment and the professional's recommendations will

86 Art. 455 para. (2) of the Civil Code.

be recorded on the psychological assessment form.[87] Where the adopter or the adoptive family belong to a national minority, the assessment may be carried out, upon request, in the language of that national minority.[88]

At the end of the assessment, the members of the assessment team will prepare a final report, including a proposal for the issue of a certificate of suitability. The final report shall be completed no later than 90 days after the date of submission of the application for the assessment of competence and shall be communicated to the applicant.[89] Obtaining a certificate of suitability is not required in two cases: if the adopter is a person with full capacity; if the adopter is the spouse of the adoptive parent by blood or marriage.[90]

Depending on the outcome of the verification, the General Directorate may decide to withdraw the certificate. If, because of the suitability assessment, the final report concludes that the adopter/family is suitable for adoption, the General Directorate for the county will issue a certificate of suitability within five days.[91] The period of validity of the certificate is of five years.[92] Once the certificate of suitability has been issued, the adopter/family is registered in the National Register for Adoption. The General Directorate is required to verify annually that the conditions based on which the certificate of adequacy was established and issued are fulfilled.

The decision not to grant/withdrawal of the certificate of a person/family suitable for adoption may be appealed, within 15 days from the date of communication, to the court competent for adoption matters in the adopter's place of residence.[93] In the event of a finding of unfitness, the adoptive person/family may lodge a complaint with the body which issued the report within five working days of the date of notification of the report of unfitness, which must forward the complaint to the Adoption Authority. The complaint will be investigated by a committee appointed by the Adoption Authority within 30 days.[94] The Romanian legislation does not set a time

87 Toncean Luieran, 2006, p. 164.
88 Art. 18 para. (4^1) of the Adoption Act.
89 Art. 20 para. (1) of the Adoption Act.
90 Art. 26 of the Adoption Act.
91 Art. 20 para. (2) of the Adoption Act.
92 Art. 18 para. (7) of the Adoption Act.
93 Art. 25 of the Adoption Act.
94 Art. 21 para. (1) of the Adoption Act.

limit for initiating a new procedure in the event of a finding of unfitness, but this can be done, mutatis mutandis, once the negative circumstances set out in the final report of unfitness have ceased to exist.

6. Benefits available to adoptive parents

In the case of an adoptive family, either spouse who is subject to income tax under the provisions of the Tax Code and who earns income from employment or, where applicable, self-employment, royalties or agricultural activity, may be granted integration leave, initially for a maximum period of one year, and, according to Act No. 70/2023, two years, and receive a monthly allowance during this period. The amount of the monthly allowance is 85% of the average net income earned during the last 12 months of the two years preceding the adoption court decision. The amount of the monthly allowance may not be less than the multiplication of the current social reference index by 3.4 (currently 2033,2 lei/405,82 EUR), while the maximum amount may not exceed 8,500 lei. The allowance is not subject to income tax or compulsory social security contributions.[95]

Following a 2020 amendment to the Adoption Act, various provisions have been incorporated to reinforce and promote domestic adoption. One key provision entails the provision of a monthly allowance to the adopter or adoptive family in specific situations. This allowance is determined by multiplying the current social reference index by 1.2, presently amounting to 717,6 lei or 143,23 EUR, for each adopted child. This financial support is extended to children meeting specific criteria at the time the adoption decision is finalized. These criteria include being between the ages of 3 and 6, having a mild or moderate disability, or being part of a sibling couple that must be adopted together.[96]

Additionally, the monthly allowance sees a 50% increase if the adopted child, at the time of the adoption decision, has reached the age of seven, possesses a severe or multiple disability, HIV infection, or AIDS, or is a member of a group of at least 3 adoptable siblings.[97]

95 Art. 50 para. (1^1) of the Adoption Act.
96 Art. 100^1 para. (1) of the Adoption Act.
97 Art. 100^1 para. (2) of the Adoption Act.

In cases where two of the above-mentioned conditions are met for the adopted child, the monthly allowance experiences a 75% increase.[98]

Moreover, if all the conditions specified in either the first or second case are satisfied, the monthly allowance sees a full 100% increase.[99] These nuanced adjustments in financial support aim to cater to the diverse needs and circumstances of adopted children, fostering a more inclusive and supportive adoption framework. The allowance is payable from the month after the adoption decision becomes final and ceases when the adopted child becomes fully capable of acting or in the month in which the adoption is terminated or declared invalid. At the request of the adopted child, which may be made after he or she has reached full capacity if he or she is in full-time education, the allowance may be granted for the duration of the education, up to the age of 26.[100]

An adopter or adoptive family who has adopted one or more children receives an annual subsidy of 1,500 lei (299,40 EUR) for each child adopted, which can be used for medical, psychological or other rehabilitation services.[101] The need for these services is determined based on a recommendation from a doctor, psychologist or social worker. The adopter or adoptive family is entitled to the allowance only for the duration of the follow-up. The period of entitlement may be extended once for a maximum of six months if the rehabilitation is continued on the recommendation of a doctor, psychologist, or social worker. [102]

7. The adoption process

7.1. Consent of adoptive parents/guardians

The legislator has shown particular concern for the expression of the consent of the natural parents, which is usual given that adoption has the effect of terminating the relationship of kinship between the natural parents and

98 Art. 100^1 para. (3) of the Adoption Act.
99 Art. 100^1 para. (4) of the Adoption Act.
100 Art. 100^1 para. (5) of the Adoption Act.
101 Art. 100^2 para. (1) of the Adoption Act.
102 Art. 100^2 para. (3) of the Adoption Act.

their relatives, on the one hand, and the adopted child and his or her descendants, on the other.[103] Thus, the parents must give their informed consent to the effects of adoption.[104] The legal literature has also emphasized that the legislator's concern for this consent was aimed at ensuring that it reflects the essence of the relationship between the parents and the child and that it is in the best interests of the adopted child. Moreover, both the Adoption Act and the Civil Code require that they agree to adoption unconditionally and freely only after having been informed in advance of the consequences of expressing consent.[105] Article 1 para. (6) of Law No. 57/2016 introduced a reference to the language used in informing parents about the effects of expressing consent. Thus, they must be informed in an accessible language, which means in a language they understand.[106]

Moreover, there are stipulated timelines and conditions for obtaining consent. The natural parents or guardians can give consent only after 60 days from the child's recorded date of birth, as indicated in the birth certificate.[107] Additionally, a withdrawal period of 30 days is allowed, during which the natural parents or guardians may unilaterally retract their consent.[108] It is imperative that the consent provided by natural parents or guardians is freely and unconditionally given, with due awareness of the consequences, particularly the severance of familial ties with the child's origin.[109] The General Directorate overseeing the habitual residence of the natural parents or guardians is responsible for ensuring that they are adequately advised and informed before granting consent. A report on this matter is then prepared and communicated to the General Directorate of the child's habitual residence within 15 working days of the request. Consent must be presented before the court when deciding on the initiation of adoption proceedings.[110] In instances where refusal occurs, the court may intervene, considering evidence of unlawful refusal and prioritizing the child's best interests.

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103 Art. 470 para. (2) of the Civil Code.
104 Art. 463 para. (1) (a) of the Civil Code.
105 Art. 465 of the Civil Code and Art. 9 of the Adoption Act.
106 Toncean Luieran, 2006, pp. 138-139.
107 Art. 466 para. (1) of the Civil Code.
108 Art. 466 para. (2) of the Civil Code.
109 Art. 465 of the Civil Code.
110 Art. 13 of the Adoption Act.

In cases involving a deceased, unknown, disqualified, declared dead, or missing parent, the consent of the surviving parent is deemed sufficient. When both parents are in one of these situations, the adoption can be terminated without their consent.[111]

Exceptionally, the guardianship court may overrule the refusal of the natural parents or, where applicable, the guardian to consent to the adoption, if it is proved, by any means of evidence, that it is abusive and the court considers that the adoption is in the best interests of the child, taking into account the opinion of the child, given in accordance with the law, with express reasoning of the decision in this regard.[112]

As a general rule, consent to adoption may not be expressed in place of the child's natural parents/guardian by a guardian, trustee or other person empowered to do so. Exceptionally, where one of the natural parents, although sufficient efforts have been made, cannot be found to give consent, the consent of the other parent shall be sufficient. When both parents are in this situation, the adoption can be completed without their consent.[113]

A child whose natural parents are under 14 cannot be adopted.[114] The minor parent who has reached the age of 14, as well as the adult parent who benefits from legal counselling or special guardianship and is not unable to express his/her will due to a lack of discernment, expresses his/her consent assisted by his/her legal guardian[115], which is a derogation from the general rule presented above.

This comprehensive framework ensures a thorough and ethical process in securing consent for adoption, acknowledging various circumstances and safeguarding the rights and well-being of all parties involved.[116]

111 Art. 464 para. (1) of the Civil Code.
112 Art. 467 of the Civil Code.
113 Art. 8 para. (3) of the Adoption Act.
114 Art. 11 of the Adoption Act.
115 Art. 12 of the Adoption Act.
116 Avram, 2016, p. 431.

7.2. Consent of the child

According to Article 463 para. (1) (b) of the Civil Code, during the adoption process, the consent of the adoptee over the age of ten is required for the adoption. This legal provision underscores that the child's consent is not a mere formality; rather, it endows the child with a special capacity to act, established by law for their own benefit. The consent of a child over ten years of age to adoption does not mean that the child is merely heard, but that the child has a special capacity to act established by law for its own benefit, but its consent has a strong emotional significance. The consent to adoption of the adoptee is a fundamental condition of the legal operation in all cases where the adoptee has reached the age of 10 years, it is understood, including - or even more so - in the case of the adoptee with full capacity to act. The expression of the will of a minor between 10 and 14 years of age, as a condition for the validity of the adoption, is an exception to the rules on capacity in matters of legal acts – it is only when the child reaches the age of 14 that his or her consent has the status of a legal expression of will – until that age, the child's attitude has only the significance of an 'emotional expression of will'.[117] The special legal capacity recognized for the child who has reached the age of ten makes his choice decisive.

According to Article 15 para. (1) of the Adoption Act, the consent of a child over the age of ten must be given before the court at the stage of the authorization of the adoption. Article 15 para. (2) of the Adoption Act states that adoption may not be granted without the consent of the child who has reached the age of ten. It follows that the court cannot overrule a refusal to give consent to adoption by a child over the age of ten. However, Article 5 para. (3) of the European Convention provides that consent may be refused to a child who suffers from a disability which prevents him or her from giving valid consent. Article 15 para. (3) of Adoption Act provides that, before consent is given, the General Directorate in whose territory the child over the age of ten resides shall, considering the age and maturity of the child, advise and inform the child, on the consequences of adoption and on his or her consent to adoption, and shall draw up a report thereon. According

117 Florian, 2016, p. 480.

to Article 6 of the European Convention, even if the child's consent is not required, the child shall be consulted as far as possible and his or her views and wishes shall be considered, considering the degree of maturity of the child. Consultation may be waived if it is manifestly contrary to the best interests of the child.[118]

Article 264 of the Civil Code addresses the crucial aspect of listening to the child in both administrative and judicial proceedings related to them. The provision outlines specific guidelines regarding when and how a child's voice should be considered in legal matters. According to para. (1), a child who has reached the age of ten years must be heard in proceedings concerning them. However, even if a child is under ten, the competent authority may decide to hear them if it deems it necessary for the case's resolution. The right to be heard, as detailed in para. (2), not only allows the child to express their views but also grants them the right to request and receive information suitable for their age. Moreover, the child is entitled to be informed about the potential consequences of their views being respected and the repercussions of any decision made about them. In para. (3), the law stipulates that any child has the right to request to be heard, following which the competent authority must provide reasons if they decide to refuse the request. Furthermore, para. (4) emphasizes the importance of considering the child's views in alignment with their age and maturity level, recognizing the evolving capacity of the child to express meaningful opinions. Lastly, paragraph (5) clarifies that the existing legal provisions related to the child's consent, their presence in proceedings, and the appointment of a representative by the court in cases of conflict of interest remain applicable. This underlines the overarching importance of upholding the child's rights and ensuring their involvement in legal processes is carried out with due consideration to their age and maturity.

Article 15^1 of the Adoption Act, introduced by Law No. 57/2016, provides that in the case of adoption of a person who has acquired full legal capacity, the consent of the adoptee and the adopter or adoptive family must be expressed before the court.[119]

118 Art. 6 of the European Convention on the Adoption of Children (Revised), Strasbourg, 04 May 2009, https://rm.coe.int/1680084823 (Accessed: 26.5.2025)

119 art 15^1 of the Adoption Act introduced by Law No. 57/2016 of 11 April 2016 for amending and supplementing Law No 273/2004 on adoption procedure.

The Romanian domestic legislation and the European Convention, share common principles regarding the importance of considering the views and consent of children in adoption proceedings. Both the Romanian law[120] and the European legislation[121] emphasize that a child over the age of ten has the right to be heard or must provide consent in adoption proceedings. This commonality reflects a recognition of the evolving capacity of children to express meaningful opinions as they grow older. Both legal frameworks stress the importance of considering the child's views and wishes. Romanian law, in Article 264 para. (4), mentions that the child's views should be considered according to their age and maturity. Similarly, the European Convention emphasizes consulting the child and considering their views, considering the degree of maturity.[122]

7.3. Duration of the adoption procedure

The adoption procedure usually lasts 9-12 months and can start after establishing the suitability of the adopter/family. The procedure is divided into four stages: the initiation of the procedure[123], the examination of the compatibility of the child and the adoptive person/family[124], the pre-adoption care[125] and the approval of the adoption.[126] The first stage of the procedure consists of the preparation of an individual protection plan for the child. The plan should identify/plan the measures to be taken to integrate the child into the family as soon as possible. The individual protection plan is approved by the judicial authority. In the second stage, the person/family suitable for adoption is identified and selected, then the compatibility of the child and the adoptive person/family is established. A report on the matching is drawn up. In the third stage of the procedure, the adoptable child is placed in the care of the adoptive person/family for 90 days. At the end of the

120 Art. 264 of the Civil Code.
121 Art. 15 para. (1) of the European Convention on the Adoption of Children.
122 Art. 6 of the European Convention on the Adoption of Children.
123 Art. 28-38 of the Adoption Act.
124 Art. 39-42 of the Adoption Act.
125 Art. 43-54 of the Adoption Act.
126 Art. 55-59 of the Adoption Act.

pre-adoption care period, the adoption service of the General Directorate for Adoption of the county prepares a final report on the child's adaptation to his/her new environment and a proposal for approval of the adoption. In the fourth and final stage, based on the proposal, the competent judicial authority approves the adoption if it is in the best interests of the child, and all the other conditions laid down by law are met. It is now not only a condition of adoption but also a fundamental principle that adoption must be in the best interests of the child.[127] Under Article 84 of the Adoption Act, the court of the place of residence of the adopted person is competent to hear applications in adoption proceedings. The time limit for appealing against a decision of the court is 10 days from the date of notification of the decision.[128]

8. Legal effects of adoption

8.1. Date of legal effects

The adoption takes effect from the date on which the court decision granting the adoption becomes final. Adoption has effects on the child's kinship, guardianship, name, domicile and residence, maintenance, succession, and nationality of the adoptee.

8.2. Impact on civil relations

Regarding the legal effects of the adoption, a distinction must be made between positive and negative legal effects of this legal procedure.

The positive, acquisitive effect of this legal operation consists in the creation of the adoptive filiation bond and of the civil relationship of kinship between the adopted person and the relatives of the adopter.[129] The legal parent-child relationship between the adoptee and the adopter is the same as that which exists by descent, including in relation to inheritance.

127 Avram, 2016, p. 428.
128 Art. 88 of the Adoption Act.
129 Art. 405 para. (2) of the Civil Code.

Although the law does not expressly provide for this, it can rightly be considered that the descendants of the adopted child also have a family relationship with the adopter and his or her relatives, since only in this way can a civil relationship equivalent to natural kinship be said to exist. It could be said that this is the 'constitutive effect' of adoption.[130]

The positive effect of the adoption is concomitant and symmetrically opposite to its negative, extinctive effect on the natural filiation between the adopted person and his parents, as well as on the natural kinship between the adopted person and his descendants, on the one hand, and the natural relatives of the adopted person, on the other hand[131], according to art. 470 para. (2) and (3) Civil Code, apart from the natural filiation between the adoptee and his natural descendants which, of course, remains untouched, as well as the natural kinship between siblings adopted by the same parent or adoptive family. Therefore it can be stated, that because the adopted child is placed in the adoptive family, the natural family relationship between the child and his or her natural parents and relatives must be broken. The child leaves the family of origin. This can be seen as the extinctive effect of adoption.[132]

As an exception to the rule, if the adopter is the adoptive parent's husband or the consensual partner of the opposite sex of the unmarried adoptive parent[133], the extinguishing effect does not manifest itself, since the natural kinship, in the broad sense, ceased on the date of approval of the previous adoption.[134]A special situation arises when one spouse adopts the other spouse's biological child. In this case the termination of the family relationship applies only to the natural parent and the natural parent's relatives who are not married to the adopter.[135] This means that the termination of family relationships is only partial, which means these relationships are only terminated between the adoptee and his descendants on the one hand and the natural parent who is not married to the adopter on the other. Consequently, the family relationship is maintained between the adopted person and his

130 Art. 470 para. (1) of the Civil Code.
131 Florian, 2016, p. 468.
132 Art. 470 para. (2) of the Civil Code.
133 Art. 6 para. (2) lit. c) and para. (3)-(4) of the Adoption Act, introduced by Art. I point 3 of Law no. 233/2011 for the amendment and completion of Adoption Act.
134 Art. 464 para. (3) of the Civil Code.
135 Art. 470 para. (3) of the Civil Code.

descendants on the one hand and the natural parent who is the spouse of the adopter and his relatives on the other. If one spouse adopts the adopted child of the other spouse, the extinction of the adoption will no longer have the effect of extinguishing the natural parents of the child and their relatives, since the natural relationship of kinship has been extinguished by the first adoption. In other words, in the case of successive adoptions of a child by two spouses, the second adoption has only a constitutive effect.[136]

8.3. The relationship between the adopter and the adopted child

As an effect of the adoption, the adoptive parent has the same rights and obligations towards the adopted child as he or she has towards his or her biological child. The rights and obligations based on parentage and civil kinship are not distinct effects of the adoption, but implicit effects, of parentage and kinship as they have been shaped by the legal operation carried out – the transfer of parental rights and duties in favour of the parents or adoptive parent of the child[137], change of name and possibly of surname of the adopted child[138], legal obligation of maintenance within the adoptive family[139], mutual inheritance between civil relatives etc.

If the adoptive parent is the spouse of the natural or adoptive parent of the adopted person, the rights and duties of parenthood are exercised by the adoptive parent and the natural parent married to the adoptive parent.[140] This solution shall also apply in the case where one partner adopts the natural or adopted child of his or her partner, but only if the partner of the biological parent is the adoptive parent.[141]

If the adoptive parent has been deprived of his or her parental rights, the guardianship court may, having regard to the best interests of the child, order guardianship or one of the protective measures provided for by law.[142]

136 Avram, 2016, p. 459.
137 Art. 471 of the Civil Code.
138 Art. 473 of the Civil Code.
139 Art. 516 para. (2) of the Civil Code.
140 Avram, 2016, p. 460.
141 Art. 6 para. (2) c) of the Adoption Act.
142 Art. 472 of the Civil Code.

8.4. Last name of the adoptee

The adopted child takes the surname of the adopter through adoption.[143] If two spouses adopt or one spouse adopts the child of the other spouse and the spouses share the same surname, the adopted child will also be given this name. If the spouses do not have a common surname, they must notify the judicial authority which approves the adoption of the name that the child will bear. For good cause shown, the court may, when approving the adoption, order a change of the adopted child's surname at the request of the adopter or the adoptive family and with the consent of the child over the age of ten. The law also expressly provides that in the case of the adoption of a married person who shares a common name during the marriage, the adoptive spouse may, with the consent of the other spouse before the court granting the adoption, be given the adoptive spouse's name during the marriage.

On the basis of a final decision approving the adoption, the competent registry office will issue a new birth certificate for the child, under the conditions laid down by law, in which the adoptive parents will be listed as the adoptive parents. The old birth certificate will be kept and a note will be made on the side of the new certificate. Thus, according to Article 23 of Law No. 119/1996 on civil status documents, as amended by Law No. 57/2016[144], in the case of adoption, a new birth certificate shall be drawn up by the local community public service for the registration of persons or, as the case may be, by the civil status officer of the town hall of the administrative-territorial unit in whose district the adoptee's residence was located until the adoption was granted, or by the headquarters of the welfare institution in whose care the adoptee was located before the adoption was granted.[145]

143 Art. 473 of the Civil Code.
144 Art. 23 of Law No. 119 of 16 Oct 1996.
145 Avram, 2016, p. 460.

8.5. Confidentiality of the adoption procedure

The adoption procedure is confidential, and the identity of the adoptive person or family and the parents of the child must be kept confidential.[146] The manner of informing the adoptee about the adoption and his/her family of origin, the general legal regime for informing the adoptee about the adoption and his/her family of origin and the general legal regime for informing the adoptee about the adoption are laid down by the special law.[147]

Adopted persons have the right to know their origins and background and to be assisted in contacting their birth parents or biological relatives.[148] The adopted person has the right to request and receive information about their place of birth, institutional background and personal history that does not reveal the identity of their birth parents/biological relatives.[149] The apparent contradiction between the two legal texts revolves around the adoptee's right to access information about their origins and background while preserving the confidentiality of the identity of their birth parents or biological relatives. Article 75 establishes a broad principle that adopted persons have the right to know their origins and background and to be assisted in contacting their birth parents or biological relatives. This provision seemingly emphasizes a comprehensive right for adoptees to access information about their roots, implying a more unrestricted approach to obtaining such details. Contrastingly, Article 76 states that the adopted person has the right to request and receive information about their place of birth, institutional background, and personal history, but this information should not reveal the identity of their birth parents or biological relatives. This provision introduces a layer of confidentiality, suggesting that certain aspects of the adoptee's history must be shared without divulging the identity of their biological connections. To reconcile this seeming contradiction, Article 77 of Adoption Act specifies that the adoptee has the right to access information concerning the identity of their biological parents only if they have attained

146 Art. 474 of the Civil Code.

147 In this respect, Articles 66 to 70 of the Adoption Act, as amended and supplemented by Law No 57/2016, regulate in detail the issues of information on adoption.

148 Art. 75 of the Adoption Act.

149 Art. 76 of the Adoption Act.

full legal capacity. This provision introduces a legal threshold, ensuring that the adoptee is mature enough to handle potentially sensitive information about their biological lineage.

In essence, while Article 75 initially emphasizes the adoptee's right to know their origins, Article 77 clarifies that the disclosure of the identity of biological parents is contingent upon the adoptee reaching full legal capacity. This nuanced approach reflects a balance between the adoptee's right to information and the protection of the privacy and confidentiality of the biological parents or relatives. The legal framework aims to respect the adoptee's autonomy while also acknowledging the sensitivity and potential consequences associated with revealing the identity of their biological connections. Information certifying the adoption can only be provided by the Adoption Authority to persons who have acquired full legal capacity. Thus, once full capacity has been acquired, the adopted person may request the court of his/her place of residence or, if he/she is not residing in Romania, the Bucharest Court, to authorize him/her to have access to information in the possession of any authority concerning the identity of his/her natural/biological parents.[150] Prior to applying to the court, the adoptee must ask the Adoption Authority to issue a document certifying the adoption, whether he/she has established a family relationship with at least one of the biological parents before the adoption, and must attend at least one counselling session to check whether the adoptee is psycho-emotionally balanced. The adopter must apply to the courts.[151] The counselling may be provided by the General Directorate in whose territory the adoptee resides, by private organizations authorized to provide it, by individual agencies, associated agencies or professional social and/or psychological non-profit organization which have concluded an agreement with the Adoption Authority.[152] If the adoptee does not reside in Romania, the counselling activity may be carried out by foreign authorities/organizations authorized for this purpose under the legislation of the State in whose territory the adoptee resides. The counselling activity shall be certified by the drawing up of a counselling report, which shall be communicated to the adopted person.

150 Art. 77 of the Adoption Act.
151 Avram, 2016, p. 461.
152 Art. 78 of the Adoption Act.

An application for authorization to access information on the identity of the natural parents shall be submitted to the court together with a copy of the applicant's identity document, a document certifying the adoption and the establishment of a family relationship with at least one of the natural parents, and a report certifying the completion of the counselling activity.[153] If the counselling activity is carried out by foreign authorities/bodies, the report must be submitted to the court in the original or as a certified copy, together with a certified translation into Romanian. The court will grant the application if it finds, based on the evidence, that the applicant adopted person, who has established a kinship with at least one of the biological parents, has received counselling and the court is satisfied that the adopted person is psycho-emotionally balanced.

The identity of the adopted person's birth parents may be disclosed, before the adopted person has acquired full legal capacity, for medical reasons only, at the request of any of the adopters, the adoptee or a representative of a health institution, accompanied by supporting medical documents, by the Adoption Authority.[154] Adoptees who have information on the identity of their birth parents may contact the Adoption Authority directly to contact their birth parents or biological relatives.[155]

The natural parents or biological relatives of the adopted person may be informed of the confirmation of the adoption, the year of adoption, the national or international nature of the adoption and whether the adopted person is registered as living or deceased. The natural parents or biological relatives of the adopted person may receive information on the adopted person. Other information concerning the adopted person may be communicated to the biological parents or relatives of the adopted person only with the express consent of the adoptee who has full legal capacity or, if the adopted person is a minor, with the consent of the adopter or his family. The agreement is requested by the national authority responsible for the protection of children's rights and adoption, where applicable, through the General Directorate or central authority of the host State or through the accredited foreign organization involved in the adoption. The Adoption Authority will provide the information.[156]

153 Art. 79 of the Adoption Act.
154 Art. 81 para. (2) of the Adoption Act.
155 Art. 81 para. (3) of the Adoption Act.
156 Art. 67 of the Adoption Act.

Adopters are obliged to gradually inform the child of the adoption from the youngest age.[157] In order to fulfil this obligation, adopters may receive assistance from professionals of the Adoption and Post-adoption Unit of the General Directorate or from authorized private organizations, individual practices, associated practices or professional social and/or psychological non-profit organization, which have an agreement with the Adoption Authority. The identity of the natural parents of the adoptive child may be disclosed by the Adoption Authority for medical reasons only, before the child has acquired full capacity, at the request of any of the adoptive parents, the adopted person, or a representative of a health establishment, accompanied by supporting medical documents. Adoptees who have information on the identity of their birth parents may directly contact the Adoption Authority to contact their birth parents or biological relatives.[158]

8.6. The follow-up period

According to Article 43 of the Adoption Act, the court may not grant adoption until the child has been entrusted for a period of 90 days to the person or family wishing to adopt him or her, so that the court can make a rational assessment of the family relationships that would be established if adoption were granted. The child's physical and mental capacity to adapt to the new family environment will be analyzed in relation to the socio-professional, economic, cultural, linguistic, religious and any other factors characteristic of the place where the child is living during the period of custody, and which may be relevant to the assessment of the child's subsequent development if the adoption is granted.[159] The purpose of the adoption placement is to enable the court to make an informed assessment of the compatibility and family relationships that would be established if the adoption were granted. The importance of custody is so great that it can also be considered as a substantive condition for adoption.

Article 45 of the Adoption Act, as amended by Law No. 57/2016, also provides for exceptional situations in which adoption may be granted without

157 Art. 80 of the Adoption Act.
158 Avram, 2016, p. 462.
159 Art. 43 parag. (1)-(2) of the Adoption Act.

having to go through this stage. These exceptions include cases involving adoption of a person who has acquired full legal capacity, adoption of the child by the spouse of the natural or adoptive parent, adoption of a child for whom the adoption procedure has been opened and who has been in foster care with one of the spouses of the adoptive family or with the adoptive family for at least 6 months and adoption of the child by his or her guardian, if at least 6 months have elapsed since the date of the establishment of the guardianship. In the first two cases, the person or family wishing to adopt may apply directly to the court for adoption.[160]

Article 47 of the Adoption Act governs the monitoring of the child's development during the adoption placement period. The General Directorate in the adopter's or adopting family's residence must regularly assess the child's progress and the relationships between the child and the entrusted person or family, generating reports every two months. Upon completion of the placement period, a final report detailing the development of relations between the child and the adopters is compiled by the General Directorate and submitted to the competent court to inform the adoption decision.[161] Article 48 of the Adoption Act addresses the potential revocation or extension of the custody measure during the adoption placement. If the General Directorate discovers that the child does not integrate well with the adopter or adopting family or encounters other impediments to completing the adoption, it promptly refers the matter to the court for revocation or, if necessary, extension of the placement. The court's decision on revocation or extension is legally enforceable.[162]

Moving on to the conditions of custody, a child may be placed for adoption if a final court decision has initiated the adoption procedure, and the adopter or adoptive family has been identified and confirmed as compatible with the child by the responsible authority.[163]

160 Art. 45 of the Adoption Act
161 Art. 47 parag. (1)-(2) of the Adoption Act.
162 Art. 48 of the Adoption Act.
163 Avram, 2016, p. 450.

9. Termination of adoption

Adoption shall be terminated by dissolution, by annulment or declaration of nullity.[164] Adoption shall be terminated by operation of law if the adoptive spouse or the adoptive spouses have died. Adoption may be terminated in respect of both minor and adult adoptees. For example, the adoption may be terminated if the adoptee is subject to a statutory protection measure, if the termination of the adoption is in the best interests of the child. [165]

Adoption may also be terminated at the request of the adopter or the adoptive family if the adoptee has made an attempt on the life of the adoptee, their ascendants or descendants, or if the adoptee has committed a criminal offence punishable by a custodial sentence of two years or more against the adopters. If the adopter has died as a result of the acts committed by the adoptee, the adoption may be terminated at the request of the heir. An adoption may be terminated at the request of the adopter only if the adoptee has acquired full capacity, even if the acts were committed before the adoption. The adoption may also be terminated at the request of the adoptee if the adopter is guilty of the acts against the adoptee.[166]

An adoption may be annulled at the request of any person who has consented to its conclusion and whose consent is the result of a mistake, deception, or involuntary act of force as to the identity of the adoptee. The action may be brought within 6 months of the discovery of the mistake or deception or the cessation of the coercion, but not more than 2 years from the conclusion of the adoption.[167] However, sham adoptions and adoptions concluded in breach of form or essential conditions are null and void if, in the latter case, the law does not make them voidable. Adoption is null and void if it is concluded for a purpose other than the protection of the best interests of the child.[168] The judicial authority may reject an application for a declaration of nullity if the retention of the adoption is in the best interests of the adoptee.

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164 Art. 475 of the Civil Code.
165 Art. 476 of the Civil Code.
166 Art. 477 of the Civil Code.
167 Art. 479 of the Civil Code.
168 Art. 480 para. (2) of the Civil Code.

As effect of the termination of the adoption on parental rights, the natural parents of the child regain parental rights and obligations if the court does not decide to order guardianship or other special protection measures for the child. The adoptee shall also regain the surname and, where applicable, the forename he or she had before the adoption was granted. However, for good cause, the court may allow the adopted child to keep the name acquired through adoption.[169]

As it has been correctly observed in the literature, Article 482 of the Civil Code is incomplete, because the main effect of the termination of adoption, which is not expressly provided for, but it goes without saying, is the extinction of the bond of civil filiation between the adoptee and the adopter, as well as the bond of civil kinship between the adoptee and the adopter's relative (extinctive effect), at the same time as the re-birth of the bonds of filiation and of natural kinship. In this regard, after the adoption has ended, the adopted person may claim maintenance only from his or her natural relatives or, where appropriate, from his or her spouse.[170] In the case of termination of adoption by operation of law, the special feature is that there is an extinctive effect in relation to the adopter and his relatives in the context of the terminated adoption, together with a constitutive effect in relation to the filiation and civil relationship between the adopted person and the new adopter and his relatives.[171]

10. Duty to provide information

Under the provisions of the Adoption Act, the adoptee has the right to know his or her origins and must be supported in contacting his or her biological parents or biological relatives.[172] The adopted person may only apply to the competent judicial authority in his/her place of residence for authorization to access information on the identity of his/her birth parents/biological relatives once he/she has acquired full capacity. Before this, the

169 Art. 482 of the Civil Code.
170 Article 520 of the Civil Code.
171 Florian, 2016, p. 516-518.
172 Art. 75 of the Adoption Act.

adopted person must request a document certifying his/her adoption from the Adoption Authority and must attend at least one counselling session, where professionals will assess whether the adopted person is psychologically/emotionally stable.[173]

The adoptive person/family must gradually inform the child from a very young age that he or she is adopted. To fulfil this obligation, adopters may be assisted by professionals of the adoption department of the county General Directorate, other private organizations authorized for this purpose, psychologists, social and/or psychological professional non-profit Organization. The identity of the adopted person's birth parents may be disclosed before the adopted person has acquired full capacity only for medical reasons, at the request of either of the adopters, the adopted person or a representative of a health establishment, accompanied by supporting medical certificates.[174]

The birth parents or biological relatives of the adopted person may receive information about the adoption of their child/relative, the year of adoption, the domestic or international nature of the adoption and whether the adopted person is alive. Other information concerning the adoptee may be disclosed to the adoptee's biological parents or relatives only with the consent of the adoptee who has acquired full capacity or, if the adoptee is a minor, with the consent of the adoptive person/family.[175]

11. Evaluation

In Romanian law, adoption is the legal act by which a relationship of descent is established between the adopter and the adoptee, as well as kinship relations between the adoptee and the relatives of the adopter. The basic aim of adoption legislation is to ensure that the child is brought up in a family. Adoption is primarily a child protection measure and is based on the principle of the best interests of the child. Adoption procedures are supervised by the Adoption Authority. At the departmental level, the General Directorate

173 Art. 77 of the Adoption Act.
174 Art. 81 of the Adoption Act.
175 Art. 80 of the Adoption Act.

is responsible for the procedures. Licensed private organizations can also assist at certain stages of the domestic adoption procedure.

As a general rule, a child can be adopted until he or she has reached full legal capacity, i.e., until he or she reaches the age of majority (child adoption). In exceptional cases, a person who has acquired full capacity may also be adopted if he or she was brought up by the adopter when he or she was a minor (adult adoption). As part of the process of becoming an adoptive parent, the adoptive person/family undergoes a suitability assessment, the aim of which is to verify the existence of parental skills, moral and material conditions that are essential for the child's development and upbringing. Following the amendment of the Adoption Act in 2020, a number of provisions have been introduced to support and encourage domestic adoption: the allowances available to adoptive parents have been increased, special allowances are available for children with disabilities or who are difficult to adopt, the validity of the certificate of suitability has been changed from 2 years to 5 years, and persons belonging to a national minority can take the suitability test in their mother tongue. The impact of the amendment is not yet measurable, but the Romanian authorities hope that the amendments will increase the willingness to adopt.

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Regulation of adoption in Serbia

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1. Introduction

Adoption is a legal institution by which a parental relationship is formed artificially, legally, between someone else's minor child (the adoptee) and an adult person with full legal capacity (the adopter).[1] Thus, a permanent and indissoluble bond is established between the adoptive parent and all his relatives, on the one hand, and the adopted child and all his descendants, on the other hand, as well as all the rights and duties that exist by law between the child and his parents and other relatives. With the establishment of adoption, the adoptee completely enters the family of the adopter as if he/she were their natural descendant and, at the same time, completely leaves the family of his/her blood relatives, with which he/she is no longer bound by any rights or obligations. Adoption can be seen as a legal act that is created by law in the prescribed form, the consequence of which is the creation of parental rights between someone else's child and the person by whom the child is adopted.[2]

In modern legal systems, adoption has a dual character because it is at the same time, the most complete form of family law protection of children without parental care and the form that realizes the parental relationship between the adoptive parents and the adoptee.[3] It is no different in Serbia regarding the aim and functions of the adoption as a legal institute. The core aim of adoption in Serbia is to protect children without parental care, to ensure the upbringing of minors in a family environment, as well as to serve

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1 Cvejić Jančić, 2004, p. 89.

2 Počuča, 2010, p. 207.

3 Jović, 2005, p. 1226.

the best interests of the child. Adoption is the most effective form of protection of children without parental care because the child gets a family with the same functions as if he had a natural family.[4]

Societies have an interest in protecting the family, primarily because of their reproductive function and their role in renewing the population. Upbringing, education, and psychological support for children are primarily achieved within the family sphere. These functions of the family affect the development of a child's personality and his/her upbringing to be responsible members of society upon reaching adulthood. However, questions remain whether the principle of special protection of the family is implemented sufficiently in practice or whether such protection is provided to families that are unable to perform their functions according to modern standards.[5]

2. Substantive legal issues concerning adoption

Civil law is not contained in a unified codex in Serbia, instead, various civil law subjects are regulated in different acts and so the rules on adoption are laid down in the Family Act.[6] The Family Act stipulates principles regarding the child as such. Among these stipulated principles is the best interests of the child, the principle of equating the rights of the child born out of wedlock with the rights of the child born in wedlock, the principle of equating the rights of the adopted child towards adopters with the rights of the child towards parents. These principles are in fact the concretization of the non-discrimination of the child principle in general. The principles of the protection and fundamental rights of the child are not only enshrined in the Family Act but are also guaranteed by the Constitution.[7] The Family Act also stipulates obligations of the state concerning the child. These are to undertake all necessary measures to protect the child from neglect, physical, sexual, and emotional abuse and every form of exploitation; to respect,

4 Kovaček Stanić, 2010a, p. 343.

5 Kovaček Stanić, 2021a, pp. 202–203.

6 Porodični zakon („Sl. glasnik RS", br. 18/2005, 72/2011 – dr. zakon i 6/2015), (Hereafter: Family Act).

7 See Art. 64. and Art. 66. of the Constitution of The Republic of Serbia (Official Gazette of the RS No. 98/2006).

protect and promote the rights of the child and to provide the child without parental care with protection in a family environment whenever possible.[8]

The principle of equating adoption with parentage is also stipulated in the Constitution. This constitutional provision provides that an adopted child has equal rights with respect to his/her adopters as a child does toward his/her parents, while the adopters have the same legal status as natural parents.[9]

In order to establish a valid adoption, it is necessary to fulfill certain legal prerequisites, which, for the sake of clarity, can be classified into several groups: (A) prerequisites related to the adoptee (general suitability of the adoptee), (B) prerequisites related to the adopter (general suitability of the adopter) and (C) assumptions related to the form of adoption.

2.1. Requirements for adoption regarding adoptive parents

In order to be able to adopt a child, the adopter must meet several conditions. In Serbian law, an adopter can only be a person who has full legal capacity, is older than the adopted person by at least 18 and at most 45 years,10 has the required personal characteristics needed for the successful exercise of parental rights, adopts together with his spouse or non-marital cohabitant, is prepared for adoption and, primarily, is a domestic citizen.

The requirement regarding the age of the adopter is realized in Serbian law through the rule that the difference in age between adoptive parents and adopted children cannot be less than 18 or more than 45 years.11 However, there is one exception to this general rule, when the minister in charge of family protection can allow the adoption of a person who is older than the adoptee by less than 18 or more than 45 years, if such adoption is in the best interest of the child.[12] The 18-year minimal age difference with regards to prospective adoptive parents can be explained by the need to prevent

8 Kovaček Stanić, 2010b, p. 143.; Art. 6. of Family Act.
9 Kovaček Stanić, 2022 In. Paweł Sobczyk (ed.) p. 190.
10 Art. 99. (1) of Family Act
11 Art. 99. (1) of Family Act
12 Art. 99. (2) of Family Act

reckless adoption decisions by couples who are too young. On the other hand, the significant difference in age between the adopter and the adopted child calls into question the harmonious psycho-physical development of the adopted child and reduces the chances of him/her integrating into the adoptive family in a way that would be similar to the natural relationship between a child and a parent.[13]

In relation to the general eligibility of adoptive parents the fundamental requirement of full legal capacity should be mentioned, too. The condition of full legal capacity of the adopter means that the adopter can only be a person who has full legal capacity.[14] Interestingly, the law does not explicitly state that the adoptive parent must be of adult age, but it does state that the adoptive parent must have full legal capacity. The rules on legal capacity are also to be found in the Family Act, where it is stated, that adult age status shall be acquired by reaching 18 years.[15] Generally, full legal capacity shall be acquired by reaching adult age or, alternatively, by concluding a marriage with court permission before reaching adult age.[16] Courts may also allow for the acquiring of full business capacity of underage persons who have reached 16 years of age, have become a parent and have reached the level of physical and mental maturity necessary for the independent care for their own person, rights and interests.[17] Even though Serbian law does not stipulate that the adoption requires the age of majority of the adopter because as a rule, full legal capacity is acquired upon reaching the age of 18, when the age of majority is also attained, there is an explicit provision that the adoptive parent must be at least 18 years older than the adopted child. The practical meaning of this provision is that a person who has full legal capacity, but is still a minor cannot become an adoptive parent (for example, a minor who acquired full legal capacity through emancipation, i.e. marria-

13 Drakšić, 2015, p. 206.

14 Art. 100. (2) 2. of Family Act, The law, in fact, says that "...a person who is completely or partially deprived of legal capacity..." cannot adopt, which is a wording whose linguistic meaning does not allow further dilemmas about whether a person with partial legal capacity can be an adopter.

15 Art. 11. (1) of Family Act

16 Art. 11. (2) of Family Act

17 Art. 11. (3) of Family Act

ge, or court decision is excluded as an adoptive parent).[18] The provisions on full business capacity should therefore be applied in the light of the above mentioned rule.

In the subject area of marital status of the adoptive parents, it must be noted, that in Serbia there are two types of family law unions regulated by law: marriage and heterosexual non-marital cohabitation.[19] In the domain of active adoptive eligibility, the Family Act of Serbia can be considered liberal,[20] because not only spouses, but non-marital cohabitants can also adopt together. On the other hand, marital status or non-marital cohabitation are conditions for adoption. This means that, as a rule, only spouses[21] or non-marital cohabitants[22] can adopt. The reason for such restriction should be sought in the fact that adoption imitates the natural parental relationship to the greatest extent possible, so its aim, among other things, is to provide the child with both parents.[23] However, two exceptions to this rule are possible: (1) only one spouse is allowed to be an adoptive parent in the event that he/she adopts the child of his/her spouse or non-marital cohabitant partner; (2) the minister responsible for family protection may exceptionally allow a person who lives alone to adopt, if there are particularly justified reasons for this.[24] The concept of justified reason, on the other hand, is a factual issue that should be evaluated by the competent minister in each specific case. Up to now, in this context, the most often cited reasons were the attachment of the child to the future adopter, previous care of the child by the adopter in another capacity,[25] special personal qualities of the adopter[26] etc.

18 Drakšić, 2015, p. 206.
19 Kovaček-Stanić, 2021b, p. 71.
20 Kušanović, Ignjatović, 2013, p. 175.
21 In Serbian law marriage is a „union of life between a man and a woman regulated by law. Marriage can only be concluded based on the freely given consent of the future spouses. Spouses are equal." See Art. 3. of Family Act.
22 In Serbian law an extramarital union is a more permanent cohabitation of a man and a woman, between whom there are no marital obstacles (common-law partners/non-marital cohabitants). Non-marital cohabitants have the rights and duties of spouses under the conditions determined by the Family Act. See Art. 4. of Family Act.
23 Art. 101. (1) of Family Act
24 Art. 101. (2) – (3) of Family Act
25 Kovaček Stanić, 2010, p. 346.
26 Drakšić, 2015, p. 210.

It is irrelevant, on the other hand, whether the adoptive parent already has a child of their own when establishing the adoption, or whether they have one or more adopted children, but in domestic practice, the rule is that people who have their own children adopt far less often.

Serbia is one of the countries whose population is very conservative in terms of sexual freedom and tolerance for differences, [27] consequently, Serbia, for the time being does not recognize any form of legal recognition for same-sex couples. Same-sex marriage is banned under the Constitution of Serbia adopted in 2006. In Serbia, couples of the same sex are not able to enter a registered partnership. Although the drafting of a law regulating registered cohabitation between couples of the same sex is in progress, it has not been adopted, arguably for political reasons. Article 62 of the Serbian Constitution serves as the basis for the rejection of this draft law, according to which marriage can be entered into by a woman and a man of their own free will before the competent state authority. The reason for the rejection of the draft law concerning registered cohabitation of same sex couples was formulated in such a way that the acceptance of such cohabitation would be unconstitutional, especially since the Constitution states that marriage, as well as cohabitation, can only be entered into by a woman and a man. Since same-sex couples cannot enter a legally recognized relationship, the question of adoption is completely excluded.

Besides adoption as a form of protection of children without parental care, Serbian law knows foster care, as an alternative for adoption. Foster care is a temporary form of child protection. It provides a supporting family home also in terms of the child's growth and development in the period until his/her biological family is rehabilitated and conditions are met for him/her to return to his/her family, until another form of protection is provided that is in the best interest of the child, or until the child becomes independent. The main difference between the two legal institution is, that unlike foster care, which is a temporary form of child protection, adoption creates a bond equal to that between biological parents and their children.

Adoption is established between the adopter and his relatives on the one hand and the adoptee and his descendants on the other hand, establishing

27 Čović, 2017, p. 90.

an indissoluble relationship equal to blood kinship. In the register of births, the adoptive parents are registered as the parents of the adopted child. In the case of adoption, the guardianship authority issues a decision establishing the adoption, which is submitted to the competent registry office for registration in the register of births. In it, the adoptive parents are registered as the parents of the adopted child. In accordance with the law, adoptive parents and an adopted child establish a permanent relationship that is equal to the relationship between children and their biological parents.

In the case of foster care, the Center for Social Work concludes a written agreement on the child's stay with the foster family. The center regularly monitors the situation and decides whether the foster parents are taking enough and good care of the child. The foster family, in accordance with the signed contract, receives regular compensation for the costs of foster care and compensation for their work in accordance with the relevant law. In family law literature, the question of the legal status of the person with whom the child is placed in foster care is controversial. Some authors believe that it is similar to the status of a foster parent, while others are of the opinion that it is similar to the status of a guardian.[28] Generally, it cannot be concluded according to the Family Act provisions that foster care is a compulsory pre-step for adoption. In Serbian law, these two legal institutes are separated.

The personal characteristics of the adoptive parents are determined by law in a positive way with one general provision, according to which only a person who has personal characteristics on the basis of which it can be concluded that he/she will exercise parental rights in the best interest of the child can adopt.[29] Therefore, unlike biological parents who do not have to confirm their suitability for parenthood before anyone, the adoptive parent must 'prove' before the guardianship authority that he/she is capable of successfully exercising parental rights. This means that the guardianship authority will have to assess in each specific case whether the moral qualities of the adoptive parent, his/her family and marital circumstances, as well as his/her ability to raise and educate a child represent a reliable basis for mak-

28 Stjepanović, 2018, p. 258.
29 Art. 100. (1) of Family Act

ing a decision on adoption. The delicacy of this assessment was the reason for introducing a special provision in the domestic legislation that obliges the guardianship authority to obtain the findings and expert opinion of a psychologist, pedagogue, social worker, lawyer, and doctor on the adoptive parent's general suitability for adoption ex officio. When assessing the general suitability of the adoptive parent, the most important and complex part of the task of the guardianship authority is the determination of the motive for the adoption and the assessment of the emotional stability of the prospective adoptive parent. The suitability of the adoptive parent in a specific case, on the other hand, is assessed based on a comparative analysis of all relevant data obtained both about the child and about the person intending to adopt, during the period of mutual adjustment.

The legislator, however, using the method of negative enumeration, explicitly determined the personal characteristics of the adoptive parents and the circumstances that represent obstacles to establishing an adoption. Therefore, the following cannot adopt: (a) a person who is completely or partially deprived of parental rights; (b) a person who is completely or partially deprived of legal capacity; (c) a person suffering from a disease that can have a harmful effect on the adoptee and (d) a person convicted of a criminal offense from the group of criminal offenses against marriage and family, against sexual freedom and against life and physical integrity.[30]

There are two more objective conditions that must be met on the side of the adopter: special training and citizenship. The Family Act of Serbia established another assumption for adoption, and it states that only a person who has been prepared for adoption under a special program can adopt.[31] The legal reasoning behind this provision is to help future adoptive parents become competent and successful parents, who have acquired the basic necessary knowledge about the child and the skills to care for the child. Preparation for adoption is carried out during the assessment of the adopter's general suitability, but necessarily before the final decision on adoption is

30 Art. 100. (2) of Family Act

31 Art. 102. of Family Act. Only the spouse or non-marital cohabitant partner of the parent or adoptive parent of the child is exempted from the obligation to prepare.

made and is carried out by the guardianship body in whose area of competence the future adopters have their place of residence.[32]

The citizenship of the adoptive parent as a prerequisite for adoption means that the active adoptive capacity in Serbian law is primarily held by persons who are citizens of the Republic of Serbia. This restriction was inspired by the consideration that in a situation where a foreigner adopts a domestic citizen, there would be a high probability that the adopted child would live abroad and would permanently integrate into a foreign environment.[33] However, a foreign citizen can still adopt a child if two conditions are met: (a) no adoptive parents can be found among domestic citizens and (b) the minister responsible for family protection has agreed to the adoption. It is concluded that adoptive parents cannot be found among domestic citizens if more than a year has passed since the date of entering data on the future adoptee in the Single Personal Register of Adoption, and if it is in the best interest of the child, the Minister can allow adoption by a foreign citizen even before the expiration of this period.[34]

With regards to children with special needs, it is usually considered that the child must have some visible physical or mental disability. In this sense the Family Act of Serbia does not contain special provisions that would regulate the adoption of a disabled or ill child, i.e. a child with a physical, emotional, or mental disability. In Serbian adoption practice, potential adopters are unfortunately usually not interested in adopting physically or mentally disabled children.[35] These children require that the adopters possess special knowledge, more commitment and effort, and the necessary medical care and assistance. There are only a few that can or are willing to provide

32 The preparation program contains several thematic units: what the person intending to adopt needs to know about adoption, motives for adoption and the stability of the adoption decision, characteristics of the child, development and needs of the child, the child's past and identity, and the arrival of the child in the family. See the Rulebook on the adoption preparation program [*Pravilnik o programu pripreme za usvojenje*] (Official Gazette of the Republic of Serbia, No. 60/2005).

33 Drakšić, 2015, p. 210.

34 Art. 103. of Family Act

35 Social workers at the Center for the Protection of Infants, Children and Youth usually point out that these children are mostly abandoned by people who would have taken care of their child if they had not been born with a disability, because they cannot emotionally accept that fact.

such effort. According to the data of the competent ministry, children with minor disabilities are mostly adopted by foreign citizens.[36] It can be considered as a general socio-cultural phenomenon, that prejudices related to disabled and ill children are still a characteristic of Serbian society.

3. Procedural framework

Adopting a child is a significant and life-changing decision, and as such, it is a legal process that requires the involvement of various institutions and authorities. For the adoption to be valid, it must be concluded in the form – which means by the competent authority and in the appropriate procedure – prescribed by law.

Considering the rules of jurisdiction in Serbian family legislation, the body responsible for establishing the adoption is the guardianship authority (*organ starateljstva*). The work of the guardianship authority is carried out by the center for social work, and the supervision of the work of the guardianship authority is carried out by the ministry responsible for family protection.[37] The local jurisdiction of the guardianship authority when establishing an adoption is determined according to the place of residence of the adopted person, and if the adopted person does not have a place of habitual residence, according to his place of residence. Finally, functional jurisdiction, as a specific type of real jurisdiction, does not have special importance in the establishment of adoption, so the official in charge of these tasks as per the internal rules of the guardianship authority participates in the procedure.

The procedure of establishing an adoption consists of three phases: (a) preparatory (preliminary) procedure, (b) decision-making procedure on establishing an adoption, and (c) the adoption registration procedure.

The preparatory (preliminary) procedure for the establishment of adoption begins: (1) with the initiating of the guardianship authority ex officio, (2) with a written request of the future adopters to the guardianship author-

36 Čović, 2017, p. 111.
37 Art. 88. and 14. of Family Act

ity in whose area of competence they have a common residence or place of residence and (3) with a written request of the child's parents or guardian to the guardianship authority in whose area of competence the child has a place of residence. Foreign citizens submit a written request for adoption through the ministry responsible for family protection. Along with the proposal for adoption, the authority attaches birth certificates for adopters and adoptees, as well as other evidence of the existence of legal prerequisites for adoption (medical certificate on the state of health of the future adopters, proof that the adopters are not deprived of parental rights or legal capacity, confirmation that the adoptive parents and the adopted child are not related by blood, which is an obstacle to establishing the adoption, etc.). The guardianship authority is especially obliged to recommend the parent to undergo psycho-social counseling before giving its consent for the adoption of the child, and after giving the consent of the parents, it is obliged to appoint a temporary guardian for the child who will represent him/her in the adoption process.[38]

The guardianship authority before which the preparatory procedure has been initiated is obliged, first of all, to determine the general suitability of the adopter and adoptee for adoption, using social work methods and engaging a team of experts (psychologists, pedagogues, social workers, lawyers and doctors), whose task is to provide findings and professional opinion on the personality of future adoptive parents and adoptees. If the guardianship authority determines that the applicants are not eligible to be adoptive parents, that is, that the child is not eligible to be adopted, it is obliged to issue a written decision rejecting the request for adoption within 60 days from the date of submission of the proper request. Applicants can file an appeal against this decision to the ministry responsible for family protection within 15 days from the date of receipt of the decision. If, on the other hand, the guardianship authority determines the existence of the general suitability of future adopters to adopt a child, that is, the general suitability of the child to be adopted, it is obliged to enter data on the future adopters or the future adoptee in the Single Personal Register of Adoption.

38 Art. 311–313. of Family Act

In Serbia there is a unique Single Personal Register of Adoption (*jedinstveni lični registar usvojenja*), which is a register of relevant data on potential adopters and adoptees (name, surname, gender, date and place of birth, unique citizen registration number, place of residence, citizenship, national or ethnic affiliation), as well as data that are important only for the child (family and health status of the child, information about the child's parents, information about the general suitability of the child to be adopted, etc.), i.e. information that is important only for future adoptive parents (school education, occupation, state of health, marital status, financial and housing circumstances, motivation for adoption, etc.).[39]

4. Qualification to become an adoptable child

In Serbian law considering the adoptee's general eligibility, specific requirements are laid down by the law. An adoptable child can only be a child who is born, whose best interest is to be adopted, who is a minor, who has the appropriate family status, for whom there is no obstacle to adoption by blood or adoptive relatives, i.e. the adoptive parent's custody, and a child whose parents agreed to the adoption, and in some cases the child's agreement is also needed for the adoption.

The birth of the adopted child is the first condition for establishing the adoption, since the adopted child can only be a person who is the subject of law. This means that a child must be born to be adopted, that is, a conceived and unborn child (*nasciturus*) cannot have passive adoptive capacity. This assumption for establishing adoption is not expressly provided in any law, but its justification is found in the fact that the unborn child still does not need any other protection than biological, and therefore the basic purpose of adoption could not be realized.[40]

39 See Art. 314–316 of Family Act and Rule book on the manner of keeping the unique personal adoption register [Pravilnik o načinu vođenja Jedinstvenog ličnog registra usvojenja], (Službeni glasnik Republike Srbije, br. 63/2005).

40 Drakšić, 2015, p. 201.

The condition of the best interest of the adoptee should ensure that adoption is allowed only if it serves the best interests of the child.[41] Along with the parents or the guardian, the interests of the adopted child are weighed when making the adoption decision by the guardianship authority, which can reject the application for adoption if it judges that it is not, for any reason, useful for the adopted child, i.e. the court that makes the final decision on the validity of the adoption. Namely, although there is a universally accepted opinion on the indisputable advantage of parental care over all other forms of childcare, not all children are eligible for adoption. Therefore, the guardianship authority must assess the psycho-physical status of the child and look at his/her entire social situation, in order to be able to make a decision on whether adoption is beneficial for the child in the specific case. The child's psycho-physical status is the result of the interaction of hereditary factors and environmental factors, e.g. the child's previous experience. Modern child psychology is able to relatively reliably determine the child's psycho-physical status at a certain moment of development, and sometimes to predict future development, and to assess the child's specific needs for adoption based on such tests.[42]

The criteria of the minor age of the adopted person means that the adoption can take place only until the child reaches 18 years of age.[43] In the case that the minor entered into marriage with the permission of the court and thus he/she acquired full legal capacity before reaching the age of majority by court decision, adoption is not allowed.[44] Serbian law, however, also determines a minimal age limit for the adoptee, which means that the child is legally eligible for adoption only when he/she reaches the age of 3 months. In practice, the adoption of newborns should be avoided, thereby preventing hasty and ill-considered decisions by the parents.[45]

The family status of the child (adoptee) indicates that any child can be adopted, provided that the other legal conditions for a valid adoption are otherwise met. Nevertheless, the legislator explicitly states that the follow-

41 See Art. 89. of Family Act
42 Đuretić, 1982, pp. 114–117.
43 See Art. 90. (1) of Family Act
44 See Art. 90. (3) of Family Act
45 See Art. 90. (2) of Family Act

ing can be adopted: (a) a child who has no living parents, (b) a child whose parents are unknown or whose whereabouts are unknown, (c) a child whose parents are completely deprived of parental rights or legal capacity and (d) a child whose parents agreed to the adoption.[46] In other words, in Serbian law it is also possible to adopt a child who has both living and known parents.[47]

The legal prohibition of blood relationship between the adoptee and adopter, from which no exception is provided is reflected in the fact that it is forbidden to adopt a child who is a direct blood relative of the adopter, regardless of the degree of kinship, or is his brother or sister.[48] Prescribing close consanguinity as an obstacle to establishing adoption is aimed at avoiding unnecessary conflicts between these relatives, who already have a legal relationship (consanguinity) and the rights and duties arising from it (for example, the legal obligation to support) or duplicating family obligations by establishing a new legal relationship (adoptive kinship). Adoptive kinship also belongs to adoption impediments, since adoption legally establishes the relationship between the child and the parents between the adoptee and the adoptive parent, and the adoptive parent exercises parental rights as a personal and absolute right. Therefore, a child who has already been adopted cannot be adopted by other persons while the previous adoption lasts. An exception is provided only in the case when the adoption is extended to the spouse or non-marital cohabitant of the adopter.[49]

Custody of the adoptive parent over the adopted child is also an exclusionary reason for adoption. A guardian cannot adopt his ward, which means that a child under guardianship cannot be adopted by his guardian until the

46 See Art. 91. of Family Act

47 The earlier solution of the Law on Marriage and Family Relations, which prohibited the complete adoption of a child with both parents, was heavily criticized by the expert teams of social work centers. They stated, namely, that in practice they often meet parents who are mentally ill or mentally retarded, educationally, and socially neglected, alcoholics or drug addicts, without employment and any material and housing conditions for raising children, or simply completely uninterested in their parenting. In such situations, it was not possible to carry out a full adoption, even when there were potential adopters and regardless of the fact that such parents were very interested in their child being adopted. Drakšić, 2015, p. 202.

48 Art. 92. of Family Act

49 Art. 93. of Family Act

guardian is relieved of his duties as guardian.[50] Such a ban was introduced for the same reason as for blood relatives, i.e. in order to exclude the simultaneous legal protection of the child through two different legal institutions. In addition, the guardian is obliged to submit a report and give an account of his/her work to the guardianship authority when his/her duty as a guardian ends, so it is better to discuss the mutual relationship between the guardian and the ward before adoption is established between them. Otherwise, the literature often points out that the adoption of a former ward would be very successful and useful, if the guardian is a person who has taken care of the child for a long time, knows him well, loves him and wants to give him the status of an 'own child'. Unfortunately, according to data from the practice of guardianship authorities, the number of such adoptions is insignificant.[51]

The consent of the adoptee's parents is a prerequisite for the validity of the adoption, so that both parents have the opportunity to decide whether they will renounce their parental rights or transfer it to the adoptive parents. The consent of the parents can be given in two ways: (a) with the designation of the adoptive parent or (b) without the designation of the adoptive parent, in the form of the so-called blank consent, which means that the parent gives consent for the adoption of his child without knowing who the adopters are. In any case, in Serbian family law, consent can only be given after the guardianship authority has recommended that the parent undergo psycho-social counseling. The goal of this counseling is for the parent to become aware of the consequences of his/her own declaration of consent and the rights and duties arising from adoption. Giving consent in fact, has the meaning of transferring parental rights, and has the effect of renunciation of own parental rights. A parent cannot give consent for adoption before the child is 2 months old, but he/she can also withdraw that consent within 30 days from the day he gave his/her consent, but he/she can use this right only once.[52] Consent for adoption is not required in the case of a parent who is completely deprived of parental rights or legal capacity by a court decision, as well as when the parent is deprived of the right to decide on issues that

50 Art 94. of Family Act
51 Đuretić, 1982, p. 103.
52 See Art. 95. and Art. 113. (3) of Family Act

significantly affect the child's life.[53] If the child is under guardianship because he/she has no parents, or if consent is not requested from the parents for the reasons mentioned above, the consent for adoption is given by the guardian of the child.[54]

Obtaining consent from both parents of the child, except in situations that are expressly stated in the law, and which have just been mentioned, creates great problems in practice. It happens, namely, that a parent who does not pay maintenance for the child, does not want to take care of the child, does not maintain personal contact with the child or, simply, does not show any interest in the child, withholds consent for adoption irresponsibly, out of spite towards the other parent who exercises parental rights. In such situations where it is unequivocally shown that the adoption of a child should be allowed against the will of the parents, i.e. when there is a conflict between the child's interest to be adopted and the parents' interest to prevent it, the guardianship authority must initiate a procedure for complete deprivation of parental rights, or a procedure for partial deprivation of parental rights with the aim of depriving the parent of the right to decide on issues that significantly affect the child's life. Only in this way, with the greater engagement of guardianship authorities to initiate such proceedings and the greater responsibility and courage of courts to deprive parents of parental rights due to their passive attitude, negligence or malice, it is possible to arrive at a correct assessment of the best interests of the child in terms of his adoption.[55]

Finally, the condition of consent of the adoptee is required for the validity of the adoption if the child is older than 10 years and is capable of reasoning.[56] This is completely logical, since adoption is an extremely important event in a child's life, an event that directs and shapes his/her entire future, and it is necessary for the child to express his/her consent for such a change. This rule stems from the internationally recognized right of the child to participate in making all decisions that concern him/her. However, attention should be drawn to the fact that the minor gives his/her consent to

53 Art. 96. of Family Act
54 Art. 97. of Family Act
55 Drakšić, 2015, p. 199.
56 See Art. 98. of Family Act

the already reached agreement of the adoptive parents and his/her parents or guardians, but his/her consent is a completely equal condition, without which there is no valid adoption.

A child's well-being has many aspects that may be more or less interrelated. It is used as an umbrella term to encompass specific concepts such as opportunities to grow, learn and achieve, feel safe and secure, to have positive personal and social relationships and to have a voice, participate and influence. Undoubtedly, children's well-being is mediated by personal and environmental factors, including individual capacities, relationships and cultural values. [57]

4.1. Children's rights in the context of adoption

Concerning the fundamental rights of the child, generally speaking, it can be stated, that the Constitution of Serbia establishes a relatively broad normative framework for regulating human rights and children's rights.58 The Family Act of Serbia also proclaims specifically some of the most important rights of the child. These are: (1) the child's right to know who his/her parents are, (2) the child's right to live with his/her parents, (3) the child's right to personal relations with the parent with whom he/she does not live, (4) the child's right to proper and complete development, (5) the child's right to education, (6) the child's right to undertake legal affairs (legal capacity of the child) and (7) the child's right to free expression of opinion. These rights apply to all children without exception, whether adopted or not.

The child's right to know who his/her parents are is a specific issue in the context of the adoption. An adopted child shall have, like any other child, the right to know who his/her parents are.[59]A child (adopted or not), regardless of age, has the right to know who his/her parents are, and a child who has reached the age of 15 and is capable of reasoning can inspect the birth register and other documentation related to his/her origin.[60] However, this could not

57 Dolan, Ze9garac, Arsić, 2020, p. 9.
58 Golić, Logarušić, 2023, p. 44.
59 Cvejić Jančić, 2018, pp. 346–347.
60 See Art. 59. of Family Act

lead to establishment of parental relations between an adopted child and his or her biological parents, since the legal or 'intentional' parentage of adopters is the only fact that counts. The information about parents may be very stressful for an adopted child. For example, if his or her parents are criminals convicted of serious crimes, or if they are mentally ill and therefore were hospitalized in the sanatorium, if they are drug addicts or alcoholics and so on, it may be questioned whether the child should know information about his or her parents.[61] Because of that, Serbian law provides that, before allowing the child to inspect the birth register, the registrar is obliged to refer the child to psychosocial counseling service, or other institution specializing in mediation of family matters.[62] The purpose of this counseling is to facilitate the child's acceptance of the truth about their origin and to contribute to the lessening of possible stress, resentment or despair that may affect the child after having found out about his or her real parents.[63]

It is the child's right to live with his/her parents and for his/her parents to take care of him/her before any other person. This right of the child can be limited only by a court decision on complete or partial deprivation of parental rights, i.e. by a court decision in the case of domestic violence. [64] In any case, the separation of the child from the parents must be in accordance with the best interests of the child. Finally, a child who has reached the age of 15 and is capable of reasoning can decide for himself/herself, which parent he/she will live with. Therefore, it may happen that this right of the child cannot be realized because the parents have died or are unknown, i.e. because they have abandoned the child, but the separation that is against the will of the parents and the child can only be carried out based on a court decision, in order to protect the best interests of the child. This right of the child confirms the general principle that pervades the entire Family Act – which is the principle that children, under regular circumstances, are best off with their parents.

One of the most important rights of a child whose parents do not live together is his/her right to maintain personal relations with the parent with

61 Cvejić Jančić, 2018, p. 346–347.
62 Art. 326. (3) of Family Act
63 Cvejić Jančić, 2019, p.148.
64 Čović, 2013, p. 639.

whom he/she does not live together. Just as when it comes to the child's right to live together with his parents, this right can only be limited by the court when it makes a decision on the complete or partial deprivation of parental rights, i.e. a decision on a measure of protection against domestic violence, and only on the condition that such a decision is in accordance with the best interests of the child. A child who has reached the age of 15 and who is capable of reasoning can independently make a decision about how to maintain personal relations with the parent with whom he does not live. Finally, it is the child's right to maintain personal relationships not only with parents, but also with relatives and other persons with whom he has a special closeness if it is in his best interest of him/her. This right of the child, therefore, stems from the general principle that both parents of the child have joint responsibility for raising and developing the child and that they are equal in exercising parental rights. It includes not only the child's right to see his parent, but also the right to maintain personal relations with him/her in any possible way (by phone, letters, electronic communications, etc.). If there is a conflict between the parents regarding the way to exercise this right of the child, the time and duration of the mutual meetings between the child and the parent are regulated by a court decision (specifying the duration of the daily, weekly, monthly or annual meetings), and if there are some particularly sensitive circumstances (for example, in case of suspicion of child abuse), the meeting place is also determined (for example, in a neutral space) or it is ordered that meetings between the child and parents have to be supervised by an expert (social worker, psychologist, doctor, etc.).

The other specified children rights (child's right to proper and complete development, the child's right to education, the child's right to undertake legal affairs and the child's right to free expression of opinion also serve the child's best interest and all children are equally entitled to these rights. Naturally, in practice it may happen, that some of the abovementioned children rights can't be realized [for example: the child's right to live with his (natural) parents is not being realized when the child is abandoned or given up to adoption by the parents]. In these cases, it is the state, that through its specialized organs seeks to supplement and guarantee the rights to which the child is inherently entitled.

5. Authorization of adoption

The guardianship authority that determined the general suitability of the adoptee chooses future adopters based on the records from the Single Personal Register of Adoption. This choice, however, is not made if the child is adopted by the spouse or non-marital cohabitant partner of the parent or the child's adoptive parent, or when the parents or the child's guardian and the adoptive parents have made the choice by agreement, and the guardianship authority has assessed that such agreement is in the best interest of the child. The procedure for making a decision on establishing an adoption is the result of an examination of all the circumstances significant for the adoption that was carried out in the previous procedure.

In Serbia, there is a minimum mandatory period, the so-called adaptation, when the adoptive parent should care for the child which was chosen to be adopted. The guardianship authority that has chosen future adoptive parents is obliged to refer the child to them for mutual adaptation (unless the adoptive parents are foreign citizens), to monitor the success of the mutual adaptation of future adoptive parents and the child, and to draw up official notes on their evaluations. In this way, the special suitability of adopters and adoptees for adoption is checked, which should show whether persons who are generally eligible to be adopters or adoptees are at the same time eligible to be adopters or adoptees in the specific case, in the mutual relationship of certain adopters with the child who should be adopted. The adaptation period can last a maximum of 6 months, and its purpose is to determine in time whether the child can adapt to the new environment and whether the selected persons are really the best possible adopters for the child. If the guardianship authority determines that the mutual adjustment was not successful, it is obliged to issue a written decision on the rejection of the request for adoption. Applicants can file an appeal against this decision to the ministry responsible for family protection within 15 days from the date of receipt of the decision.[65]

65 See Art. 317–319. of Family Act

The procedure for establishing an adoption can be initiated by the official guardianship body, the future adoptive parents, the parents of the child and the child's guardian.[66]

5.1. Request of child's parents or guardian for founding of adoption

The child's parent or guardian shall file a written request for founding of adoption to the guardianship authority on the territory of which the child has residence or dwelling place. The child's parent or guardian shall file, together with the request for adoption, an excerpt from the register of births for the child, as well as other evidence on existence of the adoptee's interest (general eligibility of the adoptee for adoption). When it receives the parent's request for adoption, the guardianship authority shall be under the obligation to recommend to the parent to undergo psychosocial counselling in the guardianship authority, family counselling service or another institution specialized in mediation in family relations. Within appropriate time after the parent has been recommended psycho-social counselling, the guardianship authority shall invite the parent to submit written statements on consent to adoption for himself/herself and the child who has reached 10 years of age. After receiving from the parent, a written statement on consent to adoption, the guardianship authority shall be under the obligation to appoint a guardian to the child, who shall represent the child in the adoption proceedings.[67]

5.2. Request of adopter for founding of adoption

The first step for potential adopters is to collect the appropriate documentation, which, in addition to identity cards and extracts from the birth and marriage registers, are confirmations that the future parents have not been deprived of parental rights, that none of the partners is under investigation, has not been convicted, has not been deprived of legal capacity and a medi-

66 Art. 311. of Family Act
67 See Art. 313. of Family Act

cal certificate has to be provided as well. Future adoptive parents also attach documentation on assets and income. Future adopters shall submit written requests for founding of adoption to the guardianship authority on the territory of which they have joint residence or dwelling place.[68]

The abovementioned documentation is submitted to the center for social work in the municipality where the potential adopters are registered. After submitting the documentation, the expert team of the center for social work, which consists of a psychologist, a pedagogue, a social worker and a lawyer, begins the process of assessing the candidate's general suitability, which lasts two months. Guardianship authority shall establish on the grounds of statements of future adopters, child's parents or guardian, the child himself/herself, and on the grounds of submitted documents, whether the adopters have the personal characteristics needed for adoption and whether the best interest of the adoptee is being served due to the potential adoption. Decision on the up mentioned facts shall be passed on the grounds of finding and expert opinion of psychologists, pedagogue, social worker, lawyer and doctor. The referred finding and expert opinion may be given by experts of the guardianship authority, family counselling service or other institution specialized in mediation in family relations, as well as health care institution.[69]

The guardianship authority that chose the future adoptive parents makes a written decision on adoption if it finds that all the conditions for establishing adoption have been met (general and special suitability of adopters and adoptees for establishing adoption). Adoption is based on the date of the decision on adoption, which is delivered in an official manner personally to the adoptive parents and the guardian of the adopted child. However, the delivery of the decision can be attended by a child if it is appropriate considering his age and maturity. The public is always excluded from the adoption procedure, and the data from the records and documentation on the adoption are an official secret that all participants in the procedure who have access to this data are obliged to keep.[70]

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68 See Art. 312. of Family Act
69 See Art. 314. of Family Act
70 See Art. 320., 323. and 324. of Family Act

Finally, the official of the guardianship authority is obliged, before or after passing the decision on adoption, and certainly before handing it over to the adoptive parents, to conduct a conversation with them in which he will familiarize them in detail and in an appropriate manner with the legal aspects of adoption, and with moral, educational and other significant consequences of adoption. It is the duty of the official to recommend the adoptive parents to tell the child the truth about his origin as soon as possible, as well as to recommend them to undergo psycho-social counseling in order to face possible dilemmas that may arise during the adoption more easily (for example, when and in what form to tell the adopted child the truth about his origin). The interview can also be held in presence of the child, if it is appropriate, considering the child's age and maturity, in which case the child will be informed in detail about the upcoming adoption.[71]

The adoption registration procedure refers to the obligation of the guardianship authority that established the adoption to immediately issue a decision on the new registration of the birth of the adopted child based on the decision on adoption and to submit it without delay to the registrar that keeps the birth register for the child. The decision on the new registration of birth cancels the earlier birth registration of the adopted child, and the data on the child's parents are replaced by the data on the adoptive parents.[72] After that, only the child and the child's adoptive parents have the right to inspect the child's birth certificate. However, before allowing the child access to the birth register, the registrar is obliged to refer the child to psycho-social counseling, so that the moment of facing this fact can pass with the help of experts and be as non-traumatic as possible for the child.[73] Finally, the guardianship authority is obliged to keep records and documentation about adopted children, which contain the most important data about the child before and after adoption, about the child's biological parents and about the adoptive parents.[74]

71 Drakšić, 2015, p. 213.
72 See Art. 325. of Family Act
73 See Art. 326. of Family Act
74 See Art. 327. of Family Act and Rule book on the manner of keeping the unique personal adoption register

6. Types of adoption

Serbian law provides for only one type of adoption: one that is full and unbreakable and places the child, considering his rights and obligations on equal footing with biological children.[75]

It is a fundamental rule, that the child can only be adopted with the consent of the parents- provided that there are parents who are known. The parents give their consent to the adoption with[76] or without knowledge[77] of the person adopting the child, but they cannot give their consent to adoption before the child has reached the age of two months. As it was mentioned before, either parent may revoke consent to the adoption within 30 days of the day on which they gave their consent.[78]

However, the consent of one parent to the adoption is not required if:

– the parent is completely deprived of parental rights;

– the parent is deprived of the right to decide on issues that significantly affect the child's life;

– the parent is completely deprived of the capacity to act.[79]

The issue of secrecy of adoption is one of the most delicate and complex aspects of the institution of adoption in general.[80] On the one hand, in order to achieve the basic purpose of adoption, it is necessary that the severance of the adoptee's ties with his blood relatives, and above all with his parents, be complete and definitive. This goal, according to the prevailing opinion of adoptive parents, is most easily achieved by covering the fact of adoption with complete secrecy and by trying to ensure that the child's natural parent and the child themselves never find out about the adoption. On the other hand, however, the position that enjoys the widest support among authorities in the field of child psychology is that it is necessary to tell the adopted child the truth about his origin in the earliest childhood. In other

75 Cvejić Jančić, 2018, p. 346–347.
76 In this case we are talking about open adoption.
77 In this case we are talking about secret adoption.
78 Jeftić In. Süss/Ring, 2021, p. 1293.
79 Art. 96. of Family Act
80 Čović, 2023, p. 68.

words, the truth told at the right time, in an appropriate way and by the most suitable person greatly contributes to the stability of the relationship between the adopter and the adopted child, freeing them from the chronic fear that the adopted child will somehow find out about the fact of the adoption, i.e. that the natural parent of the adopted child will find out who is the person that adopted the child and where he/she is. Serbian law undoubtedly favors the principle of truthfulness in establishing adoption. This results both from the legal norm that specifically contains the obligation of the official of the guardianship authority to point out to future adoptive parents the importance of informing the adoptee about the true nature of their relationship and to provide them with appropriate advisory and professional help in this regard,[81] as well as from the guaranteed right of the child to know who are his/her parents and that, after he/she reaches the age of 15, he/she is allowed to inspect the birth register and other documentation related to his origin.[82]

It has to be pointed out one more time, that the Family Act of Serbia provides the possibility for the parents to designate the adoptive parents of their child, which was back in time one of the significant novelties of Family Act of 2006 in relation to the previous law (Law on Marriage and Family Relations[83]) which did not provide such a possibility. Although in the so-called *open adoption* the parents choose the child's adoptive parents, the adoption is based on the decision of the guardianship authority, on the basis of which a new entry is made in the birth register.

From the fact, that the guardianship authority that has chosen future adoptive parents is obliged to refer the child to them for mutual adaptation, it follows that in the case when the parents choose adoptive parents, such an obligation does not exist.[84] In the years after the adoption of the Family Act of 2006, which is at the moment in force, certain abuses were observed when prospective adoptive parents who have determined general suitability for

81 See Art. 322. of Family Act

82 See Art. 59. (3) of Family Act

83 Zakon o braku i porodičnim odnosima („Sl. glasnik SRS" , br. 22/80, 24/84 – dr. zakon i 11/88, „Sl. glasnik RS", br. 22/93, 25/93 -ispr., 35/94, 46/95 – dr. zakon i 29/2001), (Hereafter: Law on Marriage and Family Relations-1980)

84 Čović, 2017, p.101.

adoption and were in the Single Personal Register of Adoption, and other interested persons, searched for parents and have reached an agreement with them that they mark them as adoptive parents. Agreements were often concluded with the presence of a lawyer as the representative of the prospective adoptive parents, and there have been cases where the prospective adoptive parents took over the child from the parents and gave him a personal name, which the parents verified by reporting it to the competent registrar, when registering the fact of the child's birth. Due to the mentioned abuses, the Ministry of Labor and Social Policy intervened in 2007, giving an opinion[85] on the correct application of Article 95. (2)[86] and Article 317. (3)[87] of Family Act.

Article 317. (3) refers to the assessment of the agreement between future adopters and parents (guardians) and prescribes that the choice of future adopters shall not be made if the adopters and the parent, i.e. the guardian of the child, make the choice by agreement and if the guardianship authority judges that such an agreement is in the best interest of the child. According to the correct application of this provision, the guardianship authority should assess whether the parent, or the guardian, has identified adoptive parents whom he knows well and for whom he can provide acceptable arguments that they will take good care of the child in his best interest.

According to the Family Act, there is no right to maintain personal relations with the natural parents after the adoption has been established. However, some authors point out, that this direction may represent a guideline for future changes in the law in this area. If the law were to regulate the agreement on communication after the based adoption and the rights and obligations of the parties in the agreement, there would be a possibility of choosing between an open (the relationship with blood parents remains despite of the adoption) and closed concept of adoption (a relationship with blood parents doesn't exist) and a more complete protection of the child's right to (timely) knowledge of origin.[88]

85 Opinion on the application of Article 95 paragraph 2 and Article 317 paragraph 3 of the Family Law, No. 110 - 00 - 00681/2007 - 14 of July 17, 2007)

86 Art. 95. (2) of Family Act: „The parent gives consent for the adoption with or without marking the adopter."

87 Art 317. (3) of Family Act „Choice of future adopters shall not be made if adopters and child's parent and/or guardian make the selection in consent."

88 Čović, 2017, p. 102

In the context of the types of the adoption, one more thought must be mentioned, which is, that Serbian law does not recognize the institution of anonymous childbirth. The right to know the origin is usually highlighted as the main argument against its introduction.[89]

7. Legal effects of adoption and termination of adoption

7.1. Legal effects of adoption

Considering the legal effects of adoption, the following should be mentioned: the personal name of the adoptee, family law effects, the prohibition of disputing the origin of the adopted child, civil kinship and inheritance rights.

When establishing an adoption, the adopted person receives a personal name according to the same rules as the personal name is determined by the child's natural parents.[90] At the same time, the surname of the adopted child can be changed according to the surname of one or both adoptive parents. As for the name of the adopted child, the general rule applies that the adopted child keeps his name, but when the adoption is established, a new name can be given to the child. In any case, a child who has reached the age of 10 and is capable of reasoning has the right to consent to a change of personal name.[91]

The family law effects of adoption refer to: (a) the prohibition of disputing the origin of the adopted child, (b) the establishment of civil kinship, (c) the establishment of marital impediment and (d) the constitution of the adoptive parent's parental right, i.e. the termination of the parental right of the child's natural parents.

The prohibition of disputing the origin of the adopted child is a consequence of the express rule that after the adoption is established, the adoptive parents are entered in the birth register as the child's parents. That is

89 Ponjavić, Palačković, 2017, p. 34.
90 Petrović, Blašković, 2014, p. 82.
91 Art. 346. (2) of Family Act

why it is forbidden to challenge the maternity and paternity of the adopted child, in order to preserve the permanence of the data on the adoptive parents as parents of the adopted child. Consequently, therefore, it would not be possible to establish maternity and paternity of an adopted child, because according to general rules, the maternity and paternity of a child cannot be established before the maternity and paternity, which is already registered in the birth register, is successfully contested.

Civil kinship is established by adoption between the adoptive parents and all their relatives, on the one hand, and the adoptee and all his descendants, on the other hand. Adoptive kinship based on adoption includes, therefore, not only the adopters, the adoptee and his descendants, but also all blood, in-law and previously acquired civil relatives of the adopter. The blood relationship between the adoptee and his natural relatives does not end with the establishment of the adoption, because the blood relationship is a biological bond of a permanent nature, which can never end, but it is immobilized for the duration of the adoption as the basis for the existence of any rights and obligations between the adoptee and his blood relatives.

Matrimonial interference is constituted by adoption in the same way as by consanguinity. Therefore, after the establishment of the adoption, marriage cannot be concluded by the same persons between whom the marriage would be illegal if a birth had taken place instead of a full adoption.

The parental right of the natural parent of the adopted child ceases and is transferred to the adoptive parents, thereby establishing all the rights and duties that exist by law between the child and the parents or other relatives. An exception to this rule appears only in the hypothesis that the adoptive parent is the spouse or non-marital cohabitant partner of the child's natural parent. In that case, the child's natural parent does not lose parental rights, but exercises it together with his spouse or non-marital cohabitant partner as an adoptive parent and has all the rights and duties towards his/her child that he/she had until then. The content of the adoptive parent's parental rights is identical to the content of the parental rights of the biological parents, that is, the same rules governing the parental right of the biological parents are applied to the exercise, deprivation, termination and extension of the adoptive parent's parental right. On the other hand, establishing an

adoption is the basis for the termination of not only the parental rights of the biological parent of the child, but also all other rights and duties of the adoptee towards his blood relatives, as well as the rights and duties of the blood relatives towards the adopted child.

Adoption constitutes succession rights on the side of the adoptee on one hand, and on the side of the adopter on the other hand. The same rules of inheritance law apply to adoptive relatives that apply to the legal order of succession of blood relatives of a certain degree of kinship. In other words, the adopted person, his descendants and his adopted children with their descendants inherit the adopter and his relatives just as children and their descendants inherit their parents and their relatives. On the other hand, adoptive parents and their relatives inherit the adopted child and his descendants just as parents and their relatives inherit their children and their descendants.

7.2. Termination of adoption

Since adoption establishes a kinship relationship between the adoptee and the adoptive parent, which is identical to the relationship of the child with his natural parents and all their relatives, and since the legal and political idea on which the institution of adoption rests is the idea of complete and permanent integration of the adoptee into the adopter's family, the adoption cannot be terminated. If it were determined that one or both adoptive parents are abusing parental rights or neglecting parental duties, the measure of complete or partial deprivation of parental rights could be applied to them. Therefore, unlike the earlier 'incomplete adoption', which was based on the provisions of the Law on Marriage and Family Relations and which could been terminated by annulment or termination, there is only one way to terminate the adoption, and that is its annulment.

Annulment of adoption occurs in two ways: (a) due to facts leading to nullity (absolute nullity) and (b) due to facts leading to voidability (relative nullity). Nullity (absolute nullity) of adoption occurs if, during its establishment, one of the assumptions related to the establishment of adoption was not respected, provided that such lack is defined by law as a cause of absolute

nullity. The lawsuit can be filed by the adoptive parents, the adopted person, the parents or the guardian of the adopted person, persons who have a legal interest in having the adoption annulled, and the public prosecutor.

Voidability (relative nullity) of the adoption occurs in the case when the consent to the adoption was given under duress or in error.[92] A lawsuit for annulment of adoption can be filed only by the person who consented to the adoption, within one year from the day when the coercion stopped, or the mistake was noticed.[93]

The effect of a legally binding judgment on annulment of adoption is constitutive, since annulment is the only way to end adoption. This means that the effects of the adoption are canceled from the moment the court decision becomes final. The court is also obliged to provide the guardianship authority before which the adoption was based with a legally binding judgment on the annulment of the adoption, and the guardianship authority is obliged, based on this judgment, to issue a decision on the annulment of the decision on the new birth registration of the adopted child, which, in fact, validates the original registration of the birth of a child who was adopted.

As a consequence of termination of adoption, all rights and duties between the adopter and the adoptee, which were based on civil kinship, are extinguished. Although there are no explicit provisions in the legal text as to whether the effects of the annulment of a complete adoption should be tied to the moment of the finality of the judgment on annulment or the nullity should have a retroactive effect, from the provision on termination of adoption by annulment it can be safely concluded that the annulment is not retroactive. After the annulment of the adoption, the guardianship authority decides on the further care of the child. This means that a minor whose parents are not alive, or are unknown, or cannot exercise parental rights, is placed under guardianship, and if the minor has a living parent capable of exercising parental rights, the parental rights of the natural parent can be re-established.

92 Art. 108. of Family Act
93 Art. 275. (2) of Family Act

The effect of termination of adoption on the adoptee's surname is now separately regulated in Serbian legislation. Namely, a child who changed his surname through adoption can take his own surname back after the termination of the adoption. It has to be mentioned, that in case an adopted child who is younger than 15 years old, a statement about taking an earlier surname would be given by the guardian with the consent of the guardianship authority, and if the minor is older than 10 years and capable of reasoning, taking the earlier surname would also require his consent.

8. Balancing of interests - legal provisions that serve the best interest of the child

When it comes to the adoption of a child, the desire of the adoptive parent for offspring is of secondary importance, since the main goal of adoption is to take care of a child who is without adequate parental care and the entire process of adoption must be in accordance with the best interest of the child,[94] whereby the personal characteristics of the future adoptive parents are playing a cardinal role.

In family law of Serbia, one of the fundamental principles is the best interest of the child. Besides the fundamental guarantees that serve the best interest of the child recorded in the Constitution, as an essential provision of the Family Act, it is laid down, that everyone is under the obligation to act in the best interest of the child in all activities related to it child.[95] The best interest of the child is also emphasized in other provisions of the Family Act – life with parents, personal relationship, exercise of parental rights, adoption, foster care and divorce.[96]

Even though it is one of the most important principles of family law, Serbian legislation does not offer general elements for assessing the 'best interests of the child', which would represent a common starting point for all relationships of direct or indirect importance for children.[97]

94 Jović-Prlainović, 2015, p. 44.
95 See Art. 6. (1) of Family Act
96 Šahović, Savić In. Cvejić Jančić, 2016, p. 255.
97 Vlašković, 2012, p. 361.

Collective cultural and social values, as well as the uniqueness and characteristics of each individual child, must be woven into the concept of the best interests of the child. Therefore, the mentioned principle includes seemingly irreconcilable elements. However, the best interests of the child should not be seen in the light of the conflict between the interests of the family as an institution and the interests of the child as an individual subject of family relations. On the contrary, the stated legal standard should be interpreted as a bridge between the child's social and family environment and the child himself. It is the bond through which the collective values of a society and the individual values of a family are transmitted to the child, but also the space in which the child will develop his/her own values that he will one day pass on to others. The builders of that bridge, the creators of the mentioned link between the external and internal elements of the best interests of the child, are, above all, the child's parents. Naturally, parents are most directly interested in the best interests of the child principle being applied in an appropriate manner. Therefore, the application of the principle of the best interests of the child should be linked to the situation of conflict, family breakdown and, above all, the necessary protection of children.[98]

Such an understanding corresponds to the best interests of the child as the 'least harmful alternative' for the child, which is largely adopted by the Draft Law on the Rights of the Child in Serbia. The concept of the best interests of the child from the preliminary draft offers an exhaustive and contemporary list of elements for the application of the aforementioned legal standard, and would, without a doubt, represent a significant step forward in that sense.

There are many challenges and tasks for Serbia in order to improve children's rights. As a field of improvement, a legal reform, such as adoption of the Child Rights Act can be mentioned. Furthermore, an increased and specified budget allocation for children; a higher level of attention to children; a fundamental reform of the education system, in accordance with international standards; an improvement of healthcare for children, including adolescent health; a better-quality education and information dissemination on child rights would be helpful as well. Of course, the mentioned measures would have to be followed by efficient and effective mechanisms

98 Vlašković, 2012, p. 364.

for implementation, therefore realization of the mentioned actions in practice remains the biggest challenge for children in Serbia.

9. Summary of the national legislation on adoption

Legal requirements relating to the adoptee, the adopter and the form of adoption are necessary for the adoption to be validly recognized. The adoption is based on a decision by the guardianship authority in the best interests of the child.[99] Only a minor child can be adopted. A child cannot be adopted before the age of three months. A minor child who has acquired full legal capacity cannot be adopted.[100]

A child is eligible for adoption without living parents, a child whose parents are unknown or whose whereabouts are unknown, a child whose parents are completely deprived of parental rights, a child whose parents are completely deprived of legal capacity and a child whose parents consent to the adoption. A blood relative in lineal consanguinity, a brother or sister, as well as a child who is already adopted by adoptive parents, cannot be adopted. The spouse or non-marital cohabitant partner of the adopter may adopt his/her previously adopted child.

A child can only be adopted with the consent of the parents. The parents give their consent to the adoption with or without knowledge of the person who is adopting the child. The parents cannot give their consent to the adoption before the child has reached the age of two months. Each parent may revoke their consent to adoption once within 30 days of the day on which they gave their consent.

A parent's consent to adoption is not required if the parent is completely deprived of parental rights, if the parent is deprived of the right to decide on matters that significantly affect the child's life, or if the parent is completely deprived of legal capacity. If the child is under guardianship, consent to the adoption is given by the guardian. A child who is ten years old and capable of reasoning must give his/her consent to the adoption.

99 Art. 89. of Family Act
100 Art 90. of Family Act

Adoption can be carried out jointly by spouses or non-marital cohabitants. Irrespective of this, a person who is the spouse or non-marital cohabitant of one of the child's parents can also adopt. In exceptional cases, the minister responsible for family protection may authorise adoption by a person living alone if there are particularly justified reasons for doing so.

Adoption establishes the same rights and obligations between the adoptee and the adoptive parents as between the child and his/her biological parents or other relatives. Adoption terminates the parental custody rights of the biological parents, unless the child is adopted by the spouse or non-marital cohabitant partner of one of the parents.

There is only one way to terminate the adoption, and that is the annulment of the adoption, which occurs in two ways: on one hand, due to facts leading to nullity and on the other hand due to facts leading to voidability. In case of termination of the adoption all rights and duties between the adopter and the adoptee are extinguished, consequently the guardianship authority decides on the further care of the child.

10. Conclusion

Adoption is an institution of family law and an institution of social protection of children without parental care, which forms a parental relationship between someone else's minor child and an adult person with full legal capacity. As a legal institution adoption acquires an institutional character because it is created before the competent state authority according to a strictly defined procedure.[101] Given that every child has the right to grow up in a family that loves and accepts him, it is best for the child to grow up within their biological family. When for some reason it is not possible for a child to live with his parents, and at the same time there is no possibility of taking care of the child in the family or by a relative, adoption is the best solution, because it represents a permanent form of protection that gives the child the possibility to fully build a sense of belonging and togetherness with adoptive parents.

101 Krstinić, Vasiljković, 2020, p. 114.

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Regulation of adoption in Slovakia

Lilla Garayova*

1. Introduction

Adoption as a legal concept has been part of human history for thousands of years, evolving alongside society and its changing values and morals. This long history highlights how strongly societal values can shape legal thought, judicial decisions, and the application of laws. The institution of adoption is a clear example of how legal practices adapt to cultural and moral priorities of each era. From ancient times to the present, adoption's purpose and regulation have shifted dramatically – always in dialogue with the social context of the time.

In ancient Rome, adoption primarily solved a pressing problem: the continuation of one's family line. Romans placed great importance on preserving the *familia*, and adoption became a practical solution for those lacking a biological heir. Older citizens without children often adopted younger adults or children to prevent their family name and property from dying out. This practice shows how adoption began as a flexible legal tool to meet specific societal needs – in this case, the need for a family's survival across generations.

For a period of about 200 years in Rome, adoption even took on a critical political role. Several Roman emperors adopted their chosen successors to ensure stable transitions of power.[1] In these instances, the motives for adoption shifted from private family concerns to public governance. Emperors would adopt capable young men (often generals or statesmen) deemed worthy to rule, effectively using adoption as a tool of statecraft. This transition – from a family-building measure to a method of selecting rulers – highlights

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1 Lindsay, H. (2009). Adoption in the Roman World. 1-242. 10.1017/CBO9780511657399.

the adaptability of adoption as an institution. It could be repurposed beyond preserving bloodlines, now to secure the continuity of the Empire with competent leadership based on merit rather than mere lineage. The fact that adoption was used to hand-pick emperors underscores how legal concepts can be molded to fit the highest political needs of society at the time. These ancient practices demonstrate that even in early history, adoption's role was defined by what society valued. In Rome's case, that included family legacy and political stability. The very existence of such practices illustrates a core theme: legal institutions like adoption are not static; they change form and function to serve the evolving priorities of the community.

The journey of adoption from antiquity to modern times reflects an ongoing dialogue between law and social values. In ancient Rome, it was about family continuity and political succession. Today, adoption is largely about child welfare. This evolution from ensuring family lineage to focusing on the well-being of children exemplifies the law's capacity to adapt to new social priorities. At each step in history, changes in moral outlook and practical needs reshaped what adoption meant and how it was practiced.

This historical perspective enriches our understanding of adoption's legal and societal functions. It reveals a dynamic relationship between law and the culture in which it operates. In essence, adoption's story is one of legal flexibility: as society's values change, so too does the legal framework of adoption, ensuring the institution remains relevant and valuable. From protecting family dynasties in Rome to providing homes for children in need today, adoption's shifting purpose underscores law's essential role in navigating and shaping human relationships and social structures.

Roman law made a clear distinction between two forms of adoption: *adrogatio* and *adoptio*. *Adrogatio* could be likened to the modern concept of adult adoption. This procedure allowed an independent adult (usually male and often older) to be adopted into another family, typically to carry on the adopter's family name and estate. The person being adopted in adrogatio had no living father (sui iuris) because he would otherwise be under another's authority. Adrogatio required a complex public procedure, including approval by popular assemblies or the emperor, because it essentially merged one family line into another. In contrast, *adoptio* referred to the adoption of a

child who was under the *patria potestas* (paternal authority) of another. In an adoptio, a younger person (often a minor) was transferred from the authority of their birth father to the authority of the adoptive father. This was a more common, private form of adoption and was used to bring a non-biological child into the family as one's own son or daughter. Historically, the primary goal of both forms of Roman adoption was to provide the adopting family with an heir or offspring. That fundamental purpose remained largely unchanged all the way until the early 20th century in many legal systems. Over time, however, an additional motive for adoption emerged: the legitimization of children born outside of marriage. Parents (especially fathers) sought ways to formally recognize and raise their biological children born out of wedlock. Adoption seemed like a possible way to do this – but it conflicted with a long-standing Roman principle: *adoptione natura imitatur* ("adoption imitates nature"). According to this principle, adoption was meant to mimic natural parenthood by creating a parent–child bond where one did not exist; it was about bringing an outsider into the family as if they were a natural child. From that viewpoint, a biological parent should simply acknowledge their illegitimate child (since the blood tie already exists) rather than adopt them.

Because of this principle, Roman law initially prohibited adopting one's own illegitimate children. Such a practice was seen as violating the idea that adoption should create a parent-child relationship only where nature had not. In other words, it made little sense to 'adopt' a child who was already, by blood, yours – the law expected that the biological parent would instead legally recognize the child through legitimation, not through adoption. This early restriction underscores how legal rules were guided by a philosophical ideal (imitation of nature in family relations) even as they gradually began to bend to new social pressures (the desire to legitimize all children in a family).

Jumping forward to the early 20th century, we see adoption being influenced by the prevailing social and economic ideology of the time. The legislative history of adoption in Slovakia (then part of Czechoslovakia) provides a telling example of how a legal framework can be shaped by capitalism and later reshaped by socialism – sometimes even misused for propaganda

purposes. Under the capitalist system, with its emphasis on property rights and lineage, adoption laws carried a distinctly materialistic tone. A notable example is Law No. 56/1928 Coll.[2] on adoption, which outlined the formal and material requirements for adoptive parents. The very language of this law reflected a focus on family line and inheritance. For instance, Article 1 of Law No. 56/1928 stated that individuals without their own biological children may adopt a child from outside their family, treating the adopted child on par with a biological offspring. In practical terms, this meant a childless person could bring an unrelated child into their family and that child would then have the same legal status as a blood descendant. This provision codified the idea that adoption served as a means to preserve family lineage and property when no natural heir was present. The adoptive child could carry on the family name and inherit just as a biological child would – a solution for those concerned with passing down wealth, estates, and family business interests.

Such an approach to adoption aligned neatly with the broader capitalist ethos of the era. It treated the family somewhat like a perpetuating enterprise: if there was a 'vacancy' in the line of succession, adoption could fill it. In this light, adoption wasn't only a humanitarian or child-focused act; it was also a tool to ensure continuity of family capital and social standing. The materialistic undertones are clear – adoption helped preserve property within a family and prevented family lines from dying out, which was important for maintaining social and economic stability in a system oriented around private wealth.

The mid-20th century brought a seismic shift in governance and ideology with the rise of socialism in Czechoslovakia (which included present-day Slovakia). Socialist legal scholars and policymakers initially viewed adoption through a very different lens. They were eager to distance their new society from what they saw as the capitalist, materialistic interpretation of adoption. In the early idealism of socialist theory, a perfect socialist society would eliminate the very problems that made adoption necessary.

In the socialist vision, they imagined a society where every child would thrive within the nurturing confines of their biological family, with support

2 Act No. 56/1928 Coll., Adoption Act

from the state and community organizations for the child's comprehensive development. The socio-economic structure would guarantee the material well-being of every family, ensuring that parents had the means to care for their children. Institutions like state-supported childcare, education, and healthcare would be so effective that no child would be left without a proper home or care. In such an ideal world, the need for adoption would simply wither away – since it was assumed there would be no orphans uncared for, no situations where a child lacked a loving family environment.

In theory, then, adoption was seen as a relic of a flawed, class-based society. Some early socialist commentators even suggested that in a true socialist utopia, adoption would become obsolete. If the state and the social collective could care for all children, why would anyone need to adopt a child as their own?

However, this vision faced stark realities; orphanages remained crowded, contradicting the optimistic belief that all children could be adequately cared for within their natural family settings. The existence of these many orphans and institutionalized children contradicted the belief that socialism had eliminated the need for adoption. It became evident that the initial reluctance to acknowledge adoption's importance was based on an unrealistic assessment of social conditions. The socialist society, despite its goals, had not eradicated all family problems – some parents were absent or unable to care for their children, and some children were indeed left without families.

Facing these facts led to a shift in socialist policy and thinking about adoption. The government and legal scholars began to reevaluate the institution of adoption, no longer as a bourgeois or materialistic tool, but as an essential social welfare mechanism. They recognized that the socialist duty to care for all members of society certainly extended to orphaned or abandoned children. Therefore, rather than shunning adoption, they decided to embrace it as a practice very much in line with socialist values – when properly framed. Under this revised understanding, adoption took on a renewed purpose in socialist Czechoslovakia. The narrative changed from focusing on the adoptive parents' interests to focusing on the child's needs and society's obligations: adoption was now about providing a loving family to a child who lacked one, thus ensuring the child's healthy

development and happiness. This served not only the child's best interests but also the collective good – a child raised in a stable family would grow up to be a healthier, more productive member of the socialist society. Adoption was reframed as a noble act that benefited everyone: the child, the adoptive parents, and society at large. The once-dismissed institution was transformed into a cornerstone of socialist social policy. Crucially, the socialist regime now touted adoption as consistent with its fundamental goals. By placing children from state care into families, the state was furthering its aim of providing the best care and upbringing for the next generation. Adoption was no longer a mere backup plan for childless couples (as the 1928 law had emphasized); it became a valued social institution to ensure every child could grow up in a family environment. In official rhetoric, adoption was elevated to a significant social value – an instrument for fulfilling the society's responsibility to its most vulnerable members. Through this evolution, we see how adoption was essentially reimagined. What started as a suspect practice under socialism (due to its perceived roots in property and inheritance concerns) was redefined into an altruistic institution aligned with socialist ethics. Adoption survived the ideological shift by transforming in purpose – from ensuring family continuity or legitimacy of birth, to serving the best interests of the child and, by extension, the ideals of the community.

Today, the purpose of adoption is to create for the child deprived of natural family environment, a suitable substitute and thus ensure his or her healthy development. In the late 20th and early 21st centuries, international human rights law added yet another layer to the understanding of adoption. Organizations like the United Nations and courts like the European Court of Human Rights (hereinafter: ECtHR) began emphasizing that adoption should be fundamentally child-centric. The guiding principle can be summarized simply: the primary goal of adoption is to provide a child with a family, not to provide a family with a child. In other words, adoption exists first and foremost to benefit children in need of homes, rather than to satisfy adults' desire to become parents. The ECtHR has articulated this principle in its case law, underscoring that the best interests of the child must be the paramount consideration in any adoption proceeding.

One important aspect of this child-centered approach is a renewed emphasis on preserving the child's connections to their biological family whenever possible. Modern human rights instruments enshrine the idea that children have a right to know – and ideally be raised by – their birth parents, as long as it is in the child's best interest. This is rooted in the recognition of a child's inherent rights as outlined in Article 7 of the Convention on the Rights of the Child,[3] which guarantees every child the right to know and be cared for by their parents, and Article 8, which protects a child's right to preserve their identity – including family relations – without unlawful interference.

These provisions reflect a conviction that, whenever safe and possible, maintaining a child's natural family ties is beneficial for their identity and well-being.

European human rights law echoes the same sentiment within the European Convention for the Protection of Human Rights and Fundamental Freedoms.[4] Article 8 of this convention establishes the right to respect for one's private and family life. The ECtHR has interpreted this to mean that authorities must prioritize supporting and keeping together biological families; the complete severance of family ties (as happens in a full adoption, which legally breaks the link to birth parents) should be a last resort. The Court has stressed that removing a child from their birth family and permanently replacing those ties through adoption is only justified in extreme situations where the biological family cannot provide a safe environment. All less drastic alternatives – such as support for the birth family, temporary foster care, or guardianship – should be considered first, in line with the principle of proportionality. These standards strongly affirm that the biological family is presumed to be the rightful primary caregiver, and that breaking that bond must be clearly warranted by the child's best interests. This hierarchy of preferences means that adoption, as a form of alternative care, is generally considered secondary to preserving or rehabilitating the child's original family situation. International law encourages countries to help families stay together or be reunited, and to use adoption only when

3 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

4 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

maintaining the biological family is truly not possible or not in the child's welfare. In practical terms, it's a warning against treating adoption as an easy fix; instead, it should be a carefully considered solution when a child genuinely needs a new permanent family.

However, all this is not sufficiently mirrored in Slovak legislation. The legal mechanisms for ensuring a child's right to know their origins are critiqued for being underdeveloped, as evidenced by the limited expression of this right in the Family Act,[5] particularly noted in Article 106(3), which provides a narrow avenue for an adopted child to access information about their origins, but this provision is seen as insufficient and conditional. It states that if it is in the adoptee's interest, the adoptive parents *may* allow the child to obtain information about their biological parents – but this is far from a robust guarantee. In effect, the law places the decision largely in the hands of adoptive parents and does not clearly affirm a child's inherent right to know his or her background. Critics argue that this falls short of the standards set by the U.N. Convention on the Rights of the Child (hereinafter: CRC) and the European Court of Human Rights, which imply that knowing one's origins and preserving one's identity are fundamental rights, not mere privileges. This gap between international principles and national legislation highlights an area where Slovak law could better align with modern human rights norms to fully respect the child's identity and history.

In summary, the contemporary legal outlook in Europe positions biological kinship as a priority, with adoption as a valuable, but secondary, measure to be used when it best serves the child's needs. It's a balancing act: on one hand, there's a commitment to the idea that, whenever possible, a child should grow up in their birth family; on the other hand, there's recognition that when a child cannot remain with their biological parents, adoption is often the best way to secure a stable, loving upbringing. The key is that the child's welfare and rights are always front and center in these decisions, consistent with the guiding human rights framework.

Adoption undoubtedly occupies a significant position within the contemporary legal framework in Slovakia – arguably more than ever, given certain demographic and social trends. Infertility has become a significant

5 Act No. 36/2005 on Family and on amendment of some other acts.

challenge, with statistics indicating that roughly *one in every six couples* in Slovakia has difficulty conceiving a child. In fact, according to some data, an estimated 15–20% of Slovak couples are infertile, a figure consistent with global trends reported by the World Health Organization (about 17% worldwide). At the same time, Slovakia's birth rate has been persistently low. The total fertility rate (the average number of children born per woman) in Slovakia is around 1.5, which is well below the replacement level of 2.1 needed to maintain a stable population.[6] In simpler terms, Slovakia's population is not having enough children to replace itself from one generation to the next.

These factors showcase the crucial role of adoption as an alternative path to parenthood and family formation. For many couples who cannot have biological children, adoption offers the chance to become parents. Moreover, from a societal perspective, adoption provides homes for children who might otherwise remain in institutional care. In a country facing fertility challenges and a shrinking population, every adoption can be seen as positively addressing both a personal longing for a family and a broader demographic concern.

Despite the importance of adoption in contemporary society, Slovakia's legal framework governing adoption has been slow to evolve. In many respects, the current laws and procedures resemble those from the socialist era decades ago. This continuity might suggest stability, but it also raises concerns that the law has not kept pace with changing times. Over the past few decades, there have been significant shifts in social values, family structures, and scientific possibilities (such as assisted reproductive technologies), as well as new international standards and best practices regarding adoption. Yet, these developments have had surprisingly little impact on Slovakia's adoption laws, which remain grounded in older concepts.

For example, European countries and global experts have increasingly embraced practices like open adoption (where adoptive families and birth families maintain some contact), child-centric approaches (ensuring the child's voice and best interests are paramount in the process), and transparent access to birth records for adoptees. Many jurisdictions have modernized

6 Bleha, Šprocha, Vaňo (2013) Prognóza populačného vývoja. Slovenskej republiky do roku 2060, Bratislava, SAV, INFOSTAT, UK.

criteria for who can adopt, removing outdated restrictions and recognizing diverse family forms (including single parents or same-sex couples in some places). Additionally, the rise of reproductive technologies and international surrogacy has created new scenarios that intersect with adoption law (such as step-parent adoption in cases of surrogacy, or clarity on parental status in cross-border situations). These are pressing contemporary issues that challenge traditional notions of parentage and family. However, Slovak adoption law has incorporated few of these new trends. The legislation still reflects assumptions and priorities of an earlier era, focusing heavily on procedural formalism and traditional family models. For instance, some critics point out that the pre-adoption foster care system and the waiting periods in Slovakia are carryovers from past policies, and that the law does not sufficiently address the psychological preparation and post-adoption support for families – areas that modern adoption practice considers vital. There is also a noted discord between the 'material' and 'formal' sources of law in adoption: in theory (materially), everyone recognizes how important and beneficial adoption can be today, but in the statutes and regulations (formally), there are inconsistencies and gaps that do not fully support those ideals. Essentially, what society needs and expects from adoption – and what global standards would suggest – is not perfectly mirrored in the black-letter law currently in force.

This country report aims to shine a light on these complexities and contradictions in Slovakia's adoption regulations. On one hand, adoption is acknowledged as a necessary and positive part of the child welfare system and a solution for many family situations. On the other hand, the legal rules governing it have not been comprehensively updated to reflect 21st-century realities. The result is a framework that can feel outdated or insufficient in addressing modern challenges, whether they be ensuring an adopted child's right to know their origins, streamlining cross-border adoption procedures, or integrating insights from psychology about attachment and trauma in adopted children.

The goal is to critically examine how the legal regulation of adoption, influenced by historical legacies and contemporary pressures. By analyzing the development and current state of adoption law in Slovakia, this chapter

highlights the tensions and opportunities inherent in legal reform. Understanding this history and context is crucial for crafting changes that honor the enduring values (like the importance of family life for every child) while also embracing innovation and inclusivity. In essence, the goal is a legal framework for adoption that is both rooted in core human values and responsive to contemporary challenges.

2. Legal regulation of adoption in Slovakia – The historical background

The evolution of adoption within our region began in the early 20th century with the formation of Czechoslovakia in 1918. Upon the republic's establishment, Act No. 11/1918 implemented a reception law that largely preserved the pre-existing Austro-Hungarian legal framework, with some modifications.[7] In practice, this meant that the Slovak territory continued under Hungarian civil law (much of which was unwritten customary law),[8] while the Czech lands followed the Austrian General Civil Code (ABGB). Following the foundation of the Czechoslovak Socialist Republic in 1918, adoption found its legal footing in the General Civil Code, specifically within the Articles 179-185. At its core, adoption was conceptualized as the formal integration of a person into another's family lineage. This process was governed by the principles of private law, resting on a contractual agreement that conferred civil law implications upon the parties involved. Early statutes allowed virtually anyone, even adults, to be adopted and integrated into another family's lineage, but the focus was not on child welfare. Instead, strict conditions reflected the era's priorities: adoptive parents had to be childless, at least 40 years old, and at least 18 years older than the adoptee. Married individuals could only adopt with their spouse's consent, and tellingly, adopting an adult was explicitly permitted as a way to ensure an heir in the absence of biological children. This principle was encapsulated in the Latin maxim *adoptio naturam imitat-*

7 Act No. 11/1918 Coll., Reception Act

8 Barzó, T. (2006) A magyar családjog múltja, jelene és jövője. 2. rész: A gyermekvédelem fejlődésének rövid történeti bemutatása és az európai családjog jövője, *Családi Jog* 2006/2, pp. 1-10.

ur ("adoption imitates nature"), meaning the law tried to model adoption on a natural parent-child relationship, though in practice the adoptive arrangement primarily served the adopter's interests. Crucially, early adoption did not sever the child's ties to their birth family – the adoptee gained a legal bond to the adopter, but remained legally connected to their biological kin. For example, if an adoptive parent failed to support the child, the biological parent could still be called upon to pay support.

Contrary to contemporary understandings of adoption as a mechanism for providing substitute care for children in need of a family environment, during this period adoption was a private-law institution aimed more at continuing family lineage and providing heirs than at protecting orphaned or needy children. The adopters' interests tended to prevail over the adoptees', and the best interests of the child were not yet the central concern.

A significant milestone came with the introduction of Act No. 56/1928 Coll., which was the first comprehensive adoption law in interwar Czechoslovakia. This 1928 Act (and its implementing Ministry of Justice Decree No. 16424/1928) aimed to unify the dual legal systems of Czech and Slovak regions by creating a single framework for adoption. The Act was detailed, consisting of 14 sections organized into six titles, each addressing a key aspect of the adoption process. These titles included:

I. Conditions for Adoption: This section detailed the prerequisites that potential adoptive parents must meet to initiate an adoption process.
II. Legal Effects of Adoption: This part elaborated on the legal ramifications of adoption, defining the rights and obligations that arise between adoptive parents and the adopted individual.
III. Dissolution of the Legal Relationship by Adoption: This title addressed the conditions under which the legal bonds formed by adoption could be terminated.
IV. Particulars of the Contract: It specified the requirements for the adoption contract, outlining the necessary formalities for its validity.
V. Jurisdiction of the Court and the Rule of Law: This section clarified the court's jurisdiction over adoption cases and the applicable legal principles.

VI. Final Provisions: This concluding title wrapped up the legislation, providing any remaining necessary stipulations for the Act's implementation.

Despite modernizing the law, the 1928 Act largely preserved the old requirements for adoptive parents – it maintained that only individuals over 40 years of age who had no biological children could adopt, and it continued to allow the adoption of adults. Adoption still took place through a contract between adopter and adoptee (or their guardians), but with an important new safeguard: the contract needed court approval to take effect, ensuring a judge oversaw the arrangement. Once approved, the adoption established a familial relationship between the adopter and adoptee similar to that between a parent and child, including with respect to any future offspring of the adoptee, except where otherwise limited by law. Notably, however, this legal bond did not fully substitute for blood ties – it was additive rather than fully transformative. The adoptee's original family connections and inheritance rights often remained intact under the 1928 law. The primary purpose remained to 'produce an heir' for the adopter's family. Correspondingly, the rights of adoptive parents were emphasized more than the welfare of the adopted child in these early regulations.

In terms of adoption's legal consequences, the new law crafted a familial bond between the adoptive parents, the adopted individual, and any offspring the adopted individual might have in the future, mirroring the relationship between biological parents and their children, except where the law stipulated otherwise. Additionally, the Act introduced provisions for the dissolution of adoption, allowing for termination by mutual consent of all parties involved in the adoption agreement.

Parental consent emerged as a crucial prerequisite for adoption. Generally, a child could not be adopted without the consent of their biological parent(s). In cases of disagreement between the parents, the father's decision would take precedence under the law. If one or both parents unreasonably withheld consent, the court was empowered to override that refusal and approve the adoption in the child's interest. Additionally, the law provided for the possibility of dissolving an adoption – essentially undoing the adoptive relationship – but only under specific conditions and typically by mu-

tual agreement of the parties involved. In essence, the 1928 unification law marked a step toward standardized adoption practice across Czechoslovakia and introduced judicial oversight, yet it retained a contractual, adult-centric view of adoption that saw it as a civil agreement to extend family lineage rather than a child-focused intervention.

The fundamental political changes in Czechoslovakia after February 1948 were reflected in the entire legal order. After World War II, Czechoslovakia underwent dramatic political changes that heavily impacted its legal system. The communist government that took power in February 1948 sought to reshape laws to fit socialist ideology. Family law was one of the first areas overhauled in what was called the 'biennial of legal proceedings', a rapid post-war legal revision. The result was the Act on Family Law No. 265/1949 Sb.[9], which entered into force on January 1, 1950. This new law – essentially Czechoslovakia's first Family Act – fundamentally reconceived the institution of adoption. It abandoned the old private-law, contract-based model and firmly placed adoption within the sphere of public family law as a form of substitute family care. In other words, adoption was now seen as a means to create a genuine parent–child relationship equivalent to a biological one for a child without a suitable family, rather than a means for adults to secure heirs.

The Act on Family Law brought many important changes to legal provisions on family relationships. It elaborated on the family law regarding the basic principles expressed in the May 1948 Constitution. Legal provisions on family were separated from general civil law, and family law provisions were unified for the entire territory of the country. This Act featured an 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 of marriage. The landscape of adoption law also underwent a transformative shift with the enactment of Act No. 265/1949 Coll., on Family Law. Adoption was reconceptualized as a means to create a familial bond that effectively substitutes for biological ties between a parent and a child. This modern interpretation of adoption aligns with the principles enshrined in various international documents that uphold the rights of children.

9 Act No. 265/1949 Coll., on Family Law

Contrasting with its predecessors, the 1949 legislation represented a departure from the complexity of earlier laws and the contractual basis that characterized the private law approach to adoption. This shift laid the groundwork for the contemporary legal regulation of adoption, moving towards a more child-centric model that prioritizes the best interests of the child above all.

A significant innovation introduced by this Act was the elimination of adult adoption, reflecting the view that adopting grown persons for inheritance or lineage purposes was a bourgeois relic inconsistent with socialist and child-centric values. From 1950 onward, only minors could be adopted in Czechoslovakia – a rule common across Soviet-influenced legal systems where adult adoption was seen as anachronistic. The new law also relaxed the stringent criteria for adoptive parents. Gone was the rigid mandate that adopters be over 40 and childless; instead, the focus shifted to whether there was an appropriate age difference and a suitable relationship between the adopter and child. The law required merely a *reasonable age difference*, enabling younger adoptive parents and those who already had children to adopt, so long as the adoption would benefit the child. This more flexible approach expanded the pool of potential adopters, prioritizing a loving and nurturing environment over formal criteria like age or marital status. As one scholar noted, for political and social reasons the entire notion of adoption was refocused on the welfare of the child, with the 'best interests of the child' becoming paramount.

Through these reforms, Act No. 265/1949 Coll. on Family Law significantly advanced the evolution of adoption legislation, transitioning from a system rooted in formal contractual agreements to one centered on the welfare and interests of the child. In keeping with this philosophy, the 1949 Act simplified adoption procedures and stripped away the heavy contractual formalities. The process now required a court decision to finalize an adoption, emphasizing that the creation of a permanent parent-child bond was a matter of public interest and not just private agreement. Overall, the 1950 reforms laid the groundwork for modern adoption law in Slovakia by firmly orienting it towards providing children with stable family homes, and by embedding socialist egalitarian principles (such as the equality of spouses, the elimina-

tion of distinctions between 'legitimate' and 'illegitimate' children, and the state's role in family welfare) into the legal system.

The Act on Family Law from 1949 was amended twice during its short period of validity. The first amendment was made by Act 61/1955 Coll. on the amendment to divorce regulations. This amendment alleviated the impossibility of dissolving a marriage without the consent of the spouse, by a court decision, which, in exceptional cases, allowed the court to declare a divorce in its decision if the marriage had been permanently and deeply dysfunctional for a long time. The second amendment was made by Act No. 15/1958 on the amendment of the regulations on adoption,[10] in which the adoptive parents were entered in the register, instead of the biological parents. This was a profound shift – the legal record would show the adopters as the child's only parents, underscoring that the adoption created a bond equivalent to birth. Czechoslovak law thus began to distinguish between 'ordinary (revocable) adoptions' (where the legal ties could still be dissolved and the birth parents remained on the birth certificate) and 'irrevocable adoptions' (where the adoptive parents legally replaced the birth parents and the relationship was meant to be indissoluble). The introduction of irrevocability greatly enhanced the stability of adoptive placements, reflecting an understanding that children thrive best with permanence. It is worth noting that this change also had social implications: by erasing the legal distinction between biological and adopted parentage in official records, the law aimed to remove the stigma or second-class status previously attached to adopted children.

Additionally, the amendment enriched the Family Law Act with stipulations concerning the necessity of consent from the legal representative of the child slated for adoption. While maintaining the requirement for such consent, the revised legislation introduced specific conditions under which the need for this consent could be bypassed.

The legislation delineated in Article 66(3) established specific exceptions to the requirement for parental consent in adoption processes, effectively outlining three distinct circumstances under which adoption could proceed without the direct consent of the biological parents:

10 Act No. 15/1958 Coll., on the amendment of the regulations on adoption

a) The first condition applies if a child has resided in institutional care for a minimum duration of one year, during which time the biological parents have not demonstrated any interest in the child. This provision acknowledges the reality of children who are effectively abandoned in care facilities, providing a pathway to adoption that prioritizes the child's need for a stable family environment.

b) The second scenario allows for the bypassing of parental consent if there has been a demonstrable lack of interest from the parents towards the child for a continuous period of at least two years. This clause recognizes the prolonged absence of parental involvement as a significant factor in considering the best interests of the child in adoption proceedings.

c) The third ground permits adoption based on the parents' advance consent to the adoption, granted without specifying particular adoptive parents. This consent must be articulated explicitly, either orally on the record before a judge or in the presence of the authority tasked with the care of young persons. This provision facilitates the adoption process by allowing parents to proactively express their willingness for their child to be adopted, streamlining the legal pathway for the child to find a new family.

These measures undeniably put the child's need for a family above the parents' right to veto an adoption. However, they also represented a significant curtailment of biological parents' rights. A parent who had shown prolonged disinterest could effectively lose the right to block an adoption. This reflects the legal culture of the time – one that did not yet fully incorporate modern human rights notions. The socialist-era lawmakers prioritized the collective social goal of providing children families (and the efficient operation of law) even at the expense of individual parental prerogatives. In retrospect, this trade-off between expediency and parental rights can be seen as controversial. At the time, though, it was in keeping with a paternalistic legal approach that trusted the state (and its courts) to decide when a parent's lack of involvement justified overriding their consent.

The Act on Family Law from 1949 and its amendments did not survive for a long time. In 1960, Czechoslovakia adopted a new socialist constitu-

tion. Under ideological influence, they mistakenly anticipated the victory of socialism and subsequent social development. These misconceptions were legally expressed in the new constitution, and shortly thereafter, the basic branches of law were recodified. 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. The new law 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 put 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. 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*". 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.

With the enactment of Act No. 94/1963 Coll. on the Family, there was a noteworthy expansion in the criteria under which a child could be adopted without the consent of their biological parents. Section 68 of the law stipulated that parental consent was deemed unnecessary if the parents had failed to demonstrate a genuine interest in the welfare of their child for a period of at least one year – a standard expected of them in their parental role. This provision was designed to balance the child's need for a stable home against parental rights: if a parent effectively abandoned their child (measured by a year of indifference), the law permitted the child's integration into a new family without further delay.

Over time, professionals debated whether waiting a full year to deem a parent's lack of interest was too long, as it could unnecessarily prolong a

child's stay in institutional care. In response to such concerns, the law was amended through Act No. 132/1982 Coll.[11] This legislative revision halved the waiting period, reducing it to six months, allowing even quicker placement of children into adoptive families when it was clear that their parents had disengaged.

Moreover, the amendment introduced a significant shift in the eligibility criteria for prospective adoptive parents. The 1982 amendment also made another progressive change: it opened the door for single persons to adopt. Previously, the prevailing interpretation of the law (especially for irrevocable adoptions) was that only a married couple could provide a proper family. The 1982 reform, however, explicitly permitted an '*osamělá osoba*' (a single person, unmarried and alone) to adopt in exceptional cases. In other words, being unmarried was no longer an absolute bar to becoming an adoptive parent in Czechoslovakia after 1982. This was a notable step toward inclusivity, acknowledging that a single mother or father could also offer a loving home. It's documented in the legal reasoning of the time that the Family Act never outright forbade single-parent adoptions, but the 1982 law clarified and affirmed it by adding language to that effect. Of course, in practice, single adopters remained rare and typically had to meet rigorous standards to prove they could care for a child alone. Still, the change was symbolically important, reflecting a softening of rigid family structure norms.

The era of the 1963 Family Act (especially post-1982) showed a system gradually adjusting to balance children's rights with parents' rights more thoughtfully. By shortening the 'no parental interest' period to six months, the law recognized the urgency of a child's need for permanency. By allowing single adopters, it recognized that the quality of the parenting environment mattered more than the marital status of the caregiver. All these developments took place, it should be noted, against the backdrop of a socialist state that heavily emphasized collective upbringing (indeed, in the 1950s the state favored institutional care, viewing it ideologically as a way to raise children in a collective spirit). By the 1960s and 70s, however, that stance had evolved, and adoption (along with foster care) gained acceptance as a preferred solution for children who could not be raised by their birth par-

11 Act No. 132/1982 Coll., Amendment of the Family Act

ents. The legal changes in 1982 can thus be seen as part of a broader trend of humanizing family law in the late socialist period, putting greater weight on the emotional and developmental needs of the child.

On January 1, 1993, Czechoslovakia peacefully dissolved, giving rise to two independent states: the Czech Republic and the Slovak Republic. In the Slovak Republic, the existing Czechoslovak Family Act of 1963 (with all its amendments up to that point) was initially adopted as the law of the land, by virtue of the reception provision in Article 152 of the Slovak Constitution. Throughout the 1990s, Slovak legal experts debated how to modernize and reform family law in the new republic. One school of thought favored reintegrating family law into a comprehensive Civil Code (a path some countries have taken, treating family law as a subset of civil law), rather than keeping a separate family act. Indeed, plans were made for a major Civil Code recodification that would eventually fold in family law as well. For the time being, however, those ambitions remained unfulfilled. By the early 2000s, it became clear that the 1963 Family Act – though a sturdy piece of legislation that had served for over 40 years – was outdated in various respects and not fully in tune with Slovakia's international commitments and the societal changes of the late 20th century.

The new Family Act No. 36/2005 Coll.[12] 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, as the process unfolded, the scope of necessary changes proved too extensive for a simple amendment, leading to a completely new codification of family law. The Family Act of 2005 was designed with contemporary principles in mind. It explicitly responded to international standards, most notably the CRC which Slovakia had ratified in 1991. According to the Act's explanatory report, a primary goal was to implement the CRC's ideals into Slovak law. This meant strengthening provisions about the best interests of the child, the child's right to be heard in proceedings, and other child-centric measures. The 2005 Act also drew upon comparative research, looking at how other European countries (like Hungary, Germany, the Czech Repub-

12 Act No. 36/2005 on Family and on Amendment of Other Acts

lic, etc.) had updated their family laws, thereby adopting best practices suitable for Slovak conditions.

In terms of adoption, the 2005 law continued the trajectory toward more transparent, child-focused procedures. It updated the rules for consent to adoption, aligning them with human rights norms, and ensured that a child old enough to express an opinion has a right for their views to be considered in the adoption process (consistent with Article 12 of the CRC). The Act introduced clearer regulations for foreign adoptions and new safeguards in alternative care (such as more detailed regulation of foster care and guardianship), recognizing that adoption is one of several ways to provide a family environment. In addition, the Act clarified the grounds for nullity of adoption and conditions under which adoptions can be arranged, making the law more user-friendly and comprehensive. Notably, by 2005 the social perception of adoption had fully shifted to emphasize giving children a loving, permanent family, regardless of biological ties – a stark contrast to the contract-and-heir motives of a century earlier. The new law embodies this change by, for example, eliminating any remaining distinctions in status between a birth child and an adopted child, and by tightly regulating any information disclosures to protect the privacy and emotional well-being of those involved (while still allowing an adoptee to eventually learn of their origins, in line with modern rights discourse).

The Family Act of 2005 is currently still in force, and it is the basis of Slovak family law, that also provides the legislative background to adoptions. It is also worth noting that Slovakia's 2005 Family Act was conceived as an interim solution, anticipating a future comprehensive Civil Code reform. As of the current date, Slovak jurists still discuss the eventual integration of family law into a new Civil Code, but until that happens, the 2005 Act stands as the primary source of family law, including adoption law, in Slovakia. This act, being relatively new, reflects the values of a democratic society and Slovakia's commitments to European and international human rights conventions. It marked the final step in the historical arc of Slovak adoption law's development – from an institution once rooted in private patrimony to one firmly grounded in children's rights and welfare. The law has proven adaptable to changing values, shifting from seeing the family as an exclusive bloodline

unit to recognizing family as any stable, nurturing environment in which a child can grow with love and security. This historical perspective thus highlights not only legal continuity and change, but also the growing acknowledgment of children as rights-bearing individuals at the heart of family law.

3. Current legal regulation of adoption in Slovakia – Substantive legal issues

Over the years, the perception and legal characterization of adoption have evolved significantly. Today, adoption is widely recognized as a critical institution in family law, primarily aimed at providing a stable family environment for minor children who lack parental care. More than just a legal framework, adoption serves as a mechanism to offer children the care, affection, and education they might not otherwise receive from their biological parents. In this way, the institution of adoption ensures that children benefit from individualized care and upbringing. Its importance has grown not only for children who are abandoned or have lost their parents, but also given modern societal challenges such as the increasing difficulty many couples face in conceiving children naturally.

Adoption creates a legal bond whereby an individual or a couple (married or not) formally assumes the role of parent to a child who has been relinquished or abandoned. This legal arrangement grants the adoptive parents all the rights and responsibilities of biological parents, establishing a permanent parent–child relationship that is recognized and protected by law. Within the concept of adoption, there are two closely related aspects that warrant distinction: one procedural and one relational.

Firstly, the term adoption encapsulates the procedural act through which adoptive parent(s) legally welcome a minor child into their family. Through this formal process, the child is integrated into the adoptive family's network of relationships, including not just the new parents but also their extended family. This act of adoption marks the beginning of a new chapter for both the child and the adoptive family, creating a nurturing, supportive environment tailored to the child's needs.

Secondly, adoption denotes the resultant legal and familial relationship that emerges between the adoptee, the adoptive parents, and the adoptive parents' relatives. This new relationship, forged by law, is characterized by mutual rights and obligations mirroring those in a biological parent-child relationship. It is important to distinguish between the act of adoption and this resulting relationship. The former is the initial legal procedure that formalizes the adoption; the latter encompasses the ongoing family dynamics and legal responsibilities that continue after the adoption is finalized.

This distinction between the act of adoption and the subsequent relationship highlights the cause-and-effect nature of the process. The act of adopting a child not only offers a solution for children whose biological parents cannot or will not provide adequate care, but it also creates a new family unit committed to the child's well-being and development. By law, the child's legal ties to the original family are severed and new ties with the adoptive family are established—outcomes that underscore the profound impact adoption has on everyone involved.

In essence, adoption is a vital legal mechanism for addressing the needs of children without parental care, giving them the opportunity to thrive in the security and love of a new family. This comprehensive understanding of adoption makes clear that it is not merely a legal formality, but a profound, lifelong commitment to the welfare and development of the child, embodying the very essence of parental responsibility and care.

3.1. Legal framework governing adoption in Slovakia

Adoption provides a child with the most natural, individualized, and continuous care possible, making it the most comprehensive form of alternative care. However, describing adoption simply as 'alternative' or 'substitute' care can be misleading. Adoption goes beyond substituting for a child's original (and perhaps dysfunctional) family; it actually establishes a new, fully functional family unit with its own unique dynamics and emotional bonds.

The legal and emotional bond between adoptive parents and an adopted child carries the same validity and depth as the bond between biological

parents and their children. This equivalence extends to the relationships between the adopted child and the adoptive parents' relatives, forming new kinship ties that closely mirror those in a biological family. When a child is adopted, a whole web of familial relationships is created: for example, any existing children of the adoptive parents become the adopted child's siblings, and the adoptive parents' parents become the child's grandparents by adoption.

This complete integration of the child into the family underscores that adoption is far more than a temporary arrangement; it creates lasting familial bonds characterized by love, responsibility, and mutual rights and obligations. An adopted child is embraced as an integral and permanent member of the family unit, not a secondary or provisional member. The formal legal recognition of these relationships confirms the child's full membership in the adoptive family, with all the rights, duties, and connections that a biological child would have.

In Slovakia, the legal framework governing adoption is meticulously outlined across various domestic laws, in addition to the Family Act from 2005,[13] which lays down the substantive legal underpinnings of adoption. The procedural aspects of adoption are detailed in the Civil Non-Dispute Procedure Code,[14] specifically from sections 135 to 150. In addition to these, several other acts contribute to Slovakia's comprehensive legal structure on adoption:

- Act No. 300/1993 Coll. on Names and Surnames: This act addresses the procedures for changing the surname (and in some cases, the first name) of an adopted child, as delineated in sections 12 to 13.[15]
- Act No. 40/1993 Coll. on the Citizenship of the Slovak Republic: Section 6 of this act outlines the implications of adoption on the citizenship status of the adopted child.[16]
- Act No. 154/1994 Coll. on Registry Offices: Section 21 specifies the role of registry offices in recording adoptions.[17]

13 Act No. 36/2005 on Family and on Amendment of Other Acts
14 Act No. 161/2015 Coll. Civil Non-Dispute Procedure Code, as amended
15 Act No. 300/1993 Coll. on Names and Surnames
16 Act No. 40/1993 Coll. on the Citizenship of the Slovak Republic
17 Act No. 154/1994 Coll. on Registry Offices

– Act No. 305/2005 Coll. on Social-Legal Protection of Children and Social Guardianship: Sections 33 and 44 of this act elaborate on the social and legal protections afforded to children in the adoption process, emphasizing the state's role in ensuring the child's welfare and rights are safeguarded.[18]

For adoptions involving international elements (for example, a Slovak child being adopted by foreigners or vice versa), the above laws are supplemented by Act No. 97/1963 Coll. on Private International Law and Procedure, particularly sections 25 to 27 and 41 to 41a, which navigate the complexities of international adoption processes.[19]

Adoption in Slovakia is further guided by numerous international treaties and conventions, including:

– The 1989 Convention on the Rights of the Child: This foundational document asserts the child's right to a stable upbringing, nationality, identity, and name.[20]
– The 1993 Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption: This documents work towards harmonizing adoption procedures across borders, ensuring that the child's best interests are the paramount consideration.[21]
– The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms: Although broader in scope, this convention underscores the importance of safeguarding human rights within the context of adoption.[22]

Together, these national laws and international instruments form a robust framework regulating adoption. They aim to protect the rights of the child by ensuring continuity in the child's upbringing, preserving the child's identity (including name and nationality), and establishing legal procedures that uphold the child's best interests both within Slovakia and in cross-border

18 Act No. 305/2005 Coll. on Social-Legal Protection of Children and Social Guardianship
19 Act No. 97/1963 Coll. on Private International Law and Procedure
20 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.
21 Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, 33
22 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

situations. This layered legal structure demonstrates a global commitment to facilitating adoptions in a manner that places the child's welfare at the forefront, balancing Slovak legal requirements with international human rights standards.

3.2. Types of adoption in Slovakia

Historically, Slovak law recognized two forms of adoption: revocable adoption and irrevocable adoption. Under the older system, revocable adoption functioned much like a guardianship arrangement. The biological parents' rights and obligations were transferred to the adoptive parents, but with a key distinction: the child's birth certificate still listed the biological parents, and the legal connection between the child and the original family was not permanently severed. In practice, revocable adoptions were often used for very young children (those under one year old could only be adopted revocably under the old rules). Once a child turned one, the adoptive parents could petition the court to convert the adoption into an irrevocable one. Revocable adoption always carried the possibility of being annulled by a court under serious circumstances, effectively undoing the adoption and restoring the legal ties between the child and their biological family. This meant that if grave concerns arose, the law allowed a revocably adopted child to be returned legally to their original family.

Irrevocable adoption, by contrast, was a permanent arrangement from the outset. In an irrevocable adoption, the adoptive parents' names were recorded on the child's birth certificate in place of the biological parents' names, symbolizing a complete and irreversible transfer of parental rights. Once an adoption was made irrevocable, there was no legal mechanism to reverse it. Over time, irrevocable adoption became the dominant practice in Slovakia, reflecting a shift toward creating enduring family bonds. This permanence demonstrates the legal commitment to the child's long-term stability and continuity of care within the adoptive family.

Today, revocable adoption has been completely phased out of Slovak legislation. Now only irrevocable adoptions are allowed. This evolution of the law highlights a focus on the long-term welfare and security of adopted chil-

dren. It solidifies each adopted child's place in their new family without any fear that the adoption could be legally undone. In essence, adoption in Slovakia is now seen not just as a legal procedure, but as a lifelong commitment to the child's best interests and well-being within their adoptive family.

According to Article 100(1) of the Family Act, the legal framework for the adoption of a minor child is designed to prioritize familial continuity and stability. It generally permits adoption by a married couple, by one spouse if they are married to one of the child's biological parents (a step-parent situation), or by the widowed spouse of the child's biological or adoptive parent. This approach shows a preference for keeping adoption within a family structure that mirrors a traditional biological family. However, the law also makes room for single individuals to adopt in special cases. A single person can adopt only if the authorities determine that it is in the child's best interests. This exception recognizes that while a two-parent family is often ideal, there are situations where a single parent can provide a caring and stable home for a child.

The law's inclusion of a surviving spouse (the widow or widower of the child's parent) as a potential adopter expands the pool of possible adoptive parents. This situation is treated differently from a single person with no prior connection to the child. In the case of a surviving step-parent, it's assumed that they already have an existing relationship and emotional bond with the child. The child may already be living in a stable environment with that step-parent. Allowing the surviving spouse to adopt simply formalizes a bond that is likely already strong, providing continuity in the child's family life and emotional support.

Adoption by a single person is still considered an exception rather than a rule. When a single individual (man or woman) wants to adopt, the court will carefully examine the circumstances. The court needs to be convinced that this adoption will truly benefit the child. Even though such an adoption results in a non-traditional family structure (a single-parent family), it can still meet all of a child's needs. The law acknowledges that in certain cases, a single parent can offer a nurturing and stable home if it genuinely serves the child's best interests.

Under the provisions of Article 100(2) of the Family Act, the law stipulates a specific framework for joint adoption, exclusively permitting mar-

ried couples to adopt a minor child together. This rule means that two people who are not married to each other cannot adopt a child as co-parents. The law emphasizes the importance of the marital union as the foundation for joint adoption. It aims to ensure that an adopted child is placed into a legally recognized and stable family unit. Because Slovak law defines marriage strictly as a union between a man and a woman, same-sex couples (who cannot legally marry in Slovakia) are not allowed to adopt a child together.

Further elaborating on the nuances of adoption within marital contexts, Article 100(3) of the Family Act addresses situations where an adoption is pursued by a stepparent – that is, the spouse of the minor child's biological parent. If a step-parent (the husband or wife of the child's biological parent) wants to adopt the child, the law requires the consent of the other biological parent (the one who is not part of the adoption). This requirement reinforces the idea that both of the child's biological parents should agree on major decisions affecting the child's life and legal status. By giving this consent, the biological parent is formally agreeing to share or transfer their parental rights and responsibilities to their spouse (the step-parent), making the step-parent a legal parent of the child.

However, the law also recognizes some cases where obtaining that consent is impossible or unreasonable. For example, if the other biological parent has been declared legally incapacitated by a court, or if that parent's whereabouts are unknown, the adoption can proceed without their consent. These exceptions ensure that the adoption process isn't blocked in situations where the usual consent cannot be obtained, while still keeping the child's best interests at heart and respecting existing family relationships.

The requirement for the other parent's consent is considered a very personal right of that biological parent. Under normal circumstances, a court cannot override or replace this consent with its own decision. This highlights the law's respect for the parental bond and the rights of the biological parent, even as it creates new legal ties through adoption. Emphasizing consent serves to balance everyone's interests and rights in the adoption process. It ensures that adoptions (especially step-parent adoptions) are handled with respect for all the legal, emotional, and relational dynamics involved.

This overall approach to adoption acknowledges that families come in diverse forms, but it always puts the child's welfare first. The goal is to create or preserve stable, loving, and supportive home environments for children. Whether an adoption involves a married couple, a single individual, or a surviving step-parent, every decision must center on the child's best interests. By prioritizing family stability and emotional well-being, the Slovak legal system takes a truly child-centric approach to adoption. It treats adoption not just as a legal formality, but as a commitment to providing a better life for the child.

3.3. Adoption proceedings

The adoption process in Slovakia involves both procedures and conditions. On the procedural side, there is a step-by-step process involving the courts, child welfare authorities, and the prospective adoptive parents. The Civil Non-Dispute Procedure Code details these steps (sections 137 to 142 cover the preliminary stage, and sections 143 to 150 cover the later stages of the adoption process). These procedures ensure that adoptions are handled transparently and fairly, protecting the rights of everyone involved –especially the child.

On the other hand, the substantive prerequisites constitute the core conditions that must be met for an adoption to be legally recognized and successfully completed. The court rigorously evaluates these conditions during its decision-making process to ensure the adoption serves the best interests of the child. The key substantive prerequisites include:

- Parental Inability or Unwillingness: The biological parents are either incapable or unwilling to provide for the child's proper upbringing, necessitating an alternative family arrangement.
- Limitation: Only minors are eligible for adoption, emphasizing the protective focus of adoption laws on children.
- Child's Best Interests: The paramount consideration is that the adoption must serve the minor child's best interests, ensuring their welfare and development.

- Exclusion of Close Relatives: Adoption is not permitted between individuals who are already closely related, to maintain clear family boundaries and legal clarity.
- Age Difference: There should be a sensible age gap between the adopter and the adoptee, to resemble the natural age difference found in biological parent-child relationships.
- Adopter's Suitability: The prospective adoptive parent(s) must fulfill specific legal criteria, ensuring they are capable of providing a stable and nurturing environment.
- Mode of Adoption: A child can be adopted either individually or jointly by a married couple, with the law specifying who can adopt together.
- Consent Requirements: The legal guardian's consent is mandatory, and if the child is of sufficient maturity, their informed consent is also required.
- Pre-adoptive Care Period: The child must spend a legally mandated period in the care of the prospective adoptive parent(s) before the adoption can be finalized, allowing for the assessment of compatibility.
- Health Assessment: A medical examination must confirm that the health of the adoptive parent(s) and the child is conducive to the adoption's success.
- Information and Instruction: The court is obligated to provide comprehensive information to the adopter and the child's legal representative about the adoption's implications, aiming to ensure full understanding and consent.

All these requirements form a strict framework for evaluating potential adoptions. The goal is to ensure that every adoption is carried out with the child's welfare as the top priority, while also establishing a stable and legally sound family structure. By being thorough with these conditions, the legal system aims to make sure that each adoption is beneficial and harmonious for both the child and the adoptive family.

The first provision that addresses adoption is the Family Act in its Article 97, which states that:

(1) Adoption shall create between the adopter and the adoptee the same relationship as exists between parents and children. A kinship relationship shall be estab-

lished between the adoptee and the adopter's relatives by adoption. Adoptive parents have the same responsibilities and the same rights and obligations as parents in bringing up children.

(2) Adoption shall be decided by the court on the petition of the adoptive parent.

According to the legal framework governing adoptions, the adoption proceedings are preceded by preliminary proceedings (also referred to as adoptability proceedings), as outlined in sections 137 to 142 of the Civil Non-Dispute Procedure Code. Typically, this stage is initiated by someone filing a formal application to adopt. However, if a court finds that all the conditions for adoption have been met, it has the authority to start the adoptability process on its own, even without a specific request.

In these preliminary proceedings, the main participants are the child (the prospective adoptee), the child's biological parents, and the person or couple who wants to adopt the child. Notably, if the child is 16 or older, the law allows them to be a participant in their own right. In other words, a teenager who is at least 16 can directly take part in the proceedings rather than only through a representative. If the child is under 16, however, they must participate through a legal representative (such as a guardian appointed by the court or a child welfare official) to ensure the child's interests are properly protected.

The biological parents are usually considered parties in these preliminary proceedings as well. But there are exceptions. If the biological parents have been legally stripped of their parental rights, if they lack full legal capacity, or if they are incapable of understanding the implications of the adoption, then they will not be included as parties. In such cases, the court appoints a guardian to represent the child's interests in place of the biological parents. Additionally, if the biological parents have already given their consent to the adoption in advance (without specifying who the adoptive parents will be), they are not treated as parties to the proceedings.

This way of handling the preliminary stage ensures that an adoption is carefully considered under the law before moving forward to the final adoption process. The system is designed to adapt to various family situations (for example, if the biological parents are absent or unable to participate) while still safeguarding the child's interests at every step. The goal of these

preliminary steps is to confirm that pursuing the adoption will truly be good for the child and that all legal conditions are satisfied. In other words, the court uses this stage to be thorough and sensitive to each case's unique circumstances, making sure that moving ahead to formal adoption is appropriate.

In the course of adoption proceedings, the court also involves the people or organizations currently responsible for the child's care. For example, if the child is in foster care or living in an institution, the court will consult with the foster parents or with the representative of that institution. This ensures the judge has up-to-date information about the child's current living situation and any special needs or considerations. Furthermore, the court is obliged to investigate any aspects of the child's circumstances that might hinder the successful completion of an adoption. This careful examination is crucial in determining whether the adoption will truly serve the child's best interests.

The court is expected to make certain decisions in a timely manner. When determining a child's adoptability (i.e., whether the child is legally free and suitable to be adopted), the court aims to issue a decision within three months from the start of the preliminary proceedings. In exceptional cases – when there are serious, unforeseen issues or objective obstacles – this period can be extended by up to an additional three months. This timeline helps prevent unnecessary delays, so that the child isn't left waiting in uncertainty for too long.

Additionally, the law provides a mechanism to revoke an adoptability decision if significant changes in circumstances occur before the adoption is finalized. An application to revoke the adoptability ruling can be made only before the court has officially placed the child in the care of the prospective adoptive parents. This provision makes the process flexible: it allows the court and the parties to revisit and potentially halt the adoption plan if new information comes to light or if the situation changes drastically. This flexibility is designed to keep the focus on the child's welfare, ensuring that an adoption proceeds only if it remains in the child's best interests given the most current circumstances.

It's also important to note that a preliminary adoptability proceeding is not required in every single adoption case. For instance, if the prospective

adoptive parent is the spouse of the child's biological parent (in other words, a step-parent adoption within an existing family), the law does not mandate a separate adoptability proceeding. This exception acknowledges that in such cases the child is already in a familiar family setting, so the extra step of determining adoptability is not necessary.

A notable safeguard in the current legislation is that if the court determines the essential conditions for adoption are not met at any point, it must terminate the adoption proceedings. If the court decides to discontinue the case for this reason, that decision can be challenged by filing an appeal. This rule ensures that the adoption process remains strict and that it only moves forward when all legal requirements are fulfilled. It's another way the system puts the child's best interests first: by preventing an adoption from proceeding under conditions that don't meet the legal standards, the law protects the child from a potentially unstable or improper placement.

Lastly, adoption cases are treated as special, non-adversarial proceedings in Slovakia. This means an adoption hearing isn't like a typical lawsuit with two opposing sides arguing against each other. Instead, it is a legal process where everyone involved (including the judge, social authorities, and the parties) is focused on a single goal – finding the best outcome for the child. Such proceedings can only begin when the prospective adoptive parent(s) file a formal petition to adopt; in general, the court will not initiate an adoption case on its own without a request. Additionally, jurisdiction for an adoption case lies with the district court of the area where the child has legal residence at the time the proceedings start. That local district court will handle the case from start to finish, ensuring that the process is managed in the appropriate venue according to the child's official residence.

3.4. Adoption in the best interests of the child

In Slovak adoption law, nothing is more important than the welfare of the child. This is made clear in Articles 98 and 99 of the Family Act. Article 98 explicitly states that *"Only a minor child may be adopted if the adoption is in the minor child's best interests."* This core principle is the foundation of the entire adoption process. In other words, every rule and requirement in the adop-

tion system is there to serve this goal: ensuring that the adoption will benefit the child. The process is built so that each step contributes to a positive and supportive environment for the child's growth and development.

This emphasis on the child's best interests in Slovak law aligns with international standards. For example, Article 3 of the United Nations Convention on the Rights of the Child also provides that the best interests of the child should be a primary consideration in all actions concerning children. There is a universal understanding that children's welfare must come first in matters like adoption. The 'best interests of the child' principle acts as a guiding compass throughout the adoption process, making sure that the child's safety, well-being, and development are always the top priority in every decision.

This harmony between Slovakia's laws and international principles reflects a shared commitment to upholding the rights and welfare of children. By centering the adoption process on the child's best interests, the legal system works to give each adopted child the best chance at a happy, secure life within a loving family. Keeping the child's welfare at the heart of every decision not only helps create strong family bonds through adoption, but it also benefits society as a whole. When children are raised in stable and loving families, they are more likely to grow into healthy, well-adjusted members of society, which in turn strengthens the community.

A crucial element of a successful adoption is the development of a strong emotional bond between the child and the prospective adoptive parent. Ideally, this bond should be as deep and natural as the connection between a biological parent and child. It's the court's responsibility to assess whether such a bond exists or is likely to form. In fact, the court takes a proactive role in this evaluation: it can independently gather evidence and information (beyond what the parties may present) to fully understand the relationship and the situation of the child. This proactive approach helps ensure that any decision to approve an adoption is truly made in the child's best interest, with confidence that the child will thrive in the adoptive home.

While the law itself might not explicitly list the broader societal benefits of adoption, those benefits are implicitly understood. The Family Act supports the idea that adoption has a positive impact on society by facilitating

the formation of new families for children who need them. This perspective is echoed in international documents as well. For instance, the Preamble of the Convention on the Rights of the Child recognizes the family as the fundamental group of society and the natural environment for the growth and well-being of children.

Not all countries' laws explicitly say 'adoption is good for society', but the sentiment is widely acknowledged. Some legal systems do make a point to mention the social value of adoption in their statutes. More commonly, however, as in Slovakia, this positive impact is implied by the way adoption laws are structured and the goals they promote. In essence, adoption serves a dual purpose: it gives children in need a loving, stable home, and it reinforces society by nurturing its most fundamental unit – the family.

3.5. Criteria for becoming an adoptive parent

The Family Act in Section 98 outlines specific criteria related to the prospective adoptive parent's suitability. These requirements are in place to ensure that the adopter is fully capable of assuming parental rights and responsibilities. All conditions must be met – if even one is not satisfied, the person cannot be approved as an adoptive parent.

The statutory requirements for an adoptive parent are as follows:

a) Full Legal Capacity: The adoptive parent must be a natural person with full legal capacity. In practice, this means the adopter must be an adult who is legally competent to act. Minors and individuals who have been deprived of legal capacity (or have limited decision-making capacity) are not eligible to adopt. This rule guarantees that the adopter is legally able to make responsible decisions and undertake all duties of parenthood.

b) Personal Qualifications: The law emphasizes that adopters should possess suitable personal qualities to raise a child. Good physical and mental health are essential, as is having a stable personality and sound moral character. The court will thoroughly evaluate the prospective parent's health (including mental health) and overall character to en-

sure there are no issues that would hinder their ability to care for a child. This comprehensive screening aims to confirm that the person can provide a supportive, nurturing, and stable environment for the child.

c) Registration in the List of Applicants for Adoption: Prospective adopters must be officially registered on the list of adoption applicants maintained by the authorities (specifically, the local Office of Labor, Social Affairs, and Family, under Act No. 305/2005 Coll. on Social-Legal Protection of Children). Registration involves a formal vetting process according to specific regulations. Candidates undergo mandatory preparation and training (at least 26 hours), which includes both individual and group sessions. During this preparation, professionals assess the applicant's parenting capacity, lifestyle, understanding of family and child-rearing, and readiness for adoption. Applicants also have to submit various documents – such as a medical certificate of health, a clean criminal record statement, proof of income, a residency certificate, and complete a detailed adoption questionnaire. Successful completion of this process results in a final evaluation report on the applicant's suitability. Only after passing all these steps is the person officially listed as a qualified prospective adoptive parent.

d) Lifestyle and Household Dynamics: The way the prospective parent lives, including their household conditions and the people living with them, should guarantee that the adoption will be in the child's best interests. Authorities will examine the stability and safety of the home – for example, whether the household is free of violence or substance abuse and whether it can meet the child's needs. Essentially, the adopter's lifestyle and family environment must be conducive to raising a child. The goal is to ensure the child will be entering a secure, loving, and caring family setting that will promote their well-being and development.

These criteria reflect a commitment to place children only with adopters who are prepared and able to provide a loving, stable family. All the conditions are cumulative – failing to meet any one of them is disqualifying. (Notably, the requirement to be registered on the official adoption list can

be waived in certain cases – for example, when the adopter is the child's stepparent – since the person is adopting a specific known child with whom they already have a relationship.)

This subchapter will provide further detail on how these criteria are vetted and will outline the procedure prior to adoption that is currently in place in Slovakia.

Prospective adoptive parents must follow a formalized sequence of steps before submitting their application to the court. Before a prospective adopter even reaches the court stage of an adoption, they must go through a structured preparation process overseen by child protection authorities. First, candidates engage with the Office for the Protection of Children's Rights (or the relevant social authority). In this stage, they receive counseling and detailed information about adoption – this helps them make an informed decision and understand the responsibilities involved. They are guided step-by-step on the requirements and procedures ahead. During this preparatory phase, as noted, applicants submit necessary documents (health and police clearances, income statements, etc.) and undergo interviews and home studies. They also attend the training sessions which educate them on parenting an adopted child, attachment and trauma issues, legal rights and obligations, and more. This phase is as much about self-evaluation and learning for the applicants as it is about vetting; many prospective parents find it helps them reflect on their motivations and readiness to adopt. At the conclusion of this preparation, the authorities compile a comprehensive report on the candidate. If the person meets all criteria (legal, personal, health, etc.) and is deemed suitable, they are officially registered in the database of approved adoption applicants. Being on this list means the person is cleared to be matched with a child for adoption, subject to final court approval. Throughout this process, the guiding principle is that adoptions should only proceed if they clearly serve the best interests of the child.

The court is also newly obliged to examine the health condition of the adopted child and the adopter not only on the basis of a medical examination, as it was regulated during the previous legislation, but comprehensively, for example on the basis of a psychological assessment. The court shall also hear the minor child in the proceedings, subject to the condition of the

best interests of the child, but only if the minor child is capable of understanding the meaning of the adoption and the questioning is not contrary to the child's best interests. If the child is not to be heard, he or she shall not be summoned to the hearing. The other parties must always be heard by the court, if possible, in person.

For an individual to be eligible as an adoptive parent, they must satisfy several criteria. Firstly, they must be a natural person possessing full legal capacity, ensuring they are legally competent to undertake the responsibilities of parenthood. Beyond legal capacity, the law emphasizes the necessity for personal qualifications that encompass good health, a commendable personality, and upright morals. These qualifications are indicative of the individual's ability to provide a nurturing and morally sound environment for the child.

Furthermore, prospective adoptive parents must be officially registered on the list of applicants for adoption, demonstrating their formal intent and readiness to adopt. The law also scrutinizes the lifestyle of the prospective adoptive parent, including the environment and the individuals with whom they share their household. This assessment aims to ascertain that the living conditions and familial atmosphere are conducive to the child's best interests, ensuring that the adoption will significantly contribute to the child's welfare and development.

Adoption laws accommodate various familial configurations, allowing for the adoption of a minor child by a stepparent – that is, an individual married to one of the child's biological parents – or by the widowed spouse of the child's parent or adoptive parent. In special circumstances, the law also permits single individuals to adopt, provided it can be demonstrated that such an adoption would serve the best interests of the child, ensuring that the child's welfare is the paramount consideration.

When the prospective adopter is married to the minor child's parent, the biological parent not involved in the adoption becomes a crucial participant in the proceedings. Their consent is imperative for the adoption to proceed, reinforcing the importance of mutual parental agreement in decisions affecting the child's future. However, exceptions are made in situations where this parent's legal capacity is compromised, or their consent is unattainable

due to insurmountable obstacles, such as unknown whereabouts or incapacitation. In these cases, the necessity for their consent may be waived, allowing the adoption process to move forward without it.

During the adoption process, the court is tasked with conducting a thorough review to ensure all the essential criteria for adoption are met. This includes holding a hearing where all parties involved in the proceedings are mandatorily heard to assess the fulfillment of the substantive conditions for adoption comprehensively. The court is diligent in including the voice of the minor child in these proceedings, except in instances where the child, due to their age or developmental stage, is unable to grasp the significance of the adoption or the proceedings. Additionally, the court may choose not to question the child if it deems that doing so would not be in the child's best interests, prioritizing the child's emotional and psychological well-being throughout the process.

Before the court decides on the adoption, the minor child must have been in the care of the prospective adoptive parent for at least nine months. The costs of the pre-adoption care shall be borne by the prospective adoptive parent. The court shall also decide on the placement of the minor child in the pre-adoptive care of the prospective adoptive parents only at the request of the prospective adoptive parent.

In the case of an adoption with a foreign element (e.g. adoption of a child by a foreigner or adoption of a child who is a foreign national), it is necessary to contact the Centre for the International Legal Protection of Children and Adolescents, which is responsible for cooperating with the centres of other countries in order to mediate all matters related to the care of children and adolescents with a foreign element. Proceedings for recognition of a possible foreign adoption decision shall be initiated only on the application of the person named as a party in the foreign decision and of the person who establishes that he or she has a legal interest in the matter. The Regional Court in Bratislava is competent to decide in the given proceedings.

Article 98 of the Family Act sets out the additional criteria for becoming an adoptive parent, by stating:

Only a natural person may become an adoptive parent who has full legal capacity, personal qualifications, in particular health, personality and morals, is regis-

tered in the list of applicants for adoption according to a special regulation, and by the manner of his/her life and the life of the persons living with him/her in his/her household, guarantees that the adoption will be in the interest of the minor child.

A critical element for the success of an adoption is the suitability of the prospective adoptive parent, who expresses the desire to adopt a minor child. The adoption process is designed not only to serve the interests of the child but also to ensure that the adopter possesses specific qualities and meets certain criteria that underscore their capability to provide a nurturing and stable family environment. The law, therefore, delineates a set of prerequisites for individuals aspiring to establish an adoptive relationship, aiming to ensure that the adoption achieves its intended purpose of benefiting the minor child. These criteria include:

- Natural Person Requirement: The prospective adoptive parent must be an individual, reflecting the fundamental objective of recreating a natural family setting for the child. This stipulation underscores the importance of personal, human interaction and care in the child's upbringing, which is best facilitated in a family environment characterized by individual attention and emotional bonds.
- Full Legal Capacity: It is imperative that the adoptive parent possesses full legal capacity. This means that minors, individuals who have been legally deprived of their capacity, or those whose capacity to act has been limited, are ineligible to adopt. The rationale behind this requirement is to ensure that the adoptive parent is legally recognized as capable of making responsible decisions and undertaking the duties associated with parenting. The consideration of legal capacity is forward-looking, focusing on the prospective ability of the individual to fulfill parental responsibilities.

In the comprehensive evaluation of prospective adoptive parents during adoption proceedings, the court's assessment extends beyond mere procedural compliance to include a thorough examination of the adopter's health status. This includes a detailed evaluation of any mental health conditions the adoptive parent might have. It's imperative for the court to consider not just the current state of health, but also the long-term prognosis and its potential influence on the individual's capacity to fulfill parental duties and

rights effectively. Such an assessment aims to ensure that the adoptive parent can provide a stable and nurturing environment for the child.

Beyond health considerations, the law mandates that adoptive parents meet specific personal qualifications, encompassing medical, personality, and moral standards. These criteria are designed to affirm that the adoption aligns with the minor child's best interests. The evaluation of these personal qualifications is primarily conducted by the authority responsible for the social and legal protection of children and social welfare. This body also maintains the registry of adoption applicants and is tasked with a comprehensive screening process that includes:

- Mandatory Training: Applicants are required to undergo a minimum of 26 hours of training, which includes both individual and group sessions. The training is multifaceted, aimed not only at providing essential information about adoption and related rights and obligations but also at conducting an in-depth analysis of the applicant's personality. This includes assessing their capability to raise a child, provide a stable environment, and their views on marriage, family, and parenthood.
- Final Report: The culmination of this preparatory phase is a detailed report that evaluates the suitability of the adoption applicant. Successful completion of this phase results in the applicant being officially listed as a prospective adoptive parent.
- Disqualification Criteria: However, certain conditions preclude registration, such as a history of conviction for deliberate offenses leading to imprisonment for over a year or admissions of guilt in crimes that significantly breach social norms or target human dignity, the family, youth, or involve endangering someone with a venereal disease.

Under Act No. 305/2005 Coll., the authority responsible for social and legal protection of children and social guardianship plays a pivotal role in overseeing the process of vetting and registering prospective adoptive parents. This process is essential in ensuring that only individuals who meet stringent criteria are considered eligible to provide foster family care. Slovak law also outlines specific disqualifications that prevent someone from being approved as an adoptive parent. The social and legal protection authorities

will stop the registration process for any applicant who falls into these categories:

(a) Criminal Record Disqualifications: If the individual has been convicted of an intentional crime and sentenced to more than one year in prison, they cannot adopt. Likewise, any conviction (or even an official admission of guilt) for serious offenses – especially crimes against life and health, human dignity, family and youth, or other grave crimes – will disqualify a person. This holds true even if the conviction has been expunged or legally 'forgiven', reflecting the strict moral integrity standards for adopters.

(b) Health Status Concerns: If a medical assessment finds that the person's health condition makes them unfit to care for a child, the person will not be allowed to adopt. The adopter needs to be in sufficient physical and mental health to meet the demands of parenting.

(c) Legal Capacity Limitations: As mentioned, anyone who does not have full legal capacity (for instance, due to intellectual disability or being under legal guardianship themselves) is not eligible to adopt. Full legal competence is a must for taking on parental responsibilities.

(d) Failure to Complete Required Training: Prospective parents are required to complete the preparatory training for adoption (foster care training) within one year of starting the process. If an applicant does not finish this required training program, they will be removed from consideration.

(e) Suspension of Parental Rights: If the person has had their own parental rights suspended, restricted, or removed by a court in the past, this is a red flag regarding their ability to care for a child. In such cases, they would not be permitted to proceed with adoption.

By enforcing these checks and disqualifications, the system ensures that only highly qualified and responsible individuals can adopt. The emphasis is always on the child's welfare – the process is designed to select adopters who can best provide a loving, safe upbringing.

Prospective adoptive parents must be officially registered on the list of applicants for adoption, a process governed by specific legislation, notably Act

No. 305/2005 Coll. on social legal protection of children and social guardianship. This Act delineates the procedural, conditional, and preparatory steps necessary for inclusion in the registry, ensuring that only those who meet the stringent criteria for providing a conducive environment for the child's growth and development are considered for adoption.

Slovak adoption law recognizes several family situations under which a person or persons may adopt a child (Family Act Section 100):

- Married Couples: A husband and wife can jointly adopt a child together. In fact, a married couple is the only grouping allowed to adopt a child together as co-parents. (Unmarried couples cannot adopt jointly under Slovak law.)
- Stepparents: One spouse can adopt the other spouse's biological child (a stepmother or stepfather adoption), assuming the other biological parent consents and the adoption is in the child's best interest. This typically happens when a parent remarries and the new spouse wishes to legally become the child's parent. The law specifically allows that *"a minor child can be adopted by one of the spouses if they are married to one of the child's parents."* Similarly, if a widow or widower marries, the new spouse could adopt the child of the deceased parent (or even the child that the deceased had previously adopted).
- Surviving Spouse of the Child's Parent: If one of the child's parents has died, the widowed husband or wife of that parent may adopt the child. For example, if a child's mother passed away and the father later dies, the mother's widower (stepfather) who had been caring for the child could formally adopt the child to solidify the parental relationship.
- Single Individuals: While the preference is to place children with families that have two parents, Slovak law does permit single persons to adopt in exceptional cases. An unmarried individual can adopt a child only if it is clearly in the child's best interest and all other conditions are met. This might occur, for instance, if the child has a strong existing bond with the single adopter (such as a relative or foster parent), or if a suitable couple is not available and the single person is especially qualified to meet that child's needs. Each such case is carefully evaluated by the authorities and the court to ensure it truly benefits the child.

It's important to note that if a single person adopts, they will be the sole legal parent of the child. Also, two people who are not married to each other cannot adopt the same child together – one of them would have to be the sole adopter. (The only exception to joint adoption is for married couples, as mentioned above.)

When a stepparent (the husband or wife of a biological parent) seeks to adopt a minor child, the consent of the child's other biological parent is usually required. In other words, the parent who is not married to the adopter must agree to the adoption, since it will affect their parental rights. This requirement ensures that both of the child's original parents have a say in such a significant decision. However, the law provides exceptions if obtaining that consent is impractical or impossible. If the other biological parent lacks legal capacity (for example, due to severe mental incapacity) or if they cannot be located or meaningfully contacted (perhaps they are unknown, long-term missing, or otherwise unreachable), the court may waive the need for their consent. Similarly, if a parent has been completely stripped of their parental rights by a prior court decision, their consent might not be required. Each of these situations is handled with caution by the court, always with the child's best interests in mind. Essentially, the law balances the involvement of the biological parents with the practical realities of each case, ensuring that an absent or unfit parent cannot block a beneficial adoption for the child.

Once a prospective adoptive parent has been approved and matched with a child, the matter goes to court for the adoption proceedings. During these proceedings, the court's role is to verify that all legal and substantive conditions for adoption have been satisfied and that the adoption will truly benefit the child. The court will hold a hearing in which all relevant parties are heard. This typically includes the prospective adoptive parent(s), the child's biological parent(s) or guardian (if applicable), and often a representative from the child protection authority. The judge will ensure that the adopter meets the criteria (legal capacity, health, etc.), that proper procedures were followed (such as the preparatory care period, discussed below), and that necessary consents are obtained. The aim is to examine the adoption from every angle to confirm it is appropriate and lawful.

Modern Slovak law places importance on the voice of the child in adoption (in line with international standards). If the child is of suitable age and maturity to understand what adoption means, the court will hear the child's wishes and opinions – provided that doing so is not contrary to the child's best interests. In practice, this usually means that older children (typically school-age and above, depending on their development) may be consulted in a sensitive manner about how they feel regarding the adoption. For very young children or any child who cannot yet comprehend the situation, the court will not require their presence or direct input (and indeed, the law says that if the child is not going to be heard, they should not be brought into the courtroom at all, to avoid unnecessary stress). The overarching principle is that the child's welfare and comfort come first. If listening to the child's views is likely to help ensure the decision is right for them, then the court will do so; if it would cause harm or confusion, it is avoided.

Slovak law requires a period of pre-adoption foster care before an adoption can be finalized. Specifically, the child must be in the care of the prospective adoptive parent for at least nine months prior to the court's final decision on the adoption (Family Act Section 103). This means that the child lives with the adopter and is cared for by them as a parent would, during this trial period. The purpose of this requirement is to allow time for bonding and adjustment – the child can gradually settle into the new family, and the adopter can confirm their ability to meet the child's needs on a day-to-day basis. It acts as a safeguard, ensuring that the adoption will likely succeed before it's legally irrevocable. During these nine months (often referred to as predosvojiteľská starostlivosť, or pre-adoptive foster care), the prospective adopter bears all costs related to caring for the child. This is logical, since once the adoption is finalized, that person will assume full parental responsibilities (including financial support) for the child. Essentially, the pre-adoption period is a test run of those responsibilities. The child is typically placed into the prospective parents' care by a court order, issued upon the adopter's request. The future adopter must file a proposal to the court to have the child entrusted to them for this preliminary period. The court will then issue a decision outlining the scope of the adopter's temporary rights and duties for the child (for example, the responsibility to care for the child's daily needs, while certain other rights – like managing the child's property

or changing the child's permanent address – might still be limited until the adoption is finalized). There are a few exceptions to the 9-month care rule. If the child has already been living with the person who wants to adopt them under another arrangement – for instance, if the person was the child's foster parent, guardian, or close relative caring for the child – and that living arrangement lasted at least nine months, the court may count that time and not require an additional pre-adoption period. The idea is that the intent of the law (testing the caregiver-child relationship and stability) has already been fulfilled in such cases. For example, if a foster family who has cared for a child for a year decides to adopt that child, they wouldn't need a further nine-month trial since the child is already well-adjusted in their care.

3.6. Criteria for becoming an adoptee

Article 99 of the Family Act touches on the adoptability criteria. It states, that:

(1) There must be a reasonable age difference between the adoptive parent and the adopted child.

(2) Only a minor child may be adopted if the adoption is in the minor child's best interests.

For an adoption to effectively replicate the dynamics of a biological parent-child relationship, careful consideration must be given to the age difference between the adoptee and the adoptive parent(s). The law requires that there be a reasonable age difference between the adopter and the child. The intention is that the adoptive parent should be old enough to realistically take on a parental role to the child – adoption is meant to emulate a natural parent-child relationship. While the statute does not specify an exact number of years as a required age gap, it implicitly prevents scenarios where the adopter is nearly the peer of the child. For instance, it would not be considered appropriate for an 18-year-old to adopt a 16-year-old, as they are too close in age for a genuine parent-child dynamic. In practice, the adopter must be at least several years older than the child (usually a generation older, in a social sense). The courts have discretion to evaluate on

a case-by-case basis what constitutes a '*primeraný vekový rozdiel*' (adequate age difference), considering the ages of both the child and the adopter. They will look at factors like the child's needs, the adopter's ability to provide care long-term, and whether the age gap supports a healthy family structure. It has been suggested that clearer guidelines (such as a minimum age difference) could be helpful, but as of now, it remains at the judge's discretion to decide if the age difference in a given adoption is acceptable. The current legislation only states there needs to be a reasonable age difference between the adoptive parent and the adoptee but does not provide guidance what is a reasonable age gap.

The determination of a maximum age difference should remain within the jurisdiction of the courts. This approach allows for a flexible assessment tailored to the unique circumstances of each adoption case, taking into account the individual characteristics and backgrounds of the parties involved. The courts are positioned to make informed decisions based on a comprehensive evaluation of the prospective adoptive parent(s) and the child, including their ages, needs, interests, and personalities.

Therefore, in adjudicating adoption cases, the court must conduct a meticulous examination of several factors. This includes, but is not limited to, the age of the adoptive parent(s) and how this relates to the age, needs, interests, and personality of the adoptee at the time of the adoption decision. Such an evaluation ensures that the potential adoptive family can fulfill the parental rights and obligations effectively and cultivate a deep familial bond, as envisioned by the Family Act in Article 98.

The basis of adoption legislation in the Slovak Republic is the stipulation that adoption is exclusively applicable to minors. This is explicitly stated in the Family Act, specifically its Article 99, which states: *"Only a minor child may be adopted if the adoption is in the minor's best interests."*[23]

This principle is echoed in various international conventions on adoption, which uniformly emphasize that the mechanisms of foster care and adoption are designed to benefit children. Nonetheless, the definition of a child is explicitly clarified in only a select number of these conventions and

23 Act No. 36/2005 on Family and on Amendment of Other Acts

is not provided in domestic legislation. According to the Convention on the Rights of the Child, a child is delineated as *"every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."*[24] This definition underscores the recognition of individuals under eighteen as children, with the caveat that certain jurisdictions might confer the status of legal adulthood at a younger age based on local laws.

The European Convention on the Exercise of Children's Rights[25] adopts this age threshold for majority but introduces a stricter stance compared to the Convention on the Rights of the Child by disallowing any reduction in this age limit. By setting eighteen as the definitive age of majority without permitting exceptions for a lower threshold, the European Convention ensures a uniform standard across member states for the recognition of an individual's status as a child. This approach not only standardizes the legal definition of childhood within the ambit of adoption and foster care but also reinforces the commitment to protecting the rights and welfare of all individuals under this age bracket, ensuring they are eligible for adoption and the benefits of a family environment that it entails.

The European Convention on the Adoption of Children[26] establishes one of the most precise and rigorous definitions concerning the eligibility of children for adoption under its framework. It categorically states that the provisions of the Convention are applicable exclusively to individuals who have not yet reached the age of eighteen. However, it further refines this criterion by incorporating an additional stipulation: to be considered a child under the terms of this Convention, the individual must also be unmarried and not legally recognized as an adult in any other capacity. This dual condition underscores a comprehensive approach to defining a child's eligibility for adoption, ensuring that the protective measures and provisions of the Convention extend only to those who are both underage and not subject to adult legal status through marriage or other legal recognition.

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24 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

25 Council of Europe, European Convention on the Exercise of Children's Rights, 25 January 1996, ETS 160

26 Council of Europe, European Convention on the Adoption of Children, 27. September 2008, ETS 202

In parallel, the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption[27] also delineates its applicability to individuals under the age of eighteen, aligning with the general international consensus on the age of majority. However, unlike the European Convention on the Adoption of Children, it does not explicitly include the additional criteria of marital status and legal adulthood in defining a child. This distinction highlights the European Convention's unique position in setting a more stringent threshold for defining who is considered a child in the context of adoption, reflecting a deliberate effort to ensure that the protections and considerations offered by the convention are meticulously targeted towards those most in need of them.

By setting these detailed criteria, the European Convention on the Adoption of Children aims to create a protective legal framework that carefully considers the specific circumstances and vulnerabilities of minors in the adoption process. This approach not only reinforces the commitment to child welfare but also addresses the complexities involved in determining a child's eligibility for adoption, taking into account various factors that could affect their legal status and, consequently, their need for the protective measures provided by adoption.

The emphasis on minors in the context of adoption reflects a broader legal and societal commitment to safeguarding the interests of children, recognizing their unique vulnerabilities and the crucial need for a supportive and nurturing family environment. By aligning national legislation with international standards and conventions, countries like the Slovak Republic affirm their dedication to child welfare, ensuring that adoption practices are geared towards providing the most beneficial outcomes for children in need of care and protection.

Under current Slovak legal frameworks, the eligibility for adoption is confined to minor children. The law clearly stipulates that a child who is conceived but not yet born does not qualify for adoption, ensuring that all legal processes regarding adoption commence post-birth. Historically, the legislation established a guideline of a mandatory one-year period of pre-adop-

27 Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, 33

tive care. This effectively made it impossible to adopt children younger than one year of age. However, subsequent amendments to the legislation have refined these requirements, reducing the pre-adoptive care period to nine months. Consequently, while the current legislation does not prescribe a specific age threshold for adoptable children, logical interpretation, considering the nine-month period of pre-adoptive care, suggests that children can be adopted from as young as nine months old.

Beyond the age parameters for adoptable children, the law underscores the paramount importance of ensuring that the adoption aligns with the best interests of the minor child. This principle is rooted in broader child protection norms, notably Article 5 of the Basic Principles of the Family Act, which mandates that the child's welfare should be the foremost consideration in all decisions affecting them. Thus, in deliberating on adoption cases, courts are expected to go beyond merely verifying the fulfillment of formal criteria for adoption. They are tasked with a comprehensive and thoughtful evaluation of each case, taking into account how the adoption would serve the child's well-being, development, and overall best interests.

This approach ensures that the adoption process is not just a procedural legal matter but a deeply considered decision that places the child's needs, rights, and future at the center of all deliberations. By integrating these considerations into the legal standards for adoption, the legislation aims to foster outcomes that genuinely enhance the lives of adopted children, offering them the stability, care, and supportive family environments they need to thrive.

The legality of an adoption process hinges significantly on ensuring that the health status of both the adoptee and the prospective adoptive parent aligns with the overarching goal of the adoption, which is to provide a conducive environment for the child's upbringing. According to Section 104 of the Family Act, it is incumbent upon the court to thoroughly examine the health conditions of both parties involved in the adoption. This scrutiny is essential to ascertain that no health-related issues would impede the ability of the adoptive parent to care for the child effectively or affect the child's well-being adversely. The court is also responsible for communicating the findings of this health investigation to the adoptive parent and the child's

legal representative, ensuring transparency and informed consent throughout the adoption process.

Typically, the assessment of health conditions is based on medical evaluations submitted by the adoptive parent alongside the adoption application. These evaluations are critical in determining whether either the child or the adoptive parent suffers from any severe, long-term, or incurable mental or physical illnesses that could undermine the adoption's objective. It is crucial to clarify that this stipulation is not designed to discriminate against children with disabilities or health issues. Instead, it aims to ensure that prospective adoptive parents are well-informed about the child's health status, including any hereditary conditions present in the child's biological family that might affect the child's physical and mental development. This knowledge is vital for preparing the adoptive parent to meet the child's specific needs effectively and to make an informed decision about proceeding with the adoption.

Should the court find it necessary, it retains the authority to mandate additional medical assessments or expert evaluations to gain a comprehensive understanding of the health conditions relevant to the adoption case. The determinative factor for the court's decision regarding the adoption will be the current medical status of the involved parties at the time the judgment is pronounced. This approach underscores the legal system's commitment to ensuring that adoptions are conducted in environments that are most beneficial to the child's health, safety, and overall development. By mandating thorough health screenings and evaluations, the law prioritizes the creation of family units that are equipped to provide the level of care and support that adopted children require, thereby safeguarding their well-being and fostering their growth in a nurturing setting.

3.7. The right of the child to know his or her origins

The question of whether, when, and how an adopted child should know about their biological origins has been a sensitive and evolving issue in adoption practice. Historically, adoption in Slovakia (as in many other countries) leaned towards secrecy. To understand the present perspective, it helps to

look back at how things have changed over time. In 1958, significant changes were introduced to Czechoslovak adoption law (which Slovakia was under at the time) by an amendment to the Family Law, by Act No. 15/1958 on the amendment of the regulations on adoption. This reform brought in the concept of irrevocable adoption, distinguishing it from the older revocable kind. One of the hallmark features of irrevocable adoption was that the civil registry (birth records) would list the adoptive parents as the child's parents instead of the biological parents. In other words, the adopted child's birth certificate was changed to reflect the new legal reality. This practice of altering the birth registry is actually influenced by principles later enshrined in the European Convention on the Adoption of Children, which seeks to maintain the confidentiality of adoption and the integrity of the adoptive family in official documents. In line with that Convention, while the adoptive parents are recorded as the child's parents in public documents, the original birth records (with the biological parents' names) are typically kept in a sealed file and not disclosed without authorization. The Convention also provides that an adopted child should have access to information about his or her origins held by authorities, but it balances this against any legal rights of the biological parents to anonymity. Essentially, when the child grows up (or as a mature minor), they might be allowed to get information about their birth family, unless a compelling reason exists to keep it secret – and even then, authorities have discretion to release information if it's deemed in the child's best interests, taking everyone's rights into account. The Convention states, that *the adopted child shall have access to information held by the competent authorities concerning his or her origins. Where his or her parents of origin have a legal right not to disclose their identity, it shall remain open to the competent authority, to the extent permitted by law, to determine whether to override that right and disclose identifying information, having regard to the circumstances and to the respective rights of the child and his or her parents of origin. Appropriate guidance may be given to an adopted child not having reached the age of majority.*

In the decades following the 1960s, the prevailing practice in Slovakia was not to inform adopted children of their adoption. Many adoptive parents were advised, or chose, not to tell the child that they were adopted. In some cases, even adoptive parents were given minimal information about the child's biological family, under a system of 'closed' adoption intended to

make the child fully part of the new family without 'interference' from the past. The rationale was often well-intentioned: adoptive parents feared that if a child knew about their biological parents or understood that they were adopted, it might cause emotional turmoil or a sense of not fully belonging. The aim was to protect the child (and perhaps the parents) from these complications by essentially erasing the child's former identity.

However, experience and psychological research eventually showed that total secrecy could be harmful. Many children who were not told about their adoption in early childhood eventually found out later in life – sometimes by accident, sometimes due to a relative's slip of the tongue, sometimes because as teenagers they sensed something wasn't right or discovered documents. Learning in adolescence (or adulthood) that one is adopted, especially if it comes as a shock, can lead to feelings of betrayal, identity crisis, and anger. Indeed, there have been cases of family estrangement and extreme emotional distress when such secrets surfaced. Adolescence is a critical period for identity formation, and being hit with the news that one's life story is different than believed can severely disrupt that process. Tragically, there have even been instances where poorly handled revelations contributed to self-harm or suicide by the adoptee. These outcomes highlighted that while adoptive parents might fear losing the child's affection or destabilizing the family by telling the truth, the risk of keeping the secret could be much more damaging.

By the 1970s, attitudes among experts began to shift towards openness. Psychologists and social workers increasingly advocated that adopted children should be told the truth about their origins, and the consensus grew that this conversation should happen early – ideally in the preschool years or early school years, when children are more accepting and it becomes a natural part of their understanding of themselves. The reasoning is that if a child grows up always knowing they are adopted (explained in a loving, age-appropriate way), then there is no shocking moment of discovery; it's simply part of their life story. This openness allows children to ask questions as they grow and to integrate their biological origin into their identity in a healthy way, rather than it being a source of confusion or shame.

Modern research in child psychology and developmental science strongly supports the idea that children have a basic need to know where they come from. Knowing one's genetic and medical history, one's ethnic or cultural heritage, and the story of one's birth can be important for personal identity and emotional well-being. Many adults who were adopted seek out their birth families or information about them at some point, underscoring that curiosity and the desire for connection to one's roots are common and natural. Additionally, medical knowledge has advanced to show the importance of family medical history for one's own health; adopted individuals often want to know if certain diseases run in their biological family, for instance.

From a legal and human-rights perspective, the trend has been towards recognizing the child (and later adult)'s right to know his or her origins. This is framed as part of seeing the child as a subject of rights, not an object. In earlier times, a child was often viewed as belonging to the adoptive family, and decisions were made by adults on the child's behalf without considering the child's perspective. Now, under the influence of instruments like the CRC and evolving national laws, children are seen as individual rights-holders. They have the right to preserve their identity (which includes knowing their original name, nationality, and family ties, as per Article 8 of the CRC), and when old enough, the right to express views on matters affecting them.

All that said, how does Slovak law currently handle this issue? As of now, Slovak legislation does not explicitly require adoptive parents to tell a child that he or she is adopted. The decision is largely left to the parents' discretion. The law does take the child's views into account once the child is mature enough: for example, Section 101(3) of the Family Act provides that if a child is capable of understanding what adoption means, the child's consent is needed for the adoption. In practice, that implies that older children involved in their own adoption will know about it (since they have to agree to it). But for infants or very young children who are adopted, there is no legal mandate that, at a certain age, they must be informed of their adoption.

Many adoptive parents do choose to tell their children, guided by the modern best practices mentioned above. They might do this through age-appropriate stories (sometimes using children's books about adoption or other tools). The prevailing view among professionals is that honesty (delivered

with love and support) fosters trust within the family and helps the child develop a secure sense of identity.

Recognizing the importance of this, it has been suggested that the law should evolve. We believe that future amendments to the Family Act should introduce an obligation for adoptive parents to inform the child of their adoptive status at an appropriate age – ideally by the time the child is approaching school age. The rationale is that by school age, children start to encounter more complex social situations and questions (such as making family trees in class, noticing family resemblances, etc.), and it is healthiest if they already know the truth about their family background from their parents, rather than finding out accidentally or from someone else.

Requiring early disclosure by law would underline the principle that an adopted child has a right to his or her personal history. It would also encourage adoptive families to handle the subject proactively and sensitively, which in the long run can prevent the trauma and familial strain that come from late or unintended revelations. Of course, even if such a law were enacted, it would be up to the parents to choose the exact timing and manner of the conversation, ideally guided by psychologists or adoption counselors. But having it as a legal expectation would mark a significant recognition that an adopted child is entitled to know the truth of their origin and that this knowledge is part of respecting the child's dignity and rights. This approach not only empowers adopted children with knowledge and understanding of their personal histories but also respects their status as individuals entitled to make informed decisions about their lives.[28] In doing so, the legal and psychological support frameworks for adopted children continue to evolve, ensuring that their rights to know their origins are protected and that their journeys toward self-discovery are supported with sensitivity and respect.

In summary, while Slovak law today does not force parents to reveal an adoption to the child, the clear trend in thought and likely future direction is towards greater openness. Adoption is no longer seen as something to be hidden; instead, the focus is on integrating the child's past with their future

28 Králičková, Z. (2009) The anonymity of adoption versus the child's right to know his or her origins, Anonymita osvojení versus právo dítěte znát svůj původ. Právní rozhledy, p. 159.

in a healthy way. A child's 'life story', including the fact of adoption, should ideally be something the child grows up understanding, so that being adopted becomes simply one aspect of who they are – one that they are able to discuss and grapple with, with the support of their family.

3.8. Legal effects of adoption

The final court decision granting an adoption carries profound legal effects for all parties involved. Adoption is unique in family law because it changes a person's legal identity and family relationships entirely, as if they were born into a different family.

Upon the formalization of an adoption, the legal ties previously existing between the adoptee and their biological family are severed. This includes the cessation of all mutual rights and responsibilities that were held between the child and their biological parents, as well as any guardianship roles that were in place. The legal dissolution of these relationships extends beyond the immediate parental figures to include grandparents and other extended family members, encompassing a broad array of legal entitlements and duties such as upbringing, contact rights, financial support, and inheritance rights among others.

However, it's important to recognize that while the legal connections between the adoptee and their original family are terminated through adoption, the biological bond remains indelible and possesses the potential to be legally reactivated in the event that the adoption is annulled. This underscores the complex interplay between legal definitions of family and the immutable nature of biological relationships.

Conversely, the legal bond established between the adoptee and the adoptive family is designed to mirror the natural relationship that exists between biological parents and their children. This equivalence extends to the adoptive parent's relatives, effectively integrating the adoptee into the adoptive family's broader kinship network as stipulated by Article 97 of the Family Act. The transformation instigated by the adoption decision becomes legally operative ex nunc, meaning it takes effect from the moment the judgment is finalized.

This transition not only redefines the adoptee's familial affiliations but also underscores the profound legal authority vested in the adoption decision, illustrating its capacity to reconfigure personal identities and familial connections in a manner that prioritizes the welfare and best interests of the child. Through this process, the law facilitates the creation of new family units, offering adoptees the opportunity for stability, care, and belonging within the context of their adoptive families.

The issuance of a final adoption decree has profound legal implications, effectively severing the intricate web of mutual rights and responsibilities that previously existed between the child and their biological parents. Upon the formalization of this decree, these rights and obligations are comprehensively reassigned to the adoptive parent, marking a significant realignment of the child's familial affiliations.

However, it is crucial to note that the adopted child is still expected to adhere to certain behavioral and social responsibilities, which are foundational to their care, upbringing, and personal development. These include cooperation with parental figures in matters of care and education, the pursuit of educational achievements, the avoidance of harmful or dangerous lifestyles, participation in family life, and contributing to the family's welfare to the extent of their capabilities and financial resources. Post-adoption, these responsibilities pivot from the biological parents to the adoptive parent, underscoring the transfer of parental roles and duties.

Moreover, the legal ramifications of adoption extend beyond the immediate parent-child relationship to encompass the child's broader familial network. The adoption decree nullifies the child's legal ties with their biological relatives, both direct and collateral. In place of these dissolved connections, a new legal kinship is forged between the adoptee and the relatives of the adoptive parent, thereby legally embedding the child within the adoptive family's lineage.

This reconfiguration of familial relationships through adoption is not limited to the establishment of new parental bonds; it also entails the child's integration into the wider family structure of the adoptive parent. Hence, any legal obligations or rights traditionally associated with familial relation-

ships are now applicable to the adoptive kinship, reflecting the law's objective to ensure the child's full assimilation into the adoptive family.

This legal framework is designed to replicate the essence of a natural family environment as closely as possible, fulfilling the overarching goal of adoption: to provide the child with a supportive, nurturing, and stable family setting that serves as a surrogate to their original familial circumstances. By facilitating this comprehensive transfer of rights, responsibilities, and familial bonds, the legal system aims to secure the best possible outcomes for the child, promoting their well-being and development within the context of their new adoptive family.

Under the stipulations of Article 108 of the Family Act, a significant procedural outcome of adoption is the replacement of the biological parent(s)' names with that of the adoptive parent(s) in the official civil registry. This process, which is obligatory and admits no exceptions, signifies the legal acknowledgment of the adoptive parent(s) as the child's parent(s) in all official documents, including the child's birth certificate. The inclusion of the adoptive parent(s)' names in lieu of the biological parent(s)' underscores the intent of adoption to forge a relationship between the adoptee and the adoptive parent(s) that mirrors the natural bond found within biological families. This legal transformation is solidified once the adoption decree becomes final, marking a pivotal moment in redefining the child's familial identity.

Furthermore, a mandatory legal effect of adoption, as detailed in Article 105 of the Family Act, involves the adoptee assuming the surname of the adoptive parent(s). In scenarios where a child is adopted by a married couple or by a stepparent, the child will adopt the shared surname of the spouses. If the spouses chose to maintain their original surnames upon marriage, the adopted child will adopt the surname designated by the spouses for their mutual children at the time of marriage, as per their declaration of consent. This aspect of the law, like the registry change, is non-negotiable and applies to all adoption cases without exception.

Adoption can affect a child's citizenship status as well. Under the Slovak Citizenship Act (Act No. 40/1993 Coll.), if at least one of the adoptive parents is a Slovak citizen, an adopted child automatically acquires Slovak citizenship upon adoption (assuming the adoption is finalized by a Slovak court or

later recognized in Slovakia). This is important for integrating the child into the new family's country and giving the child the same legal nationality as the parents. It ensures, for example, that the child has the right to reside in Slovakia, travel on a Slovak passport, and enjoy all the rights of a Slovak national. Conversely, the law also contemplates how one might lose Slovak citizenship –for instance, if someone is adopted by foreigners and gains a new citizenship, or in adulthood if someone wants to relinquish Slovak citizenship. But in general, for a child, the key point is that adoption by Slovak parents secures their membership in the national community of those parents.

All of these legal effects – change of parentage, name, and potentially citizenship – work together to fully integrate the adoptee into the adoptive family, both legally and socially. The goal is that there should be no legal distinction between an adopted child and a birth child in the eyes of the law. An adopted child has the same surname, appears in the family's official records as their child, shares the family's citizenship, and has identical rights (to support, inheritance, etc.) and duties (obedience, support of parents in old age, etc.) as any biological child would. This comprehensive transformation underscores the law's commitment to ensuring that once an adoption is completed, the child is truly 'as if born to' the adoptive parents. In summary, the legal effects of adoption in Slovakia dissolve the child's previous familial bonds and replace them with new ones in the adoptive family. These changes – from the birth certificate to the family name and citizenship – are designed to secure the child's place in their new family forever, granting them the same legal status, sense of belonging, and security that a biological child would have in that family. The adoption decree is thus a powerful instrument: it not only changes a child's day-to-day life by providing new parents, but it redefines the child's identity in the eyes of the law, all with the aim of serving the child's best interests for the rest of their life.

4. The procedural background of adoption in Slovakia

Following the exploration of the substantive conditions necessary for adoption, it is logical to delve into the mechanisms of adoption and the proceedings through which these conditions are operationalized and brought to fru-

ition. Some of the procedural background we have already touched on in the previous chapter, since it is impossible to discuss the substantive background without touching on the related proceedings. In Slovakia, adopting a child isn't governed by a single law or one standalone procedure. Instead, the process is guided by multiple laws and codes – primarily the Family Act and the Civil Non-Dispute Procedure Code – along with various other related regulations. These laws work together to define the roles and responsibilities of courts and other state bodies at every step of an adoption. Some procedural elements were already mentioned in the previous chapter, since it's impossible to discuss the substantive conditions for adoption without also referencing how the process works.

All these rules and proceedings share one central goal: upholding the best interests of the child. The legal framework is carefully designed so that every decision and action during an adoption keeps the child's welfare as the top priority. Within this framework, some procedures in the adoption process are universal, meaning they are required in every adoption case. Others are case-specific, triggered only by particular circumstances or the unique facts of a given situation. Additionally, different state authorities (like courts, child protection offices, and social services) each play distinct roles throughout the process. Which authority takes on which task can vary depending on the stage of the adoption and the specifics of the case.

This two-tiered approach – having some steps that always occur and others that happen only when needed – allows the adoption process to adapt to each child's situation while still following a consistent legal framework. It creates a multi-faceted support system where various officials and agencies collaborate, each contributing their expertise to facilitate a successful adoption. By combining clear procedures with substantive legal conditions, the Slovak adoption system thoroughly vets each case to ensure that every adoption is suitable and beneficial for the child.

The Civil Non-Dispute Procedure Code states that adoption proceedings encompass three distinct procedures, that is:

– Adoptability/preliminary proceedings – determining if a child is legally eligible to be adopted.

– Adoption proceedings – the court process to legally establish the parent-child relationship between the adoptive parent(s) and the child.
– Placement of a minor in pre-adoptive care – arranging for the child to live with the prospective adoptive parent(s) for a trial period before the adoption is finalized.

The court in whose district the child is domiciled at the time of the commencement of the proceedings, as determined by agreement of the parents or by other lawful means, shall have local jurisdiction in adoption proceedings. If there is no such court, the court in whose district the child resides shall have jurisdiction.

4.1. Preliminary (adoptability) proceedings

The preliminary or adoptability proceedings focus on one key question: Is the child legally free and eligible to be adopted? This step happens before any formal adoption application is considered. Under Article 137 of the Civil Non-Dispute Procedure Code, a petition to start adoptability proceedings can be filed by the legal representative of a child for whom the prerequisites for adoption under the provisions of family law are fulfilled, by a body for social-legal protection of children and social guardianship, or by the institution where the child is placed.

In some cases, the court doesn't even need a petition to begin these proceedings. If the court becomes aware that a child meets all the prerequisites for adoption set by family law (for instance, required consents are in place and there are no legal obstacles), it can initiate adoptability proceedings on its own motion. This ensures that a child who might be eligible for adoption isn't overlooked just because no one filed an application.

During adoptability proceedings, the law carefully defines who the parties are to make sure everyone's rights are considered and that the interests of all involved, particularly the minor child, are adequately represented and protected. The principal parties in such proceedings include the petitioner – who initiates the process – the child in question, and the child's biological

parents. This configuration underscores the legal system's commitment to involving those most directly impacted by the adoption process.

For minor parents of the child, there are special rules. If a biological parent is a minor aged 16 or older, Slovak law allows them to participate in the proceedings independently (without needing a legal guardian to represent them). If the parent is younger than 16, then a court-appointed guardian must represent that young parent's interests during the proceedings. This approach recognizes that older minors might be mature enough to have a say, while very young parents need an adult to protect their rights.

There are also circumstances where the biological parents will not be included as parties in the adoptability proceedings. Situations where parents have been legally deprived of their parental rights and responsibilities, lack full legal capacity, or are unable to comprehend the implications of the adoption process, result in their exclusion as parties. In such scenarios, when a biological parent cannot act as a party, the court will ensure that the child's interests are still protected. Often, a guardian or another suitable representative is appointed to look out for the child's welfare throughout the adoptability proceedings.

Furthermore, biological parents who have preemptively consented to the adoption, without specifying adoptive parents, are also not considered parties to the proceedings. (In other words, they agreed to the adoption in general and relinquished their parental rights, so they are not involved in choosing or approving the adoptive family in court.

As part of the adoptability hearing, the court will gather as much information as possible about the child's situation. It will hear from whoever currently has the child in their care – such as foster parents, the orphanage staff, or the child's temporary guardian – as well as from the authorities overseeing the child's care. This comprehensive approach gives the judge a complete picture of the child's circumstances, including any factors that might affect the child's adoptability or the likelihood of a successful adoption placement (for example, health issues, special needs, or the child's own wishes if they are old enough to express them).

After reviewing all the information, the court will decide whether the legal conditions for adoption are met for this child. If the prerequisites for adoption are not fulfilled, the court will dismiss (stop) the proceedings at

this stage. In practice, this means declaring that the child is not adoptable (at least for the time being). This safeguard ensures that no adoption process moves forward unless it's truly appropriate and lawful to do so – in other words, unless the child is definitely eligible and available for adoption under the law.

On the other hand, if everything is in order and the child does qualify for adoption, the court will formally declare the child adoptable. The law urges the court to make this decision in a timely manner: ideally within three months from the start of the adoptability proceedings. In particularly complex cases, or if unexpected issues arise, the court can extend this period by another three months. This timeline emphasizes that while thoroughness is crucial, determinations about a child's status should not be dragged out longer than necessary. The goal is to avoid leaving the child in uncertainty about their future for an extended period.

Even after a child is declared adoptable, the court's oversight continues as a safety measure. The law provides a mechanism for changing course if new information comes to light. Up until the point when the child is actually placed with adoptive parents (the official transfer of the child to the new family), the court has the authority to revoke its adoption-related decision if someone presents significant new facts that were not known earlier. For example, if a previously unknown relative comes forward who is willing and able to care for the child, or if some legal irregularity is discovered in how the earlier consent was obtained, the court can reopen the case and potentially reverse the decision that the child is adoptable. This provision acts as an important safeguard, ensuring that the final outcome remains in the child's best interest, especially if circumstances have changed at the last minute.

In summary, the preliminary adoptability proceedings serve as a foundational step that legally frees a child for adoption. By carefully vetting the situation – confirming that parental rights have been addressed, verifying the child's status, and hearing from all relevant parties – the system strives to protect the child from rushed or improper adoptions. Only when a child is truly eligible for adoption (and it is in their best interest) will the process move forward to the next stage.

4.2. Adoption proceedings

Once a child is legally cleared for adoption (through the adoptability process) and a prospective adoptive family is ready to proceed, the formal adoption proceedings begin. These proceedings don't start automatically; they require a formal application (petition) to be filed with the court by the prospective adoptive parent(s). This ensures that the court only moves to this critical stage when a family is prepared to adopt a specific child, signaling a serious and deliberate commitment.

The law specifies the participants to make sure everyone with a major stake in the child's life is involved:

- The child being adopted (usually represented by a guardian or advocate, especially if the child is too young to speak for themselves in court).
- The child's biological parents or the child's current legal guardian (for instance, a guardian appointed by the court if the biological parents are unavailable or incapacitated).
- The prospective adoptive parent (or parents, if a couple is adopting together).
- The spouse of the prospective adoptive parent, if the adoptive parent is married. (In Slovakia, a married person usually needs the consent of their spouse to adopt a child, so the spouse is involved in the process unless that consent requirement is waived for some reason.)

However, just like in the adoptability stage, there are circumstances where some of these individuals won't be included as parties in the adoption proceeding:

- If a biological parent has been stripped of their parental rights by a prior court decision, or if they lack legal capacity, they do not take part in the proceeding. In such cases, a guardian ad litem or another representative may be appointed to represent the child's interests instead.
- If the law waives the need for the biological parents' consent in this particular adoption (for example, if the parents have abandoned the child, cannot be located, or have otherwise forfeited their rights), then the biological parents are not considered parties in the adoption hearing.

– If the court already determined the child's adoptability in an earlier proceeding (meaning the parents' rights were addressed and terminated, and consent issues resolved at that time), the biological parents will not be parties in the final adoption proceeding. The adoption proceeding then focuses mainly on the child and the adoptive parent(s).
– Similarly, if the prospective adoptive parent is married but the spouse's consent to adopt is not legally required (for instance, perhaps the spouse is legally incapacitated or the couple is separated and the law allows one spouse to adopt alone), then that spouse is not a party to the case.

Once the adoption application is filed and the relevant parties are established, the court takes an active role in moving the process forward. The court's goal is to reach a decision on the adoption relatively quickly – generally within six months of the application being filed. This six-month guideline underscores the importance of providing the child with a permanent family without undue delay. However, if there are valid reasons that make it impossible to conclude the case in that timeframe (for instance, difficulty in gathering necessary evidence or unforeseen complexities in the case), the court is allowed to extend the proceedings beyond the six-month mark. The overarching aim is to be thorough and fair, but also to avoid leaving the child in legal limbo for too long.

During the adoption proceedings, the judge will carefully review all aspects of the case. The court will hold hearings to listen to the testimonies and views of the prospective adoptive parent(s) and any other relevant parties. Whenever possible, these individuals should be heard in person. Meeting the parties face-to-face helps the judge assess their sincerity, understand their motivations, and evaluate their preparedness for adoption. It also gives the adoptive parents a chance to be directly involved and voice anything they want the court to consider.

If the child is old enough and mature enough to understand what adoption means, the court may also seek to hear the child's feelings and wishes. This is done delicately and only if it is in the child's best interest. The judge might speak with the child in chambers or through a child psychologist to gauge the child's comfort with the adoption. The child's perspective is very important, but the court will weigh it according to

the child's age and emotional state, always ensuring the child is not put under stress or pressure.

Another aspect of the proceeding is reviewing health information. The court will consider the medical condition of both the child and the prospective adoptive parent. This doesn't mean that having a health issue will stop an adoption; rather, the court wants to ensure that any special medical needs the child has can be met by the adoptive parent, and that the adoptive parent is physically and mentally fit to take on the care of the child. For example, if a child has a medical condition, the court will want to know that the adoptive parents are aware of it and have a plan to manage it. If the adoptive parent has a health issue, the court will consider whether it might affect their ability to care for the child long-term.

Slovak courts also see it as part of their duty to educate the adoptive parents (and other parties) about what adoption entails. Judges often explain the significance of adoption — emphasizing that it creates a permanent parent-child relationship with all the same legal rights and responsibilities as a biological family. The court will stress the importance of the child's welfare and make sure the adoptive parent understands the obligations they are undertaking. This conversation or advice from the judge helps confirm that the adoptive parent is fully aware of the lifelong commitment and the serious responsibilities that come with adopting a child.

When the judge is satisfied that all legal requirements are met and that the adoption will truly be in the child's best interest, the court will issue an adoption judgment (the final decision approving the adoption). In this judgment, the court not only declares that the child is legally adopted by the new parent(s), but also makes certain decisions that solidify the child's new identity in the family. For instance, the court will specify the surname the child will carry after the adoption. Typically, the child takes the last name of the adoptive family (if desired and appropriate), underscoring that the child is now a full member of that family. This part of the decision is symbolic but also practical, as it affects the child's legal documents.

After the adoption judgment is issued, the court has the responsibility to inform the civil registry office about the new family status of the child. The civil registry will update the child's birth records to reflect the adoption –

including the names of the adoptive parent(s) and the child's new surname. Essentially, a new birth certificate can be issued for the child with the adoptive parents listed as the parents. This step is crucial for the child's identity documents and for official recognition that the child is now legally part of the adoptive family.

Through the adoption proceedings, the Slovak legal system conducts a thorough examination and formalization of the new parent-child relationship. Every requirement and safeguard – from confirming necessary consents, to setting timelines, to checking on health, to personally hearing from those involved – is aimed at ensuring that the adoption is truly in the child's best interest and that the adoptive family is ready for the lifelong commitment. Once this stage is successfully completed and the judgment is final, the adoption becomes legally binding, and the child becomes, in the eyes of the law (and in reality), a permanent member of the adoptive family.

4.3. Placement of a minor in pre-adoptive care

Before an adoption can be finalized, Slovak law requires a transitional period often referred to as pre-adoptive care. This is a period during which the child lives with the prospective adoptive parent(s) before the court makes the final adoption order. The idea is to help everyone adjust and to confirm that the placement is truly in the child's best interest. The process of arranging this placement is itself a legal proceeding, and it is initiated only when the prospective adoptive parent requests it. The prospective adoptive parent must file a petition with the court to have the child placed in their pre-adoptive care. It's not automatic. This requirement ensures that the prospective parents are fully committed and ready to take the child into their home even before the adoption is legally final. Essentially, the court wants to see a proactive step from the adoptive family saying, "We are prepared to care for this child as our own while we complete the legal process."

The child must have lived with the prospective adoptive parent for at least nine months before the court will approve the final adoption. This roughly nine-month period serves a bit like a 'test run' for the new family. It allows the child and the prospective parents to form a bond and adjust to life to-

gether. It also gives social workers and the court time to observe the placement. The length (nine months) is significant – it's long enough to reveal any major issues in the placement and to help ensure that the attachment between the child and the adoptive parents is strong and genuine.

During this pre-adoptive care period, the prospective adoptive parent is responsible for all costs of caring for the child. This means the adoptive family covers day-to-day expenses such as food, clothing, healthcare, and education for the child during the trial placement. By assigning financial responsibility to the prospective parents, the law ensures they are not only willing to care for the child emotionally but are also prepared to support the child materially, just as they would after the adoption is finalized.

The participants in a pre-adoptive care proceeding are essentially the same as those in the adoption proceeding. This includes the child, the biological parents (if they are still legally considered parties at this stage), the prospective adoptive parent(s), and the adoptive parent's spouse (if applicable). Keeping the same circle of involved parties ensures consistency – everyone who has a say in the final adoption is also involved in decisions about the pre-adoption placement.

When the court reviews the request for pre-adoptive care, it carefully considers whether placing the child with the prospective parent is in the child's best interest. If everything looks favorable, the court will issue a formal order to place the child in the prospective adoptive family's care for this trial period. This court order is very important because it doesn't just say "the child will live with these people now." It also clearly lays out the specific rights and obligations of the prospective adoptive parent while the child is in their care.

The inclusion of detailed rights and obligations in the operative part of the court's order is crucial for several reasons. Firstly, it provides the prospective adoptive parent with a clear understanding of their role and the expectations placed upon them during the pre-adoptive care period. Secondly, it ensures that the child's needs and welfare remain the central focus, with legal stipulations in place to protect their well-being. Lastly, it allows for the establishment of a structured environment in which the child and prospective adoptive parent can begin to form the emotional bonds and connections that are essential for a successful adoption.

The pre-adoptive care period is a critical time for the child and the prospective parents to bond and adjust. It gives the child a chance to become comfortable and secure in what could become their new family, and it gives the future parents an opportunity to experience the realities of parenthood (with the support and supervision of the social services system while the legal process is still underway). If any red flags or challenges come up during this time, they can be addressed before the adoption is made final, which is much easier than after an adoption has been legally completed.

5. Conclusion

Slovakia's legal framework for adoption is built around a single core principle: the best interests of the child come first. From the moment a child is identified as potentially adoptable, every step in the process is geared towards ensuring that child can thrive in a stable, loving, and permanent family environment. This means that adoption in Slovakia is not treated as a mere legal formality – it's a life-changing intervention meant to provide a child with a family, rather than to give a family a child. Consistent with this child-centered approach, even preliminary stages like declaring a child's adoptability and placing them in pre-adoptive foster care are carefully regulated to serve the child's needs above all.

The adoption process in Slovakia is governed by clear procedures and strict criteria designed to ensure transparency, fairness, and child-centered decision-making. The roles of everyone involved – biological parents, prospective adoptive parents, child welfare authorities, and the courts – are precisely defined by law. Every adoption case is overseen by the courts, which act as guardians of the child's best interests at each step.

Slovakia's approach to adoption ensures that an adopted child becomes, in every legal sense, a full member of their new family. The law deliberately mirrors the structure of biological family relationships in the adoptive context. This means that when a child is adopted, they gain the same family name and legal identity as if they were born to the adoptive parents. All the kinship ties are recognized: the adopted child stands in the place of a biological child, and the adoptive parents' relatives (grandparents, aunts, uncles,

siblings) legally become the child's relatives as well. In practice, an adoption in Slovakia completely severs the legal relationship with the biological family and creates a new parent-child bond with all accompanying rights and obligations. The child's right to inheritance, to the parents' care and support, and to a sense of permanent belonging in the family are all protected. By ensuring that the legal effects of adoption extend to name, identity, and kinship rights, the law affirms that adopted children deserve the same recognition, rights, and sense of security as any biological child in a family.

For all its strengths, the Slovak adoption framework has a notable gap: there is no legal requirement that children be informed of the fact that they are adopted. In Slovakia, it is left to the adoptive parents' discretion whether – and when – to tell a child about their adoption. The law does not mandate any age or stage by which a child should be told about their biological origins or adoptive status. This stands in contrast to modern best practices in child welfare. Psychologists and child rights experts generally advocate for openness: children should be told, in an age-appropriate way, about their adoption story as early as possible, so that they grow up with an honest understanding of their identity. Knowing one's origins is considered a fundamental aspect of the child's right to identity, recognized by international instruments like the UN Convention on the Rights of the Child. In fact, Article 7 of the Convention affirms a child's right to know and be cared for by their parents (which can extend to knowledge of biological parents in cases of adoption), and Article 8 upholds the child's right to preserve their identity. By remaining silent on this issue, Slovak legislation risks undermining these principles. The absence of a disclosure requirement could lead to situations where individuals discover their adoptive status only much later in life or by accident, potentially causing feelings of betrayal or confusion. It also means that an adopted child might not have the opportunity to meaningfully participate in decisions affecting their life (such as maintaining contact with biological siblings or relatives) because they simply were never told they were adopted. This deficiency in the law highlights a tension in the otherwise child-centric Slovak system: the right of the child to know their origins – integral to their identity – is not fully guaranteed.

A new challenge has emerged in the Slovak legal context that could drastically reshape adoption law – and not for the better. As of mid-2025, the ruling coalition parties have put forward a proposed constitutional amendment that would restrict adoption exclusively to married heterosexual couples. In essence, the proposal seeks to enshrine in the Constitution that "only a man and a woman united in marriage may jointly adopt a child." This amendment, trumpeted by its proponents as a defense of 'traditional values', is part of a broader package of measures aimed at what the Prime Minister has called building "a dam against progressivism". If enacted, this constitutional change would categorically exclude unmarried couples and single individuals from ever adopting children, regardless of how qualified or caring they may be. Under current Slovak law, a single person is permitted to adopt a child (and indeed many single adults provide loving, stable homes), though two people who are not married to each other cannot adopt the same child jointly. The amendment would eliminate even these possibilities. Only different-sex married couples would be allowed to adopt, slamming the door shut on a wide range of potential parents. The proponents claim this change simply codifies a traditional notion of family, but in practice it would deprive many children of a chance to ever find a permanent family at all.

The human cost of such a restriction would be tragically high. Children who tend to wait longest in orphanages or foster care – older children, sibling groups, or those with special needs – often find homes with compassionate single adults willing to welcome them. By outlawing adoption by anyone except married man-and-woman couples, the amendment cruelly shrinks the pool of available parents for these waiting children. In effect, many of the most vulnerable kids could age out of care without ever being adopted, not because there were no capable parents, but because those parents didn't fit a narrow definition of 'family'. This outcome directly conflicts with the cardinal principle of child welfare that the child's best interests should drive decisions. It places an ideological agenda above the real, urgent needs of children who yearn for a family.

From a human rights perspective, the proposed amendment raises serious red flags. International law emphasizes non-discrimination and the primacy of the child's best interests in adoption. Slovakia is a party to treaties

like the Convention on the Rights of the Child and is bound by European Union non-discrimination standards – all of which stress that children should not be denied a loving family on the basis of arbitrary criteria like the marital status or gender of prospective parents. Indeed, a broad coalition of human rights organizations and experts (including the Slovak National Centre for Human Rights and the Public Defender of Rights) have warned that the amendment appears to conflict with Slovakia's obligations under international law. Such a constitutional ban on certain adoptive parents would mark a sharp departure from the child-centered ethos that has guided Slovak adoption law to date. It would place Slovakia at odds with evolving international standards, which increasingly recognize diverse family forms and focus on providing every child with a home, rather than policing who qualifies as a parent. While the author of this chapter does agree with the notion that the ideal place for bringing up a child is a two-parent family and adoption by single adults should not be the default practice, completely excluding single adults from adopting will ultimately harm the group we are aiming to protect the most – children.

Slovakia's adoption system has, in many respects, been a success story in aligning national law with international best practices for child protection. Over the years, the country has developed a detailed, thoughtful framework that respects the emotional, legal, and social dimensions of forming a family through adoption. This framework puts children first – from rigorous vetting of parents to full legal integration of adopted kids into families – and thus far has sought to widen, not narrow, the opportunities for children to enjoy family life. However, at this moment Slovakia stands at a critical crossroads. The pending constitutional proposal represents a stark choice between two futures. One path continues toward inclusivity, transparency, and the primacy of the child's welfare, ensuring that adoption laws evolve to meet children's needs in a changing world. The other path veers into exclusionary, ideologically driven policies that elevate a narrow notion of family above the lived realities of children waiting for a home.

In navigating this question, it is vital that Slovak lawmakers remember what is at stake: the rights and dignity of the child. Adoption is, at its heart, about giving children a chance to grow up loved and supported. Policies

must serve that goal – not undermine it. Slovakia's legal framework for adoption has come a long way, and it would be a profound tragedy to reverse that progress. The hope is that reason and compassion will prevail over fear of change. The future of adoption law in Slovakia should be guided not by political slogans, but by a steadfast commitment to children's best interests. In the end, every child's need for a family outweighs any ideological discomfort with the diversity of modern families. Maintaining that focus will ensure that Slovak adoption law remains on the right side of history – and, more importantly, on the right side of children's lives.

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Regulation of adoption in Slovenia

Suzana Kraljić*

1. Substantive legal issues concerning adoption

1.1. The core aim of adoption

The Constitution of the Republic of Slovenia[1] (hereafter: CRS) provides that children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms in accordance with their age and maturity (art. 56(1) of the CRS). Furthermore, children shall be guaranteed special protection from economic, social, physical, mental, or other exploitation and abuse. Such protection is regulated by law (art. 56(2) of the CRS). Children and minors who are not cared for by their parents, who have no parents, or who are without adequate family care shall enjoy special protection by the State (art. 56(3) of the CRS). The provision of the CRS thus refers to the obligation of the State to provide, if necessary, alternative care for children.

Adoption is regulated explicitly by the Family Code[2] (hereafter: FC). In the Introductory Provisions of the FC, adoption is defined as a special form of child protection, which establishes a relationship between the adoptive parent and the child on an equal basis with the relationship between the parents and the children[3] (art. 9 of the FC). The foundations of the Slovenian legal regulation of adoption derive from this definition:

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1 Constitution of the Republic of Slovenia (Slovene *Ustava Republike Slovenije*) (CRS): Uradni list (official gazette) 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.

2 Family Code (Slovene *Družinski zakonik)* (FC): Uradni list RS, no. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US, 5/23, 4/24 – odl. US.

3 Latin *adoptio naturam imitator*.

a) adoption is defined as a special form of child protection - this means that adoption will only apply when it is not possible to provide adequate care for a child in their family of origin. It is an *ultima ratio* measure that should only be applied when adequate child protection cannot be ensured by other less intrusive measures that would be less intrusive in the parent-child relationship. Therefore, adoption as a form of child protection has a subsidiary character. According to the Convention on the Rights of the Child[4] (hereafter: CRC), a child has the right, to the maximum extent possible, to know and be cared for by their parents, but not being cared for by parents in general (cf. art. 7(1) of the CRC[5]). Ensuring a stable family is undoubtedly a well-accepted and positive objective when children cannot be cared for by their parents. Indeed, the preamble to the CRC states that, for a child to develop a full and harmonious personality, they should grow up in a family environment, in an atmosphere of happiness, love, and understanding. However, this statement cannot in any way be interpreted as a »right« or as a requirement that every child should be placed for adoption if they cannot be cared for by their parents.[6] Adoption should be seen as *ultima ratio* measure. Following the principle of graduality, more lenient measures should be used if it is possible to safeguard the best interests of the child (e.g., measures to keep the child in the family);

b) adoption is a special form of child protection - according to art. 5 of the FC, a child is a person who has not yet reached the age of 18 years unless they have acquired legal capacity previously. The predecessor of the FC, namely the Marriage and Family Relations Act[7] (hereafter: MFRA), did not contain a definition of a child. If a child had acquired full legal capacity before the age of 18 (i.e., by entering into marriage and

4 Convention on the Rights of the Child (Slovene *Konvencija o otrokovih pravicah)* (CRC): Uradni list SFRJ – MP no. 15/90, Uradni list RS – MP, no. 9/92.

5 Comp. art. 7(1) of the CRC: *„1. 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."*

6 Commissioner for Human Rights, 2011.

7 Marriage and Family Relations Act (Slovene *Zakon o zakonski zvezi in družinskih razmerjih)* (MFRA): Uradni list RS, št. 69/04 – uradno prečiščeno besedilo, 101/07 – odl. US, 90/11 – odl. US, 84/12 – odl. US, 82/15 – odl. US, 15/17 – DZ, 30/18 – ZSVI.

becoming a parent and being granted full legal capacity by the court), such a child would no longer be eligible for adoption, even though they had not yet reached the chronological age of 18. In both cases, the child has acquired full legal capacity before the age of 18, and the child has thus already become emancipated. Consequently, this means that parental responsibility has also been terminated. However, starting from art. 9 of the FC, only a child can be adopted and not an adult;

c) the adoption creates the same relationship between the adoptive parent and the child as between biological parents and children. Adoption thus represents the best alternative care for child protection since the child is fully integrated, in fact, and legally, into the family of adoptive parents. However, once the adoption order becomes final, we can no longer speak of adoption as an alternative care for child protection. Adoption creates the same rights and obligations between the adopter and the adopted child as those between natural parents and children.

1.2 Requirements for adoption

1.2.1. Requirements for the adoptive parent

A valid adoption requires fulfilling the requirements laid down by law, both for the child and the adoptive parent. The child's biological parents must also fulfil the requirements, which makes the child eligible for adoption.

To become an adoptive parent, following formal requirements on the side of the adoptive parent (also so-called active adoptive capacity), shall be fulfilled:

a) spouses or cohabiting partners can only adopt a child jointly unless one adopts the child of spouse or cohabiting partner. Exceptionally, a child may also be adopted by one person who is not married or in a cohabitation if this is in the child's best interests (art. 213 of the FC). However, from January 2023, a child may also be adopted by same-sex partners who are married or in a cohabitation[8];

8 Decision of the Constitutional Court of the Republic of Slovenia *Up-675/19-32*, 16 June 2022.

b) a relative in the direct line (lineal kinship) of consanguinity (ascendants and descendants) cannot be adopted, nor can be a sibling (art. 214(1) of the FC). A sibling is a relative in the second degree of a collateral kinship. Consequently, this means that adoption is possible between relatives in the third degree in the collateral kinship onwards (e.g., aunt, uncle, nephew, niece, cousin);

c) the guardian cannot adopt their ward as long as the guardianship relationship between them continues (art. 214(2) of the FC);

d) the adoptive parent may only be a person of legal age with the legal capacity to act, who is at least 18 years older than the child (so-called necessary age gap). By setting the minimum age at 18 years, the aim is to ensure that a parent-child relationship can be established. It is also possible to derogate from this necessary age gap. Still, it must be established that such a derogation, and thus a lower age gap and consequently such an adoption, is in the child's best interests (art. 215(1) of the FC).

Article 216 of the FC defines the impediments for adoption. Thus, the adoptive parent cannot be a person:

a) deprived of parental responsibility - the FC defines parental responsibility as the entirety of the parents' obligations and rights to create, in accordance with their respective capacities, the conditions in which the child's full development will be ensured, and it belongs jointly to both parents (art. 6 of the FC). Since parental responsibility constitutes the entirety of the obligations and rights given to the parents to ensure the child's full development, and since adoption creates the same relationship between the adoptive parent and the child as between the biological parents and the children, and consequently the adoptive parent acquires parental responsibility through adoption, the existence of parental responsibility in the prospective adoptive parent is a prerequisite for adoption. A court takes the court decision in a non-contentious civil procedure. Its effects extend to all possible cases of adoption (e.g., the requirement that the person does not guarantee that they will exercise parental responsibility for the benefit of the child will be assessed as a possible legal impediment on a case-by-

case basis). The FC also provides the measure of limitation of parental responsibility (art. 171 of the FC), which is a more lenient measure than the deprivation of parental responsibility. Art. 216 of the FC stipulates that the adoptive parent cannot be the person deprived of parental responsibility. Therefore, the measure of parental responsibility limitation as a legal impediment for the adoptive parent is not mentioned in art. 216 of the FC. This measure only limits the exercise of certain parental responsibility rights if the child is at risk, and the child's best interests will be sufficiently protected by this measure, taking into account the circumstances of the case (art. 171(1) of the FC). The parents may retain rights that will not endanger the child and their best interests. The question arises whether a measure limiting parental responsibility may also result in a person not being able to be an adoptive parent. Proceeding from the art. 216(1) of the FC, an opposing position must be taken since only the deprivation of parental responsibility is defined as a legal impediment to adoption. However, the art. 216(6) of the FC provides a legal basis that a person against whom a measure of limitation of parental responsibility has been imposed may also be disqualified as suitable for adoption. The adoptive parent cannot be a person who does not guarantee that they will exercise parental responsibility for the child's best interest;[9]

b) living with a person deprived of parental responsibility. Without a specific definition of persons, this impediment extends to any person who would live with the potential adoptive parent and be deprived of parental responsibility. This could include persons who are related to the potential adoptive parent by a partnership (e.g., marriage, cohabitation), kinship (blood, adoption, marriage), contractual relationship (e.g., lifetime maintenance agreement, tenancy agreement), or simply by living together. The legislator has not defined either the person or the duration of common life;[10]

9 Kraljić, 2019, p. 755.
10 Kraljić, 2019, p. 756.

c) who has been finally convicted of an intentional offence prosecuted *ex officio* or of an offence against life and limb[11] or a sexual offence for which the offender is being prosecuted on the motion. The prospective adopter will prove that this impediment is not given by means of a certificate of no criminal record obtained by means of an extract from the criminal record[12];

d) living with a person who has been finally convicted of an intentional offence prosecuted *ex officio* or of an offence against life and limb or a sexual offence for which the offender is being prosecuted on the motion. This means that the person living with the prospective adopter will also have to provide a certificate of no criminal record, which will be obtained by means of an extract from the criminal record;

e) reasonably believed to be taking advantage of the adoption to the detriment of the child. Upon receipt of an adoption application, the social work centre will first prove the adoptive parent's suitability, the adoption's eligibility, the motives for adoption and other circumstances relevant to the adoption (art. 224(1) of the FC). If it establishes the existence of circumstances which show that there are reasonable grounds to believe that the adoption would not be in the best interests of the child, the social work centre will not grant the applicant the status of a candidate for adoption (e.g., a measure of limitation of parental responsibility has been imposed). As a consequence, there will also be no registration of candidates for adoption in the central database (comp. art. 224(1) with art. 225(1) of the FC). Circumstances which would give rise to a reasonable presumption that the adoption would not be in the best interests of the child would be given if the potential adoptive par-

11 Offences against life and limb are covered by Chapter 15 of the Criminal Code (Slovene *Kazenski zakonik* (CC-1): Uradni list RS, no. 50/12 - officially consolidated text, 6/16 – popr., 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21, 105/22 - ZZNŠPP, 16/23, 07/24 – odl. US). However, offences against sexual integrity are covered by Chapter 19 of the CC-1 and the offence of rape (art. 170 of the CC-1) may be prosecuted on motion if committed against a person with whom the perpetrator is living in a conjugal or cohabiting partnership, and the offence of sexual violence (art. 171 of the CC-1) if committed against a person with whom the perpetrator is living in a conjugal or cohabiting relationship.

12 Criminal records are records of natural persons and legal entities convicted res judicata in the Republic of Slovenia, and records of citizens of the Republic of Slovenia convicted res judicata abroad.

ent wished to adopt the child to get labour force, social status in society, economic benefits, trafficking in human body parts, child prostitution, paedophilia, etc.;[13]

f) who does not guarantee they will exercise parental responsibility in the child's best interests. This can be given if the person has characteristics (e.g., alcohol or drug use, aggressiveness, indulging in idleness or gambling) which do not indicate that they are suitable to bring up and care for the child or to represent the child. Circumstances may be given which will generally disqualify a person (general disqualification) as suitable to be an adoptive parent in relation to any child (e.g., drug addiction). Alternatively, circumstances may be given which will give rise to a specific disqualification which will only be manifested by the unsuitability of a person to be an adoptive parent in relation to a particular child, while they will be suitable to be an adoptive parent in relation to another child (e.g., the previous relationship between the child and the mother's new partner has not been appropriate, or if there is a conflict of interest);

g) who is not of legal capacity or who has a mental disability or illness, such as to make adoption not in the best interests of the child (art. 216(7) of the FC). Starting from the definition of art. 216(7) of the FC, it is also possible for a person under adult guardianship to adopt a child. A person will only be disqualified as an adoptive parent if they have a mental disability or illness such that the adoption would not be in the best interests of the child. The provision in art. 216(7) of the FC that a person placed under adult guardianship and for whom a guardian has been appointed is not automatically deprived of the possibility of adoption, which is also in line with art. 23 of the Convention on the Rights of Persons with Disabilities[14] (hereafter: CRPD) relates to respect for the home and the family. Based on art. 23(2) of the CRPD States Parties have the obligation to ensure the rights and responsibilities of persons with disabilities also with regard to the adoption of children, and the best interests of the child shall be paramount.

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13 Kraljić, 2017, p. 64.

14 Convention on the Rights of Persons with Disabilities (Slovene *Konvencija o pravicah invalidov*) (CRPD): Uradni list RS – Mednarodne pogodbe, no. 10/08.

In principle, a Slovenian child should be adopted by a citizen of the Republic of Slovenia. However, the adoptive parent may exceptionally be a foreign national if the social work centre has not been able to find a suitable adoptive parent among the citizens of the Republic of Slovenia for the child to be adopted (principle of subsidiarity of international adoption). The adoption of a child adopted by a foreign national must be approved by the Minister responsible for the family. Consent is not required if the child is adopted by the spouse or cohabiting partner of one of the child's parents or by a child's relative (Art. 217(2) of the FC).

There are many more potential adoptive parents in Slovenia, i.e. persons who have already been granted the status of candidate for adoption by the social work centre than there are eligible children available for adoption. In December 2023, 637 applications for adoption were submitted to social work centres. Of these, 513 couples/individuals were assessed as suitable adoptive parents, while 164 were still awaiting the decision on their suitability for adoption.[15]

1.2.2. Requirements for the adoptable child

The formal requirements for the adaptable child (so-called passive adoptive capacity) are:

a) only a child, i.e. a person under 18 years of age, may be adopted (art. 212 in connection with art. 5 of the FC). Thus, the FC only knows of a full adoption.[16] Starting from art. 9 of the FC, prenatal adoption is also not possible since adoption is a special form of child protection and not a nasciturus;[17]

b) the child's opinion, expressed by themselves or through a person whom they trust and whom they have chosen, shall also be considered, provided that they are capable of understanding its meaning and consequences (art. 215(2) of the FC). It is a right of the child, not an obligation;

15 Statistics acquired from Ministry for Labour, Family, Social Affairs and Equal Opportunities.

16 Latin *adoptio plena*.

17 Kraljić, 2019, p. 739.

c) the child's consent is required for adoption, provided that the child is capable of understanding its meaning and consequences (art. 215(3) of the FC).

In particular, in non-contentious civil proceedings, the court must examine whether the adoption is in the child's best interests [art. 229(1) of the FC]. The principle of the child's best interests is not designed as a kind of 'super-right' and cannot be used to override other rights - e.g. in deciding whether or not a child should be considered 'adoptable'. Decisions for the deprivation of parental responsibility that could open the door to adoption must be clearly based on the best interests of the child. On the other hand, the adoption decision-making process depends on several specific and clear rights-based criteria that other considerations cannot override. The best interests criterion is the basis for determining the most appropriate outcome for the individual child who is in fact 'adoptable', and its interpretation must be consistent with all the other rights contained in the CRC and other relevant instruments. This determination process involves an assessment of several factors which have nothing to do with the child's alleged 'better position elsewhere'.[18]

Parents can give consent to adoption when the child is eight weeks old. Any previous consent has no legal effect (art. 218(1) of the FC). With this regulation, the legislator wanted to protect parents from hasty decisions. The eight-week time limit after the child's birth allows parents to give their decision a good and weighty consideration, consult with professionals, and arrange any other assistance they may need. Young mothers are particularly vulnerable here, as they want to protect them from making life-changing decisions. Allowing a mother to give consent to adoption immediately at the birth of her child is exploiting her weakness when she is at her most vulnerable. Many mothers are young, single and economically vulnerable. The time afforded by the current FC regulation allows them to recover from the effects of pregnancy (e.g. nausea, hormonal changes) and childbirth (e.g. fear, pain) within eight weeks and to make an informed decision in circumstances that are less stressful and emotionally charged.[19]

18 Commissioner for Human Rights, 2011.
19 Fenton-Glynn, 2016a, p. 315.

However, Slovenian law lacks of any provisions specifically referring to adoptions of children from minorities or children with disabilities or illnesses. The FC also does not explicitly provide for the adoption of siblings. As there is often an emotional attachment between them, efforts should be made to ensure that, where possible, they are not separated and are adopted together. This further ensures that children's identities, including family relationships, are respected and protected. This also gives effect to art. 8(1) of the CRC („*1. States Parties undertake to respect the right of the child to preserve his or her own identity, including nationality, name and family relationships as recognized by law without unlawful interference.*").

Only a child can be placed for adoption if the parents consented to the adoption after the child's birth, either before a social work centre or a court. Parental consent is, therefore, a prerequisite for adoption but will not be required if the parent has been permanently deprived of parental responsibility or if the parent is permanently incapable of expressing their will (art. 218(1) of the FC). Since the FC no longer refers to the deprivation of legal capacity but only to the placement of an adult under guardianship, it will be necessary to verify separately in each case of adult guardianship whether such person is capable of giving consent to the adoption of their child. The mere fact that a parent is under guardianship does not automatically imply that they are incapable of making decisions. The consent of the person under adult guardianship will not have to be obtained only if that person is permanently incapable of expressing their will.[20]

The FC regulates only adoption by the competent state authority. Under the MFRA, this was the social work centre and under the current FC, it is now the court in non-contentious civil proceedings. The FC does not allow for so-called private adoptions, which is known in some other countries. The European Convention on the Adoption of Children (Revised), which Slovenia has not ratified, gives a clear starting point that an adoption shall be valid only if it is granted by a court or an administrative authority (art. 3).[21]

20 Novak in Novak, 2019, p. 737.

21 The European Convention on the Adoption of Children (Revised) is available at https://rm.coe.int/1680084823 (Accessed: 13.12.2023)

As adoption has significant and far-reaching consequences, both of a legal and personal nature, the time that must elapse between the grounds for adoption and the actual adoption is fixed.[22] The FC has shortened the period between consent and adoption. Under the MFRA, a one-year time limit was given, whereas under the FC, this time limit is only six months (art. 218(3) of the FC). A child may also be adopted before the expiry of the six-month time limit from the fulfilment of the parental consent condition if the court finds that this would be in the child's best interests. This will be the case in particular if parental responsibility is deprived of both parents. The six-month time limit thus allows the biological parents to consider the merits of their decision. They can also withdraw the consent given for the adoption.[23] On the other hand, it also allows the prospective adoptive parent to withdraw from the intended adoption. Once the adoption decision has become final, the adoption can no longer be dissolved (art. 221 of the FC).

A child whose parents are unknown or whose whereabouts have not been known for a year may also be placed for adoption (art. 218(2) of the FC). Parents will be unknown in the case of a foundling whose father and mother could not be traced. A child whose parents have not been known for a year will also be allowed to be placed for adoption. In both cases, however, parental consent is not required.

A child who has no living parents may also be placed for adoption. Since the child's parents are not alive and thus cannot be the child's legal representatives, such a child shall be placed under guardianship for children, and a guardian shall be appointed to be the child's legal representative. The child's guardian will give consent to the adoption but needs permission from the social work centre. The child will also be placed in foster care.

2. Procedural framework

Both the CRC and the CRS provide that children who are not cared for by their parents, who have no parents or who are without adequate family care

22 *UPRS sodba U 446/2005,* 12 March 2006.
23 *VSRS sodba X Ips 746/2006,* 1 July 2009.

enjoy the special protection of the State (comp. art. 56 of the CRS and art. 21 of the CRC). Adoptions should only be carried out if the parents, despite all the help and support they have received to maintain the child in their family environment, are unable to do so or are no longer allowed to take care of their child. Only if all less restrictive measures do not lead to the desired circumstances allowing the child to remain in the family environment of origin should adoption be the *ultima ratio* (subsidiarity principle) measure. Poverty, poor financial situation, and illness of the parents alone should not form the bare basis for the adoption of a child.[24]

Although the jurisdiction in the adoption procedure was transferred from the social work centres to the courts, the social work centres still have a pivotal role in an adoption proceeding, as they verify both the requirements of the child to be adopted (so-called passive adoptive capacity) and the requirements for a person who wishes to become an adoptive parent (so called active adoptive capacity). The role of the social work centres is focused on verifying the requirements as well as the best interests of the child. However, social work centres no longer have decision-making powers, as the courts now decide on adoption in non-contentious civil proceedings.

The social work centre also examines the person's eligibility to be an adoptive parent. If the social work centre confirms that the person fulfils the requirements, it will grant the person the status of a candidate for adoption and enrol them in the central database of candidates for adopters (art. 225 of the FC).[25] Currently, 513 candidates for adopters are enrolled in the database.

Adoption proceedings may, therefore, be initiated in court only on the proposal of the social work centre (art. 121(1) of the Non-Contentious Civil Procedure Act[26] (hereafter: NCCPA-1) in conjunction with art. 226(1) of the FC). An exception is made if the spouse or cohabiting partner of one of the child's parents wishes to adopt the child, in which case the adoption proceedings are initiated on the proposal of the spouse or cohabiting partner of the child's parents (art. 122(2) of the NCCPA-1).

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24 Kraljić, 2019, p. 75.

25 Kraljić, 2019, p. 798-799.

26 Non-Contentious Civil Procedure Act (Slovene *Zakon o nepravdnem postopku)* (NCCPA-1): Uradni list RS, no. 16/19.

The principle of protecting the best interests of the child is also a fundamental principle in adoption. Adoption must be in the best interests of the child, which must prevail over the interests of the biological or adoptive parents. Adoption is about finding a family for the child, not the child for a family.[27] The latter shows that the democratic adoption model has prevailed over the patriarchal one. In the past, adopting a child often served to satisfy the needs and desires of adults or families for children.[28] The child's best interests constitute a legal standard to be assessed on a case-by-case basis. Considering the child's history (e.g., relationship with parents, illness, possible domestic violence, time spent in an orphanage), the child's linguistic, cultural, religious and national background, and the child's best interests, every effort is made to find the best adoptive parent for each child.

The social work centre shall examine whether the child to be adopted fulfils the requirements for adoption. If the social work centre finds that the requirements are met, it will register the child in the central database of children needing adoption. For a child registered in the central database of children needing adoption, the social work centre will select the most suitable candidate from among all possible candidates for adoption, considering the child's characteristics and needs, the wishes expressed by the candidate, the professional opinion of the social work centre, the wishes of the biological parents regarding the prospective adoptive parents, and the time of registration in the central database of candidates for adoption, and will file a petition for adoption with the court. The time of registration will not have to be taken into account if it is in the best interest of the child to be adopted by a particular candidate for adoption (art. 226 of the FC).

Before the court decides on adopting a child in a non-contentious civil procedure, it may determine that the child should spend a certain amount of time with the family of the prospective adoptive parent (art. 227(1) of the FC). This ensures that the best adoptive parent can be found for each child. At the same time, it allows the child and the prospective adoptive parent to assimilate to each other and adjust to the new situation. It is a transition period, as the parents are no longer exercising parental responsibility during

27 See *Pini and others v. Romania* (app. nos. 78028/01 and 78030/01), 22 June 2004.
28 Fenton-Glynn, 2016, p. 7.

this time, and the prospective adoptive parent is not yet exercising parental responsibility.[29] The placement will not be necessary if the court decides that the child is to be adopted by the spouse or cohabiting partner of the child's parent since they already live together and the relationship between the child and the adoptive parent already exists.

If the court finds that the adoption requirements prescribed by the FC are fulfilled, and in particular that the adoption is in the best interests of the child, it will issue an adoption decision (art. 229(1) of the FC in conjunction with art. 121 of the NCCPA-1). But, if the court decides that the adoption requirements are not fulfilled or that the adoption would not be in the child's best interests, it will reject the adoption application (art. 229(2) of the FC in conjunction with art. 121 of the NCCPA-1). The court shall send the final decision on the adoption of the child within 15 days of its finalisation to the competent social work centre for the purpose of entering the information in the evidence, and to the administrative unit, which shall enrol the adoption in the civil registry (art. 229(3) of the FC).

Social work centres are also responsible for keeping records of the child who has been adopted. The latter is not explicitly provided for, but it is self-evident since the social work centre is the authority that verifies the suitability of a child for adoption and, if it concludes that the child meets the requirements for adoption, it registers the child in the central database of children in need of adoption (cf. art. 218(5) of the FC). To reach such a conclusion, the social work centre will need the relevant documents (e.g., on the child's health), which it has to maintain and have available.[30]

2.1 Qualification (what are the objective conditions that must be met)

Spouses, cohabiting partners or individuals considering adopting a child may contact a social work centre, where they will be provided a first social assistance service. The adoption professional will provide a first social assistance service in which the purpose of the adoption, the procedure, the conditions,

29 Kraljić In Kraljić et al., 2022, p. 504.
30 Kraljić, 2019, p. 790-791.

the possibilities and the doctrine of professional work in the field of adoption will be explained.[31] After the first social assistance service, the couple (spouses or cohabiting partners) or the individual who decides to adopt shall submit a written application for the child adoption to the social work centre with territorial jurisdiction in the area of the couple's or the individual's permanent residence (art. 223 of the FC). The written application, explaining why they decide to adopt, must be accompanied by the relevant documents:

a) a curriculum vitae;

b) a certificate of employment;

c) a certificate of personal income for the last three months;

d) a medical certificate;

e) and the administrative fee.[32]

The centre for social work will, *ex officio*, obtain the following for the applicant(s):

a) an extract from the civil registry of the birth;

b) an extract from the civil registry of the marriage;

c) a certificate of nationality;

d) a certificate that the applicant has not been deprived of parental responsibility;

e) a certificate that they are not subject to criminal proceedings - the social work centre will obtain a certificate from the Criminal Records Office from the Ministry of Justice (the so-called 'certificate of no criminal record'[33]);

f) a certificate that no final charges have been brought – this certificate shows that the person, i.e. the applicant, is not under criminal proceedings. It can be obtained from the district court;

g) a certificate stating that the applicant is not placed under adult guardianship.[34]

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31 Center za socialno delo Maribor, 2014.

32 Založnik, 2012.

33 Also known as *certificate of non-conviction* or *certificate of good conduct.*

34 Založnik, 2012.

Based on a complete application, the social work centre will start the procedure to determine the suitability of the applicant(s) for adoption. The general part of the adoption procedure (first phase) concerns the determination of the so-called general suitability of the adopter. In the first phase, the social work centre will determine the objective suitability of the applicants to express their wish to adopt. In a special part of the adoption procedure (second phase), the so-called specific suitability of the adopter (subjective suitability) is determined, which is assessed in relation to the child to be adopted by the prospective adopter. This will be determined at a later stage when the child is placed with the prospective adoptive parent with a view to adoption. The first stage is, therefore, common to all potential adoptive candidates, while the second stage concerns a candidate who has already been selected as a potential adoptive parent for a specific child, and determines whether they will be able to fit into the new situation and whether the adoption will be in the best interests of the child.

The social work centre will determine the general suitability of the adoptive parent by objectively ascertaining:

a) the fulfilment of the requirements for adoption laid down in articles 213, 214 and 215 of the FC. The social work centre will verify the existence of a marriage or cohabitation in joint and step-parent adoption (art. 213 of the FC). It will also verify the possible existence of a prohibited degree of consanguinity, which is an obstacle to adoption. Adoption is not possible between blood relatives in a direct line (ascendants and descendants) and not in a collateral line up to the second degree (sibling relationship). A guardian cannot adopt a ward as long as the guardianship lasts (art. 214 of the FC). The social work centre must also examine the age requirements of the applicant, who can only be a person of legal age who is at least 18 years older than the child (art. 214 of the FC). In exceptional cases, adoption may also be granted to a person who is not 18 years older than the child once all the circumstances of the case have been investigated and it has been established that such an adoption would be in the best interests of the child;

b) motives for adoption – adoption is intended to ensure the child's welfare, so the fundamental motivation of the prospective adoptive parent

should be directed towards child's best interests. In the past, adoption was often driven by the satisfaction of adults' needs (families) and their desires for children for various reasons.[35] If so-called patriarchal model of adoption prevailed in the past, where adoption was primarily in the interest of the adoptive parent and their family, today the democratic model of adoption is established, which is focused on the best interests of the child.[36] It is crucial to find the most suitable adoptive parent for the child, considering the child's age, needs (e.g., religion, language, disease) and other relevant circumstances;

c) other relevant circumstances for adoption – since each adoption represents an individual relationship, that can manifest in the specific characteristics of the child (e.g., illness, culture, religion, child's history) as well as of the prospective adoptive parent (e.g., illness), the general clause (»other relevant circumstances for adoption«) allows for the adaptation to the needs of each particular case.

The social work centre carefully examines the application with all the relevant documentation. It also includes interviews involving a social worker and a psychologist with the applicant. They assess the suitability of the applicant for adoption. The social work centre also conducts a visit to the prospective adoptive parents' home, allowing an evaluation of the living conditions necessary for the child. General suitability of the living conditions (e.g., size of the apartment, sleeping space) and specific suitability are assessed. The latter is particularly important when considering the adoption of a child with special needs (e.g., a blind child or a physically disabled child).

The social work centre also assesses the suitability of the applicants, including their previous life (e.g. possible criminal records, employment, health) and their personal qualities (e.g., integration into the social environment). Social work centre also investigates the genuine motives for adoption and the relationships between spouses or cohabiting partners as potential adoptive parents, assesses the relationships with other family members, and considers their broader social environment. The temperament and

35 Fenton-Glynn, 2016, p. 7.
36 Mladenović, 1981, p. 272.

character traits of the individuals, their cultural and religious views, educational level, as well as their housing and general material conditions for life, should be investigated.[37]

After the individual preparation is completed, an opinion the applicant's suitability as a candidate for adoption will be prepared. The procedure for determining the applicant's suitability may not take longer than one year from the application submission date (art. 224(3) of the FC). After the procedure for determining the applicant's suitability has been completed, the social work centre will adopt an expert opinion, which may be either positive or negative. A positive opinion will establish the applicant's suitability as a candidate for adoption, while a negative opinion will establish the existence of certain circumstances which have led to the applicant's unsuitability as an adoptive parent. If the opinion concludes that the applicant is suitable to be an adoptive parent, the social work centre will grant them the status of a candidate for adoption and enter them in the central database of candidates for adoption. The personal data file on applicants for adoption includes:

a) date of birth;

b) nationality;

c) sex;

d) information on status (education, employment, self-employment, student status, retirement, farmer status, housewife status);

e) data relating to the type of living arrangement (marriage, cohabitation, civi union, single, divorce, widowhood);

f) the date of registration;

g) the identification number assigned to the applicant or applicants for adoption at the time of entry in the information system;

h) the administrative file [art. 285(1) of the FC].

In the procedure for determining an applicant's suitability, the social work centre may, in an expert opinion, declare that the applicant is not suitable to be an adoptive parent. In such a case, the social work centre will issue a decision not to grant the applicant the status of candidate for adoption.

37 Jakovac-Lozić IN Hrabar & Korač Graovac, 2007, p. 351.

The central database on adoption contains personal data on:

a) candidates for adoption;

b) children in need of adoption;

c) the biological parents of children in need of adoption;

d) the adoptions carried out in the Republic of Slovenia.

The data listed above are entered by the social work centres, each for the area of its local jurisdiction (art. 284(1) of the FC). The social work centres have access to personal data on candidates for adoption for the entire territory of the Republic of Slovenia within the central database. However, personal data on children in need of adoption, personal data on the biological parents of children in need of adoption and personal data on adoptions carried out may only be viewed by each social work centre for the area of its local jurisdiction (art. 284(3) of the FC). Central access to the list of candidates for adoption will thus enable the social work centre to select the most suitable candidate for adoption in its area for a child who is eligible for adoption in accordance with the provisions of art. 226(1) of the FC.

2.2. Qualification to become an adoptable child

A child is eligible for adoption if they fulfil the general suitability requirements for adoption under art. 218 of the FC. Only a child may be placed for adoption:

a) if, after the child's birth but not before the age of eight weeks, the parents have consented to the adoption before a social work centre or a court. Consent is not required if the parent is deprived of parental responsibility or is permanently incapable of expressing their will;

b) whose parents are unknown or whose whereabouts have been unknown for a year;

c) who has no living parents.

Following points a) and b), adoption is possible only after six months have elapsed since the requirements were fulfilled. Exceptionally, it may be possible before the expiry of six months if the court finds that it would be in

the child's best interests. The court adopts such a decision if both parents are deprived of parental responsibility. However, a child who has no living parents may be adopted immediately.[38]

Once the social work centre has an eligible child for adoption, it will select the most suitable candidate for adoption from among all possible candidates for adoption, considering the child's characteristics and needs, the wishes expressed by the candidate, the child's opinion, the social work centre's expert opinion, the biological parent's wishes regarding the prospective adoptive parents, and the time of registration in the central database of candidates for adoption, and will file a petition for adoption with the court (art. 226(1) of the FC). The social work centre must find the adoptive parent for the child who, in its opinion, will be able to take the best care of the child. In doing so, it shall also consider the child's upbringing, if any, ethnic, religious or cultural background,[39] the child's needs (e.g., health needs) and the child's wishes, if they are able to express them and understand their meaning.

Although adoption is primarily for the child, the prospective adopter's wishes are also considered. They often want the child to be as young and healthy as possible. As there are many more candidates for adoptive parents than there are children eligible for adoption in the Republic of Slovenia, waiting times can vary from one candidate to another. Applicants are not always willing to accept every child, which is their legitimate right.[40] It is sometimes challenging to find adoptive parents for children with special needs and Roma children.[41]

Exceptionally, the time of entry in the central database of candidates for adoption need not be considered if it is in the child's best interests that the child be adopted by a particular candidate (art. 226(2) of the FC). Following the principle of the child's best interests, the legislator has made it possible to overlook the order in which the candidates for adoption are entered into the central database. For example, a child will be adopted by a specific can-

38 Novak in Novak, 2019, p. 737.
39 So also art. 19(3) of the CRC.
40 Ministrstvo za delo, družino, socialne zadeve in enake možnosti, 2018.
41 S. H. H., 2015.

didate in the case of a step-parent adoption, where the spouse or cohabiting partner of the child's parent adopts the child (art. 228 of the FC). Adoption by a specific candidate will also occur in the case of the parents' advanced expressed will (art. 212 of the FC), an innovation introduced by the FC. Parents may (also) express their will in advance concerning the adoptive parent in the event of death or permanent incapacity to exercise parental responsibility. For a parent's advanced expressed will the same requirements shall be fulfilled as for the validity of a last will under the Inheritance Act[42] (hereafter: IA). The court will only consider the parents' advanced expressed will on the adoption if it is not contrary to the best interests of the child.

2.3. Authorisation of adoption

When striving to find the best adoptive parent for each child, the court may decide to determine whether the child and the prospective adoptive parent will be able to adjust to the new situation and whether the adoption will be in the best interests of the child, that the child should spend a certain time with the prospective adoptive parent's family (art. 227(1) of the FC). A child will be placed in foster care for this purpose. When the child is adopted by the spouse or cohabiting partner of the child's parent, such placement will not be necessary, as there will already be a living relationship between the prospective adoptive parent and the child. Even if the child has been in foster care for a long time, additional time to assess whether the prospective adoptive parent and the child can adjust to the new situation will not be necessary.

During the period when the child is placed with a potential prospective adoptive parent, that individual will have certain obligations as well as a supervisory duty towards the child. The provisions of the Provision of Foster Care Act[43] (hereafter: PFCA) will be applied analogously to these relation-

42 Inheritance Act (Slovene *Zakon o dedovanju*) (IA): Uradni list SRS, no. 15/76, 23/78, Uradni list 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, 102/24.

43 Provision of Foster Care Act (Slovene *Zakon o izvajanju rejniške dejavnosti)* (PFCA): Uradni list RS, no. 110/02, 56/06 – odl. US, 114/06 – ZUTPG, 96/12 – ZPIZ-2, 109/12, 22/19.

ships (art. 227(2) of the FC). By expressly referring to the PFCA, prospective adoptive parents are granted the right to receive foster care allowance[44] during the duration of the placement for adoption. This is a trial period to determine whether the child and the prospective adoptive parent can adapt to the new situation and whether adoption is in the best interest of the child. After the trial period, the conclusion may be reached that the selected adoptive candidate is unsuitable for adopting this specific child.

When the spouse or cohabiting partner of one of the child's parents applies for the child's adoption, the provisions from art. 223 to art. 227 of the FC, which relate to the procedure for determining the requirements for adoption, do not apply. The spouse or cohabiting partner of the child's parent applies for adopting a specific child with whom they have already established a family life and mutual connections have already formed. Nevertheless, the court must verify whether the adoption is in the best interest of the child and whether the other requirements for adoption are fulfilled, both on the side of the child being adopted and the prospective adoptive parent. In making the decision, the court considers the opinion of the social work centre. In non-contentious civil proceedings, the court will either issue an adoption decision or reject the adoption application. The court must send a final court decision on adopting a child to the relevant social work centre within 15 days to enter data into central records. This includes the personal data collection on completed adoptions in the Republic of Slovenia, which includes:

a) the number and date of the adoption decision;

b) the date of adoption;

c) the age of the adoptive parent at the time of adoption;

d) the child's age at the time of adoption (art. 285(4) of the FC).

Based on the text of art. 212 of the FC in conjunction with art. 218 of the FC, it can be concluded that adoption before the birth of a child is not possible. Art. 212 of the FC expressly states that "only a child" can be adopted. The art. 218(1) of the FC clearly indicates that a child may be "... *given for adoption only if the parents have consented to the adoption after the child's birth*...". Prena-

44 Novak, 2017, p. 187.

tal adoption and prenatal consent to adoption are not possible.[45] If prenatal adoption were possible, it would deviate from the principle that the best adoptive parent should be found for every child. Until the child is born, it is not possible to know the child's complete regular and special needs, which will be crucial in finding the most suitable adoptive parent.[46]

In addition to the mentioned safeguard for biological parents, the legislator has added an additional measure. Parents who have given consent for the adoption of their child after birth but before the child is eight weeks old must reconfirm this consent after eight weeks; otherwise, the consent has no legal effect (art. 218(1) of the FC). Adoption can only proceed six months after the given consent (or confirmation of consent), allowing parents to revoke their consent within this timeframe. In exceptional cases, adoption may occur before the expiration of the six months period from the given consent (or confirmation of consent) if the court determines it would be in the child's best interest. This is the case when parental responsibility is revoked from both parents (art. 218(3) of the FC) or if both parents are deceased. This arrangement reinforces the principle of safeguarding the child's interests in adoptions, as it aims to allow parents to make considered decisions regarding such a significant act. Moreover, this timeframe also enables prospective adoptive parents to withdraw from the adoption of a child placed in their foster care for adoption purposes.

3. Types of adoptions

The concept of simple or incomplete adoption[47] was already known under the Basic Adoption Act[48] from 1947. The MFRA 1976 introduced only full adoption, which also inherited the FC form 2017. If the simple or incomplete adoptions from that time were not converted into full adoptions, they

45 FC expressly stipulates in its art. 119(1) the possibility of prenatal acknowledgment of paternity: *„1. Paternity can also be acknowledged for a conceived but unborn child, with the consent of the mother. 2. The acknowledgment of paternity for an unborn child only has legal effect if the child is born alive … 4. Notwithstanding the provision of the preceding paragraph, paternity can be acknowledged for a stillborn child or a child who dies immediately after birth."*

46 Novak, 2017, p. 265–267; Novak in Novak, 2019, p. 735.

47 *Latin adoptio minus plena; Slovene nepopolna posvojitev.*

48 Basic Adoption Act (Slovene *Temeljni zakon o posvojitvah):* Uradni list FLRJ, št. 30/47, 24/52, Uradni list SFRJ, št. 10/65, 29/71, Uradni list SRS, št. 51/71 in 15/76 – ZZZDR.

remained incomplete and may still be present today. The distinction is evident in the area of inheritance, as children who were incompletely adopted retained inheritance rights from their biological parents. As mentioned, the Slovene FC recognizes only full adoption[49], where equal relationships arise between the adopter, their relatives, the child, and the adopter's descendants, as among relatives (art. 219 of the FC). Following such full adoption, it is impossible to dissolve the adopted relationship (art. 221 of the FC).

Once the adoption decision becomes legally binding (final), access to personal data is no longer possible. Adopted children do not have the right to access the personal data of their biological parents. Similarly, the biological parents do not have the right to access information about the adopted child (art. 222(2) of the FC). An extract from the birth registry issued for an adopted child does not contain a note about the adoption. However, adoption in Slovenia is not considered completely closed. Adoption information disclosure from the birth registry is possible if the person to whom the data relates provides written consent. Consent is obtained by the social work centre at the initiative of the adopted child or biological parents. If biological parents request information about the adopted child, a child who has reached the age of 15 can provide consent if capable of understanding its meaning and consequences. The adopted child or their legal representative can also request information about the health status of biological parents from the social work centre under the conditions specified by law. Upon receiving the request, the social work centre will obtain information from healthcare institutions (e.g., hereditary diseases, mental illnesses) and provide it to the adopted person or their legal representative in an anonymized form (art. 222(3) of the FC). The Slovenian regulation represents progress from the MFRA provisions. However, adopted children still do not have an absolute right to the disclosure of the identity of their biological parents. Such regulation is present in Sweden, where adult children who were adopted have this right and where the child's right to know their origins always prevails over the parents' right to anonymity.[50]

Adoption in Slovenia can be consensual or forced. Consensual adoption occurs with the consent of the parents, which can be given either in front

49 *Latin adoptio plena; Slovene popolna posvojitev.*
50 Kraljić In Kraljić et al., 2022, p. 489.

of the social work centre or the court. According to the art. 218(1) of the FC, consent for adoption can be given only after the child is born. However, the consent must be confirmed when the child is eight weeks old. Under the FC, parental consent for adoption is not required if parental responsibility has been permanently deprived or if parents are permanently incapable of expressing their will (art. 218(1) of the FC).

In step-parent adoption, a child is adopted by the partner (e.g., new husband) of one of the child's parents (e.g., mother). If the other parent of the child (e.g., father) is still alive, their consent is required for this adoption unless parental responsibility has been deprived.[51] On the other hand, single adoption is referred to when only one person adopts the child. The difference between the two possibilities is that the child has two parents in the first case, and two individuals share parental responsibility. In contrast, in the second case, only one person has parental responsibility – the adopter. In joint adoption, a child is adopted by a married couple or cohabiting partners.

In 2016, a proposal was formulated to implement the concept of 'confidential birth or confidential delivery'. According to the proposal, a pregnant woman could arrange with the maternity hospital for the anonymous birth of her child and immediately place the child for adoption after birth. The proposal was rejected with the argument that there were no obstacles for a woman to give up her child for adoption after childbirth. The Republic of Slovenia's Communication Office responded but did not address the general possibility of introducing the concept of confidential birth. As of today (December 2023), the law in Slovenia does not regulate anonymous or confidential birth.

4. Follow-up

Adoption creates the same relationship under the FC between the child and their descendants and between the adoptive parent and their relatives as between relatives. The legal bond between the adoptive parent and the adopted child follows the natural parent-child relationship. On the other hand,

51 Oliphant & Ver Steegh, 2016, p. 486; Zaviršek et al., 2012, p. 64.

the legal relationship between the child and their biological parents stops when the adoption order becomes final.

The adoptive parent will acquire parental responsibility and all the rights and obligations arising from there, which are set out in the FC in the parent-child relationship. After the adoption is final, the adoptive parents are enrolled into the civil registry as the child's parents and a birth certificate is issued without an adoption record. This ensures the protection of the privacy of both the adopter and the biological parents of the child.

Adoption also creates certain legal impediments under the FC. Adoption constitutes an impediment to the conclusion of a marriage between the adoptive parent and the adopted child (art. 27(2) of the FC). That is also an impediment in the case of a biological child-parent relationship. In fact, neither relatives in the direct line nor relatives in the collateral line up to and including the fourth knee can marry each other (art. 27(1-2) of the FC).

However, the parent-child relationship will not be dissolved if the child is adopted by the spouse or cohabiting partner of one of the child's parents (so-called step-parent adoption). In such a situation, only the rights and obligations between the child and the parent and their relatives are dissolved in whose place the adoptive parent steps through the adoption. The purpose of adoption, where a partner adopts their partner's child, is to provide the child with an additional parent.[52]

The final adoption decision also marks a significant pivotal moment in terms of the information relating to all three parties involved, namely the child being adopted, the child's biological parents and the adoptive parent. After the adoption decision has become final, the adopted person has no right to know the personal data of their biological parents, which are kept in the civil registry and other personal data records.

Information about an adopted person's biological parents can vary and may include:

a) non-identifying information, including their general appearance, religion, ethnicity, race, education, occupation, etc. This information in-

52 Novak IN Novak, 2019, p. 718.

cludes the name of the agency that arranged the adoption and the facts and circumstances relating to the nature and cause of the adoption;

b) identifying information concerning the biological parents or other members of the biological family representing their names and addresses;

c) the medical and psychological data of the biological parents, which may be provided at any time after the adoption. This information is important for adoptive parents as it can indicate whether a child is at increased risk of certain diseases.[53] Ensuring access to health data is also crucial for realising the right to the highest attainable standard of health under art. 24 of the CRC, as this inevitably includes information on family history. Denying children adequate medical information could be detrimental to their standard of care and unnecessarily jeopardise their health.[54]

The biological parents who have given the child up for adoption also have no right to know the personal data of the child (art. 222(2) of the FC). Only the names of the adoptive parents, not the biological parents, are visible when consulting or extracting the civil registry. Namely, in the case of child adoption, the birth register extract is issued without an endorsement of the adoption (art. 29(3) of the Rules on the implementation of the Register of Deaths, Births and Marriages Act[55]). The Slovenian legislator intended to create greater stability in the relationship between the adoptive parent and the adopted child. On the other hand, it also gives the biological parents security, as they often want their identity to be kept secret, which allows them to maintain their privacy.[56] However, in recent years, the child's interests and right to know their origins came to the forefront.

The information on the adoption from the birth register may be consulted only with the written consent of the person to whom it relates. A child who has attained the age of 15 years may give their consent if they are capable of

53 Law Offices Stimmel, Stimmel & Roses, n.d.
54 Childs Rights International Network, 2018.
55 Rules on the implementation of the Register of Deaths, Births and Marriages Act (Slovene *Pravilnik o izvrševanju zakona o matičnem registru*): Uradni list RS, no. 40/05, 69/09, 77/16, 102/20, 108/22.
56 Bubić & Traljić, 2007, p. 125.

understanding its meaning and consequences. Otherwise, the child's legal representative, i.e. the adoptive parents or guardian, may give consent. Consent is obtained by the social work centre at the initiative of the adoptee or the biological parents (art. 222(2) of the FC).

Although it is also possible under the FC for a child to know who their parents are, this is subject to the biological parent's consent. If they refuse, the disclosure of the biological parents' information to the child will not take place. This will deny the child their psychological interest in knowing who their parents are. The individual has a need for identity, which can be fulfilled if they know their origins. Apart from the psychological interest, the child may also have a medical interest, exercised through art. 222(3) of the FC, and a material interest (e.g. inheritance, maintenance). The latest should not play a primary role in establishing the identity of the biological parents.[57]

An exception to the art. 222(2) of the FC represents the obtaining of health data. The adoptee or their legal representative may request from the social work centre information on the health of the biological parents to the extent and under the conditions provided for by law. In this case, the social work centre will obtain the information from the health institutions (e.g., possible hereditary diseases) and send it in an anonymised form to the adopted person or their legal representative (art. 222(3) of the FC). Where the child has been adopted by the spouse or cohabiting partner of a parent, the provisions of art. 222(2-3) of the FC do not apply, as the child still has one biological parent (step-parent adoption). With joint adoption, the child will get two new parents, while a step-parent adoption gives the child only one.

As mentioned above, access to data is only possible with the child's or biological parents' written consent. A child who has reached the age of 15 may give their consent, provided that they are capable of understanding its meaning and consequences. The legislator has thus given an objective presumption as a starting point, namely the child's chronological age of 15 years. However, the mere fulfilment of the objective presumption is insufficient since the child must also fulfil a subjective presumption, manifested in their capacity to understand the meaning and consequences of the consent. If the child's biological parents do not give consent, the child is prevented

57 Končina Peternel, 1998, p. 65; Kraljić, 2023, p. 132.

from obtaining their information. The biological parents are thus guaranteed anonymity if they do not wish their information to be disclosed. For the child's right to information or knowledge of origin to be realised, three cumulative conditions must be met: the child must be at least 15 years old (objective condition), the child must be able to understand the meaning and consequences of the consent given (subjective condition), and the biological parent must have given their consent.

According to the FC, this makes it possible to disclose information about the biological parents of a child who has been adopted. A complete denial of the possibility to access information on the biological parents would also be contrary to art. 7 and 8 of the CRC.[58] However, the child's right to know who their biological parents are is still not sufficiently protected, as there is no legal obligation under the FC for the adoptive parent to inform the child of their origin.[59] Following the example of other countries, Slovenia should improve regulation in this area towards the child, thereby ensuring that their right to know their biological parents is respected.

The legal effects or consequences of adoption also extend to rights and obligations outside the FC, which are defined by other laws. One of these is the IA, which provides for:

a) by the intestate succession, the deceased's adopted children and their descendants, and the adoptive parent and their descendants, also inherit from the deceased (art. 10(1) of the IA);

b) the adoptee and their descendants acquire the legal right of inheritance from the adopter (art. 21(1) of the IA);

c) adoptive parent and their relatives become the legal heirs of the adoptee by adoption (art. 21(3) of the IA);

d) the adoptive parents and their descendants have the right to the compulsory portion of the deceased (art. 25(1) of the IA);

e) the adopted children and their descendants who lived together with the deceased and helped them to acquire property by their work, earnings

58 Following art. 7(1) of the CRC the child has »*as far as possible, the right to know and be cared for by his or her parents*«. With art. 8(1) of the CRC the States Parties undertake »*to respect the right of the child to preserve his or her own identity, including ... family relations ...* «.

59 Vučković Šahović & Petrušić, 2016, p. 109.

or otherwise have the right to claim a portion of the deceased's property corresponding to their contribution to the increase or preservation of the value of the deceased's property (art. 32(1) of the IA);

f) the deceased's adopted children and their descendants who lived in the same household with the deceased have right to household goods intended to satisfy their daily needs, such as furniture, household appliances and other household furnishings, bedding and the like, but not if these goods are of greater value (Art. 33(1) of the IA);

g) the testator may disinherit an heir entitled to a compulsory portion if they wilfully committed a grave offence against the adopted person (art. 42(1) of the IA);

h) if the adoptee, entitled to the compulsory portion, is too indebted or wasteful, the testator may take away their compulsory portion, in whole or in part, for the benefit of their descendants. Such deprivation shall remain valid only if the person deprived of the compulsory portion has, at the time of the opening of the succession, a minor child or a minor grandchild by a previously deceased child or if they have an adult child or an adult grandchild by a previously deceased child who is incapable of earning (art. 45 of the IA);

i) in the case of a written (allographic) will before witnesses and in the case of a judicial will, the testator's adopted children and their descendants and adoptive parents may not be witnesses and may not make a will as a judge after the testator has made a declaration (art. 67(2) of the IA).

It should also be noted that art. 228(2) of the IA provides that the provisions of the 1965 Inheritance Act[60] apply to succession in the case of incomplete adoptions.[61] The BAA governed incomplete adoption. Incomplete adoption created a relationship between the adopter and the adoptee and their descendants similar to that between parents and children. The adoptive parent had the right to exercise (at that time so-called) parental right and was also the legal representative of the adopted child. The adop-

60 Inheritance Act (Slovene *Zakon o dedovanju):* Uradni list SFRJ, no. 42/1965.
61 Latin *adoptio minus plena.*

tion did not, however, affect the rights of the adoptee concerning their biological parents and relatives, nor their obligations towards them (art. 17 of the BAA). Thus, despite the incomplete adoption, the adoptee retained a legitimate right of inheritance from their biological parents and relatives. In 1976, the MFRA was adopted, which introduced an important novelty. It introduced full adoption, which replaced incomplete adoption. This was an important innovation since a full adoption is characterised by the cessation of all mutual rights between the adoptee, the biological parents and other relatives, which had not been the case under the previous regime.[62] The MFRA made it possible to convert incomplete adoptions into full adoptions, provided the conditions for full adoption existed under the MFRA. If the conditions for conversion did not exist, the BAA continued to apply to incomplete adoptions. The latter was also applied when conditions were met, but no change was made, as these were not implemented in all cases. As a result, the courts are still confronted with incomplete adoptions in connection with inheritance.[63]

Under the Personal Names Act[64] (hereafter: PNA-1), an adoptive parent may also change the adoptee's personal name. For a child who already has a personal name, the adoptive parent may choose a new personal name at the time of adoption, which must be stated in the adoption decision. Therefore, when the court establishes in the non-contentious civil proceeding that the requirements for adopting a particular child are met, it will grant an adoption decision, which will include the child's first and last name chosen by the adoptive parent per the PNA-1. The adoptive parent may give the child a new surname anytime during adoption. On the other hand, the child's first name cannot be changed between the ages of four and nine. If the child is already nine years old, the change of their personal (name and surname) name requires their consent, provided that they are capable of expressing their will in the light of their personality development (art. 14 of the PNA-1).

62 *VSL sklep I Cp 1540/2014*, 22 October 2014.

63 *VSM sklep I Cp 549/2011*, 3 September 2011; see additional Stališča in pravna mnenja VSRS - VS031586, 18 June 1992.

64 Personal Name Act (Slovene *Zakon o osebnem imenu*) (PNA-1): Uradni list RS, no. 20/06, 43/19.

If the adoptee is a foreign national, they may acquire the citizenship of the Republic of Slovenia by adoption, according to the provisions (cf. art. 4-6 of the Citizenship of the Republic of Slovenia Act[65] (hereafter: CRSA), provided that at least one of the adoptive parents is a citizen of the Republic of Slovenia and that the adoption establishes a relationship between the adoptive parents and the adoptee equivalent to that between parents and children (a full adoption) (art. 7 of the CRSA). In the case of an adoption in which the relationship between the adoptive parents and the adoptee is not the same as that between biological parents and children, the adoptive parents, who are citizens of the Republic of Slovenia, may request the nationality of the Republic of Slovenia for their adopted child, who is under the age of 18, and has a permanent residence in the Republic of Slovenia (art. 21(7) of the CRSA). If a child acquires citizenship of the Republic of Slovenia at the time of adoption, they will be considered a citizen of the Republic of Slovenia from birth (art. 8 of the CRSA).

Adoptions cannot be dissolved under Slovenian law but can be annulled. The annulment will be possible if all the legal requirements for adoption are not fulfilled. Proceedings to annul an adoption are initiated based on a petition:

a) one of the biological parents;

b) by the adoptee who has reached the age of 15 years, provided that they are capable of understanding the meaning and legal consequences of their actions;

c) the adoptive parent;

d) a social work centre.

5. Balancing of interests

As early as 2002, the UN Committee on the Rights of the Child explicitly appealed to States Parties to ensure that all States Parties take the necessary measures to enable all children, regardless of the circumstances of their

65 Citizenship of the Republic of Slovenia Act (Slovene *Zakon o državljanstvu Republike Slovenije)* (CRSA): Uradni list RS, no. 24/07 – uradno prečiščeno besedilo, 40/17.

birth and adopted children, to obtain information on the identity of their parents, parents as far as possible.[66] However, the CRC itself does not give any guidance or conditions as to when this right should be provided to a child.[67]

Under art. 7(1) of the CRC, the child also has the right to know and be cared for by their parents. States Parties shall ensure the implementation of this right in accordance with their national law and the obligations imposed on them by the relevant international instruments in this field. However, according to art. 7(1) of the CRC, the child has this right only in so far as it is possible to do so. The provision of art. 7 of the CRC does not obligate States to guarantee the children the absolute right to know who their parents are. The CRC leaves it to the States Parties to decide how the State will regulate this right of the child.[68] At the same time, it should be stressed that an absolute ban on the right to know one's biological parents is contrary to the provisions of the CRC.[69]

Art. 7 of the CRC is complemented by art. 8 of the CRC, which provides for the right of the child to maintain their own identity[70], which is not clearly defined in the CRC. Still, the CRC gives three examples of what 'own identity' includes: nationality, name and family relationships (art. 8(1) of the CRC). It follows from the above that nationality, name and family relationships are crucial in defining a child's identity, but they are not the only ones.[71] States Parties thus have an obligation to ensure that the child's identity is restored as soon as possible.[72]

The family relationships referred to in art. 8 of the CRC, as an elementary part of the child's right to know their identity, also form the basis for knowledge of parents, both legal/social parents and biological parents. The latter has become particularly important in recent years, as many children

66 Concluding Observations, recommendations 31 and 32, CRC/C/15/Add.188, 8.
67 Kraljić, 2021, p. 101.
68 Novak IN: Novak, 2019, p. 742.
69 Ziemele, 2007, p. 27.
70 The word 'identity' originates from the Latin word '*identitas*' and refers to a set of individual characteristics by which each person differs from another (Petrović & Blašković, 2014, p. 79).
71 Kraljić, 2021, p. 101.
72 Čolaković, 2021, p. 2021; Clark, 2012, p. 627.

who have been adopted, born through donation-based artificial insemination or an anonymous birth, tend to search for their biological parents, i.e. to search for their origins. While in the past this search was based mainly on paper documents and personal testimonies, the rapid development of modern technologies has further contributed to and indeed made it possible for children, who are now often adults, to search for their biological parents.[73]

Although the right to know one's origins is enshrined in the CRC and is thus a fundamental right of the child, it cannot be found explicitly in the CRS or in the FC. This creates the impression that the Slovenian FC gives priority to ensuring or preserving the anonymity of the biological parents. However, the fact that the right of the child to know their origin is not explicitly provided for in the CRS or the FC does not mean that it can be denied.

In 2007, the Constitutional Court of the Republic of Slovenia (hereafter: CCRS) also dealt with the right to know one's origin, taking the precise statement that the right of an individual to know their origin belongs to the set of personality rights, the basis and the limit of the constitutional protection of personality rights being positioned in art. 34 and 35 of the CRS. A person's personality is a combination of various personal goods safeguarded by individual personality rights inherent to the individual. The guarantee of personality rights ensures those elements of the individual's personality which are not protected by other provisions of the CRS. But only with them is the individual given the possibility to develop freely and shape their life according to their own choices. Among the elements that are decisive for the development of the individual's personality is the knowing the own origins and who one's biological parents are. This is one of the key elements shaping an individual's self-perception and place in society. Awareness of one's origins also significantly influences family and kinship ties. The inability to determine one's own origin may represent a severe burden and uncertainty for the individual. Therefore, the right to know one's own origin is also part of personality rights. In a broader sense, it involves the right to personal identity, encompassing the right to a per-

73 Kraljić, 2021, p. 101.

sonal name and citizenship, as well as the right of the individual to know the identity of their parents.[74]

According to the Slovenian FC, once the adoption order has become final, the principle of anonymity applies to both the biological parents and the child who is adopted. However, it comes naturally that both the child and the biological parents seek information about each other. There is a conflict of interests between the biological parents, who may wish to maintain anonymity, and the child, who seeks to trace their roots and thus exercise the right to know their origins. The aim should be to ensure a fair balance between conflicting interests (e.g., the mother's right to remain anonymous and the child's right to know their origins).[75] Even if the biological parent does not consent to disclose their identity, the competent authority should be able to disclose the information in each specific case where it is reasonable to do so in the circumstances (e.g. medical information).[76] The latter is also possible under the FC.

6. Summary of the national legislation on adoption

Slovenian FC was adopted in 2017 and came into effect in April 2019. Despite significant innovations to strengthen the position and protection of children in everyday life and court proceedings related to family law matters, some issues remain open, undefined, and unanswered. In the sphere of adoption law regulation, the latter is also evident.

FC followed its predecessor, the MFRA, regarding requirements for adopters and the child being adopted. However, a new development occurred in 2022 when the Constitutional Court of the Republic of Slovenia assessed that preventing same-sex couples from jointly adopting a child in Slovenia is unconstitutional. As a result, same-sex married couples or partners in a cohabitation can now jointly apply as candidates for adopters, and if granted, they can also adopt a child in the Republic of Slovenia.

74 Decision of the Constitutional Court of Republic of Sloveni, no. *U-I-328/05-12*, 18. October 2007; comp. also *Godelli v. Italy* (app. no. 33783/09), 25 September 2012.

75 Council of Europe, 2018, p. 55.

76 Velkavrh, 2012, p. 34.

One of the shortcomings is the absence of a provision in the FC regarding the duty of adoptive parents to inform the child that they are adopted. This type of regulation is found in comparative legal systems and should be considered a positive aspect. It is unacceptable that such a relationship, which is created by adoption and which creates family ties between the adopter and the adoptee, should be built on obfuscation and a misconception of one's own origins.

While FC ensures that an adopted child has the right to know about their biological parents, it is subject to the consent of the biological parents. FC thus governs the right of biological parents to veto disclosure. If the biological parents exercise this right, the child will not be able to find out who their biological parents are. Although this theoretically ensures the right to know one's origin, priority is still given to biological parents. It is essential to consider that when they opted for adoption, anonymity was guaranteed to them. However, it would be meaningful today to contemplate ensuring respect for this right of the child already at the time of adoption. Informed consent by biological parents would provide a different foundation than adoptions under the previous regulations. It would also be appropriate to think about a legislative step towards explicitly regulating open adoption, where post-adoption interaction between the biological and adoptive parents is also given. The child's best interests should be the primary consideration.

Positively, efforts to find the best adoptive parents for each child are commendable. This includes consideration of the child's ethnic, religious, cultural, and linguistic background. However, despite the small number of eligible children for adoption in the Republic of Slovenia, it can still happen that a suitable adoptive parent is not found. In the past, this occurred with Romani children, who were then placed for adoption abroad. In recent years, significant efforts have been made in the Republic of Slovenia to raise awareness of Romani issues and promote their integration, as evidenced in the adoption field. Resistance to adopting Romani children has decreased, allowing these children to find suitable adoptive parents in the Republic of Slovenia and experience upbringing in a family environment.

If circumstances arise that threaten the child's healthy development to the extent (e.g., domestic violence, drug use, neglect) that the parents are deprived of parental responsibility or other circumstances dictate the need (e.g., death of the parents) to find alternative care for the child. Such circumstances should not deprive the child of a family environment which plays an important role in their upbringing and preparation for independent living. In such a case, the State may place a child for adoption. The State must consider the principle of proportionality and the principle of the protection of the best interests of the child. Adoption is the best measure of protection for children who are deprived of family life in their biological family. Adoption establishes the same relationship between the child and the adoptive parent as between parents and children and enables the child to develop in a family environment. The Slovenian legal framework for adoption is adequate. Still, it is nevertheless possible to identify certain shortcomings, which mainly result from the contemporary understanding of the child's right to know their origin. It would therefore be advisable to further align this with modern guidelines and understanding of this right of the child. This could further strengthen and ensure respect for the rights and best interests of the child.

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Regulation of Adoption in Ukraine

Sibilla Buletsa*

1. Introduction

Every child has a natural right to a family, a mother and a father. The social value of adoption is perceived as an indisputable truth against the backdrop of the difficult lives of well-fed but unloved 'state children'. Orphans and children deprived of parental care are most often adopted. Adoption is one of the oldest and most traditional institutions of family law. The Babylonian Code of Hammurabi (2285 BC) and the Indian Laws of Manu, written around 200 BC, also mention adoption. In Ukraine, adoption was not regulated by family law until the second half of the eighteenth century, when institutions for the care of orphans and children deprived of parental care were established. At the same time, canon law allowed adoption, and the traditional practice of family adoption was based on the adoption of a child as a foster parent in accordance with the family's decision regarding an orphan or child deprived of parental care or an agreement on foster care between the adoptive parents and the child's birth parents. The adoptive parents confirmed these legal facts in their applications and wills. The procedure and consequences of adoption were first regulated by the "Rights under which the Little Russian people are judged", and then by the Code of Laws of the Russian Empire, the Galician Civil Code and the Austrian Civil Code[1]. Adoption in the western Ukrainian lands was a widespread social phenomenon that had long been governed by customary law. Work on the codification of civil and other branches of law in the last quarter of the eighteenth century led to the adoption of the Galician Book of Laws in 1797, and later the Civil Code for the

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1 Solovei, A., 2022, pp. 36-37.

whole of Austria was approved by an imperial patent and enacted on 1 January 1812 under the title "General Civil Code for the Hereditary Lands of the Austrian Monarchy"[2]. Articles 179 to 186 of Chapter III "On Mutual Rights of Parents and Children" of the above-mentioned regulatory act were devoted to adoption issues. During the adoption process, the parties had to conclude an agreement that had to be approved in a court hearing. This requirement was established to prevent illegal adoptions and to ensure that the parties complied with all legal requirements. According to §185 of the General Civil Code of the Austrian Empire of 1811, an adoption agreement could be terminated only by mutual agreement of the parties, and only in the form in which it was concluded[3].

One form of placement for orphans and children deprived of parental care is adoption. Other options include guardianship, foster care, adoption and family-type children's homes. However, there is no doubt that growing up and raising a child in a family is not comparable to these types of placements for orphans and children without parental care. This statement stems from the fact that the family is the foundation and centre of society, and that the family has always been one of the most important human values. According to Article 20 of the Convention on the Rights of the Child (to which Ukraine is a party), a child who is temporarily or permanently deprived of his or her family environment or who, in his or her best interests, cannot remain in such an environment, has the right to State protection and assistance. States Parties must ensure that the change of care for the child is made in accordance with their national laws. For example, in its ruling of 18.03.2019 in case No. 215/4452/16-ц (proceedings No. 61-1145св19), the Supreme Court of Ukraine composed of the panel of judges of the Civil Court of Cassation clearly stated that the presumption in favour of the mother in cases concerning children, which relies on a local court decision adverse to the child's father, is not confirmed at the level of the United Nations, as follows from the Declaration or the case law of the European Convention on Human Rights[4]. This may include adoption, where the successor's desire to raise the child, his or her ethnic origin, religious and cultural affiliation

2 Stefanchuk, R.O., 2016, p. 228.
3 Tuboltseva, Ya.S., 2019, p. 137.
4 Hretchenko, Larysa, 2020

and native language are taken into account. Thus, the state has assumed the obligation to resolve issues related to the maintenance and upbringing of orphans and children deprived of parental care, which is also enshrined in Articles 51 and 52 of the Constitution of Ukraine. These norms are more specifically defined in the Law of Ukraine "On ensuring organisational and legal conditions for the social protection of orphans and children deprived of parental care"[5] (Article 3 of the Law stipulates that one of the main principles of the state policy on social protection of orphans and children deprived of parental care is to promote the adoption of children, create a system of encouragement and support for adoptive parents) and the Law of Ukraine "On Protection of Childhood"[6] (Article 24 of the Law states that orphans and children deprived of parental care should be placed under guardianship or care, for adoption or placed for upbringing in families of citizens (foster families), in baby homes, orphanages, boarding schools, family-type children's homes on full state support).

Given the social significance of adoption in ensuring the right of every child to be brought up in a family, a Decree was adopted, according to which Ukraine annually celebrates Adoption Day on 30 September[7].

2. The concept of adoption in Ukraine

Adoption of children is considered to be the best way to place children[8], without parental care, as the main objective of adoption is to take care of children without parental care and to create favourable living conditions and upbringing for them in a family. The law requires a strict adoption procedure, which requires only a court decision and an application from a person wishing to adopt a child. The decision to adopt a child must be made in court, as it is extremely important for the child, the adoptive parents and

5 Pro zabezpechennia orhanizatsiino-pravovykh umov sotsialnoho zakhystu ditei-syrit ta ditei, pozbavlenykh batkivskoho pikluvannia : Zakon Ukrainy vid 13.01.2005
6 Pro okhoronu dytynstva : Zakon Ukrainy vid 26.04.2001
7 Pro Den usynovlennia: Ukaz Prezydenta Ukrainy vid 27.11.2008
8 Usynovlennia krok za krokom. (2014). 64 s.

the adoptive parents. Protection and safeguarding of children's interests is one of the most important goals of adoption; the state should be responsible for ensuring and fulfilling these interests. It is proposed to enshrine in the law the principle of legal protection of the best interests of the child – these are the fundamental principles and guiding ideas reflected in international treaties and enshrined in national legislation aimed at harmonious development, meeting the needs and interests of the child, taking into account the exclusivity and peculiarities of each child[9].

In Ukraine, adoption is the adoption of a person into the family by an adoptive parent as a daughter or son on the basis of a court decision[10]. An exception to this is when a Ukrainian citizen adopts a child who is a citizen of Ukraine but resides outside Ukraine, or when the adopter is not a citizen of Ukraine or when a foreigner adopts a child who is a citizen of Ukraine at a consular office or diplomatic mission of Ukraine.

The definition of the term 'adoption' includes the following features: 1) adoption is possible only for a child whose parents are dead, deceased or unknown, or a child whose parents have been deprived of parental rights, and in exceptional cases – for an adult who has no mother or father or has been deprived of their care; 2) adoption is on the basis of the rights of a daughter or son; 3) an adopted child loses the legal status of an orphan; 4) as a result of adoption, mutual rights and obligations arise[11]; 5) the main purpose of adoption is for the adopted person to acquire the status of a child and a family member, and for the adopter(s) – a parent(s) with all the consequences that follow from the fact of biological origin; 6) it is performed in respect of a person who is not in a legal parent-child relationship; 7) the adoption action is voluntary, since the adoption of a person into the family cannot take place against the will of the person who has expressed a desire to adopt a child; 8) adoption is carried out in accordance with the procedure provided for by law (in a separate proceeding in accordance with the provisions of the Civil Procedure Code of Ukraine); 9) adoption is a legal act[12]. As a rule, adoption is carried out by a court decision, except in the case of adoption by a citizen

9 Mykytyn, Vitalii, 2017, p. 72.
10 Simeinyi kodeks Ukrainy vid 10.01.2002
11 Dombrovs'kyi, K.H., 2020, p. 56.
12 Zhurylo, S.S., 2013, p. 200.

of Ukraine of a child who is also a citizen of Ukraine but resides abroad, which is carried out at a consular office or diplomatic mission of Ukraine. The adoption procedure is regulated by Articles 207-242 of the Family Code of Ukraine, Resolution of the Cabinet of Ministers of Ukraine of 08.10.08 No. 905 "On Approval of the Procedure for Adoption Activities and Supervision of the Rights of Adopted Children"[13], Articles 7, 293, 310-315 of the Civil Procedure Code of Ukraine[14].

According to the National Social Service of Ukraine, between 24 February 2022 and 1 April 2023, regional services for children identified 8,512 children who, for one reason or another, were left without parental care during wartime. Of these, 1476 children became orphans due to the circumstances of Russia's military aggression against Ukraine. In addition, the adoption rate has declined over the past eight years. While in 2014, the total number of adopted children from boarding schools, orphanages and shelters was 1,358, only 484 children were adopted in the whole of 2022 and the first quarter of 2023. The number of children who become orphans or lose parental care is growing. In particular, based on these statistics, we can say that between 12 August 2022 and 13 January 2023, the number of children without parents increased by 3265. It is also worth considering the fact that it is difficult to obtain an accurate figure given the dynamics of events. It is impossible to fix any final figure[15].

As of 31 March 2023, there were 14673 orphans and children deprived of parental care who could be adopted. Of this number, 10,608 children are placed in family-based care (foster care, foster families, family-type children's homes, families of relatives, temporary placement with Ukrainian citizens) and 4,065 are in institutions. Taking into account the number of adoptions of orphans and children deprived of parental care during the war with Russia since 2014, 1,354 children were adopted in 2021, and 752 in 2022. That is, 978 fewer children were adopted in the year of the full-scale invasion

13 Pro zatverdzhennia Poriadku provadzhennia diial'nosti z usynovlennia ta zdiisnennia nahliadu za dotrymanniam prav usynovlenykh ditei: Postanova Kabinetu Ministriv Ukrainy vid 08.10.2008

14 Tsyvil'nyi protsesual'nyi kodeks Ukrainy vid 18.03.2004

15 Shtokaliuk, Yu. (26.05.2023).

than in the year of the war's outbreak[16]. In 2024, 1270 orphans and children deprived of parental care were adopted in Ukraine. 1268 of them were adopted by Ukrainian families. This is almost equal to the numbers before the full-scale invasion, when intercountry adoption was allowed and children were adopted by both Ukrainians and foreigners. Only 140 children aged 11 to 17 (11%) were adopted last year. This figure is comparable to the desires of candidates for adoption: only 13% of candidates registered last year declared their intention to adopt a child over the age of 10. At the same time, 70% of children registered for adoption are of this age.

Part 2 of Article 207 of the Family Code of Ukraine states that adoption of a child is carried out in the child's best interests to ensure stable and harmonious conditions for his or her life[17], that is, the priority of child adoption is to ensure a stable and harmonious life for the child in the adoptive family. It should also be noted that in this case, adoption is important for the adoptive parents, as they can satisfy their natural needs for motherhood and fatherhood through this family law institution. Scholars have different understandings of the best interests of the child, for example, S.Y. Fursa suggests that the best interests of the child are understood as ensuring the conditions necessary for the full physical, mental and spiritual development of the child. Analysing the process of observance of the best interests of the child in the adoption procedure, the author notes that observance of the child's interests is the main goal of adoption in our country. Adoption of a child is carried out in his or her best interests to ensure stable and harmonious living conditions. Thus, the interests of children in the institution of adoption are the main purpose for which it was introduced[18]. As noted by Zh.V. Petrochko, ensuring the best interests of the child is to meet his or her individual needs in accordance with the child's age, gender, health status, developmental features, life experience, family, cultural and ethnicity, taking into account the child's opinion[19]. O. Melnyk believes that the best interests can be identified with the concept of well-being, which includes material, spiritual, emotional, mental and other components[20]. The author substantiates the need

16 Natsional'na servisna sluzhba Ukrainy. (2023).
17 Simeinyi kodeks Ukrainy vid 10.01.2002
18 Simeinyi kodeks Ukrainy: naukovo-praktychnyi komentar, 2008, p. 542.
19 Petrochko, Zh.V., 2014, p. 71.
20 Mel'nyk, O.V., 2015, № 4 (14). p. 75.

to enshrine the concept of the best interests of the child in national legislation, in particular, in Article 1 of the Law of Ukraine "On Protection of Childhood". In addition, they consider it expedient to unify the provisions of the legislation and use the generally accepted term 'best interests of the child', without replacing it with the analogue 'highest'[21], as it is in the Family Code of Ukraine.

Thus, adoption opens up a life perspective for them, as the adopter, as an adult, feels the need to take care of another person, to be a support for them, and further counts on reciprocal relations on the part of the adult adopted children towards them. As already noted, adoption is one of the oldest institutions of family law, although the term 'adoption' did not appear immediately. But "throughout the entire period of its formation and development, there was not the slightest doubt about its necessity, humanism, and its mission of making life better"[22]. In practice, the judges of the Grand Chamber of the Supreme Court of Ukraine have drawn attention to an important issue concerning the priority of methods of maintaining children deprived of parental care and orphans. Adoption is the preferred form of placement of orphans and children deprived of parental care in Ukraine, as guardianship does not create a bond between the guardian and the person under guardianship as a child or parent. As the communication between the boy and his aunt was limited, this would not have provided him with any benefits as a family member. Thus, in this case, the 'best interests of the child' are unlikely to be the most important consideration in establishing guardianship, whereas in adoption, the most important consideration is that the child lives in a family with a father and mother, providing him or her with love and understanding. In addition, the current legislation of Ukraine, in particular the Family Code of Ukraine, does not sufficiently regulate the issue of custody of foreigners. It also cannot be seen as protecting the 'best interests of the child'[23]. In the European Court of Human Rights (hereinafter: EctHR) judgment in the case of *M.*

21 Korniienko, M., 2020, p. 402.; Do Dnia usynovlennia: chomu Ukraini slid ratyfikuvaty Haaz'ku konventsiiu pro usynovlennia? (2022).

22 Romovs'ka, Z.V., 2009, p. 421.

23 Postanovy Velykoi Palaty Verkhovnoho Sudu vid 16.10.2018; Okrema dumka suddiv Velykoi Palaty Verkhovnoho Sudu Kibenko O. R., Kniazieva V. S., Yanovs'koi O. H. vid 16.10.2018

S. v. Ukraine[24], where the Court emphasised that in such cases, the main importance is to decide what is in the best interests of the child. Today, there is a broad consensus, including in international law, in support of the idea that the best interests of children should be paramount in all decisions concerning them. At the same time, the ECtHR has noted that in determining the best interests of the child in each particular case, two aspects must be taken into account: first, the child's best interests are served by maintaining his or her connection with the family, unless the family is particularly unsuitable or dysfunctional; second, it is in the best interests of the child to ensure that he or she develops in a safe, secure and stable environment that is not unsafe.

In the theory of family law, adoption is considered in several senses, namely

a) an institution of family law, which is a set of legal norms that regulate personal non-property and property relations arising in connection with adoption, as well as other legal relations related to the adoption procedure, supervision over the observance of the rights of adoptive parents and adopted children, etc;

b) a legal act that includes both the actions of the adopter aimed at establishing legal relations of paternity and maternity, and the actions of the court aimed at establishing legal relations between the adopter and the adopted child, and at the same time at terminating the legal relationship between children, birth parents and their relatives (with certain exceptions);

c) the legal relationship between the adoptive parent and the adopted child, which usually arises on the basis of a court decision that has entered into force;

d) a procedure, namely a set of actions of the adoptive parents and the body authorised to perform the relevant act, which gives rise to the legal relationship of adoption;

e) as an act of civil status, i.e. an act that is subject to registration in accordance with the procedure established by law.

24 M.S. proty Ukrainy vid 11.07.2017

Adoption is only the basis for the emergence of relations of paternity and maternity, and therefore legal relations on adoption should not be equated with parental legal relations. Thus, S.S. Zhurilo[25] and E.M. Bahach[26] point out that the difference between legal relations on adoption and parental legal relations is that the legal fact that gives rise to adoption is an action[27], and adoption is based on two circumstances: the will of the adopter and a court decision. No such will of the parents is required for the emergence of parental relations. Moreover, in some cases, such relations may arise even against the will of the child's father (mother) (for example, when paternity is established in court). In other words, the basis for the emergence of parental relations is an event.

In the first month after Russia's full-scale military invasion of Ukraine, adoption was suspended – or, more precisely, it was impossible. This applied to both old and new adoption applications. In fact, this pause was caused by objective circumstances, not by changes in legislation.

On 24 May 2022, the first changes were made to the adoption process since the beginning of the war. They define the list of documents required for the return of an adopted child if the child is temporarily displaced outside Ukraine during the introduction of a state of emergency or martial law in Ukraine. On 31 May 2022, additional procedural changes were made a few days later. In particular, they envisage the digitalization of adoption procedures and the creation of a single electronic database of families of potential adopters, orphans, children without parental care and children deprived of parental care. The information and analytical system 'Children' contain relevant information[28]. This has greatly facilitated the process of submitting and receiving the necessary documents by prospective adopters, accelerated the verification of the submitted documents by the competent authorities and simplified communication between the participants in the adoption procedure. In addition, the Child is Not Alone chatbot aids wartime children who need temporary refuge, are lost, or are found by a family.

25 Zhurylo, S.S., 2013, p. 42.
26 Simeinyi kodeks Ukrainy: Naukovo-praktychnyi komentar, 2010, p. 577.
27 Mykytyn, V.I., 2017, p. 66.
28 „Dity". (2023).

The possibility to submit an application for registration of candidates for adoption with other required documents not only at the place of residence in paper form, but also in electronic form (for citizens of Ukraine). Therefore, you can apply for a consultation on the adoption of a child on the Diia portal, where there is a new service called 'Adoption'. Starting from September 2022, the portal allow you to apply for the status of a candidate for adoption[29]. The Diia portal offers five additional features to streamline adoption. Ukrainians could previously register as adoptive parents and request adoption consultations online. Before, potential parents had to spend months gathering paperwork and credentials from numerous agencies, waiting in lines, applying to the children's service, and filling out applications manually. The adoption or guardianship process may take years.

Five new adoption options on the Diia platform in Ukraine have simplified and streamlined the procedure[30]:

1. Adoption: candidature extension. Ukrainians who are adoption candidates can use this service. Many people cannot become parents during the one-year adoption application period. The new service extends adoption candidates' status.
2. Foster parents, foster carers: candidate registration. Ukrainians who desire to foster children can use the service. Also for those who prefer a family-style children's home. The foster parents receive state funding to care for the orphan.
3. Second-foster or adopt. A spouse of an adoptive parent can use the service. These foster or adoptive parents are married.
4. Child guardianship: candidate registration. The service is ideal for relatives who want to legally guard orphaned youngsters. The child remains an orphan, and the guardian or custodian represents them until they turn of age. The child may also be adopted by others with his or her consent.

29 Usynovlennia dytyny staie prostishym: yak pratsiuie nova posluha na portali Diia. (2022).
30 Sproschuiemo shliakh do bat'kivstva: na portali Diia dostupni 5 novykh posluh z usynovlennia. (2023).

5. Adoption: deregistration. Ukrainian candidates for adoption who have not yet become parents and have decided not to adopt an orphan might use the service[31].

Since the first of June 2023, 744 people have applied for online adoption consultations through the Diia portal. It became possible to apply online for candidacy for adoptive parents on 9 September 2023, and since then 39 citizens have sent applications to the regional Children's Services. Adoption is a lengthy process, as it requires a training course on raising orphans and children deprived of parental care, conducted by social service centres with the involvement of specialists in psychology, pedagogy, medicine, etc.[32].

3. Conditions of adoption

The current family legislation, including the Family Code of Ukraine, does not contain a definition of the term 'conditions of adoption'. O.S. Kuzhko believes that the conditions of adoption should be understood as the rules of family law of Ukraine that must be observed in the course of the said legal act. Given this and the peculiarities of adoption cases, the courts should check the compliance of the application with both the form and content of the requirements set out in Article 252 of the Civil Procedure Code of Ukraine, as well as the requirements set out in Chapter 18 of the Civil Procedure Code of Ukraine, namely: whether the application contains information about the adoptive parents, the child to be adopted, his/her parents, brothers and sisters; whether the motives for which the person wants to adopt the child are stated[33]. The conditions of adoption should be understood as the require-

31 To use one of these Diia portal services, log in or register with an electronic signature, select the desired service, fill in your residential address, marital status, marriage, and children you want to adopt, and wait for the registration data. After 15 minutes, you must attach the required documents, sign the application electronically, and send it for processing. No need to wait in lines or spend weeks gathering certificates—all the relevant documents will be extracted from the registries automatically. Filling out the application data will take about 30 minutes. When applying for the aforesaid services, the Diia portal provides an instant no-criminal record extract. After that, the children's service will review the data and contact possible parents or guardians.

32 Zruchni onlain-resursy dlia usynovlennia abo tymchasovoho prykhystku ditei. (2022).

33 Kuzhko, O.S., 201), p. 93.

ments set forth in the law for a certain circle of persons (adoptive parents), which must be observed in the adoption procedure. Such conditions include requirements for the subjects of adoption (the adopted child and the adoptive parents), as well as conditions for the consent of: the child; his or her parents or persons in loco parentis; one of the spouses, if he or she is not the adoptive parent. For example, the personal qualities of an adoptive parent are not stipulated by law, but it is necessary to proceed from the interests of the child and they must be able to fulfil parental responsibilities[34].

3.1. Adopted person requirements

Article 208 of the Ukrainian Family Code allows minors under 14 and 14–18 to be adopted. The lawmaker does not specify a minimum adoption age. Article 209 of the Family Code of Ukraine sets a special condition for the adoption of three categories of children: abandoned in a maternity hospital or other healthcare facility, refused to be taken away by their parents or other relatives, and abandoned or found. Two months after being found or two months old, a child can be adopted. In this case, a child is abandoned in a maternity hospital if its mother left the child without a written document indicating its future fate or wrote a statement refusing to take the child, indicating her consent to its adoption. Article 219(2) of the Family Code of Ukraine allows a child to be adopted without the consent of the adult parents if the court finds that the parents have not lived with the child for more than six months without valid reasons, have not shown parental care and concern, and have not raised and maintained the child. The legislator has given the woman two months to alter her mind and take the child back because she is in a terrible physical and emotional state after childbirth [35].

Information on all children who may be adopted, placed under guardianship, care or fostered by a family of citizens must be entered in the register of orphans and children deprived of parental care. The procedure for keeping such records is set out in the Resolution of the Cabinet of Ministers

34 Zhurylo, S.S., 201), p. 156.
35 Simeine pravo Ukrainy, 2015, p. 280.

of Ukraine of 8 October 2008 No. 905 "On Approval of the Procedure for Conducting Adoption Activities and Supervising the Observance of the Rights of Adopted Children"[36].

Article 210 of the Family Code of Ukraine provides that, as a general rule, it is prohibited to separate siblings during their adoption if they are registered together for possible adoption. The same Article also contains an exception to this general rule, according to which, in the presence of circumstances of significant importance, the court, with the consent of the guardianship and trusteeship authority, may order the adoption of one of them or their adoption by different persons. Such circumstances may include, for example, the presence of a certain serious illness in one of the siblings and their stay in a special medical and educational institution. But in all cases, if the adoption is not secret for the child, the siblings have the right to know about the child's new place of residence.

Thus, adoption is possible if: the child has the status of an orphan, is deprived of parental care, and his or her parents have given notarised consent to the adoption. At the same time, the child must be registered for adoption by the services for children and the National Social Service[37].

3.2. The other party to the adoption relationship is the adopter

The requirements for a person wishing to adopt a child can be divided into positive and negative, depending on the need for the absence or presence of relevant circumstances in the person wishing to adopt a child [38]. According to Article 211 of the Ukrainian Family Code, the following people can become adoptive parents: 1) the adopter must be legally capable and at least 21 years old, unless they are related to the child; 2) an adoptive parent can be at least 15 years older than the child they seek to adopt. Adult adoption requires a minimum age gap of eighteen years. Thus, the legislator set the minimum age

36 Pro zatverdzhennia Poriadku provadzhennia diial'nosti z usynovlennia ta zdiisnennia nahliadu za dotrymanniam prav usynovlenykh ditei: Postanova Kabinetu Ministriv Ukrainy vid 08.10.2008

37 Minenko, Kyryl, 2023.

38 Stoianova, T.A., 2009, p. 399.

for adopting parents at 21 (excluding relatives) and the minimum age difference at 15 (if an adult is adopted – 18 years). It is good that the 45-year age gap barrier that limited adoptive parents has been lifted; 3) couples, since family rearing usually serves the child best; 4) the Family Code of Ukraine prevents unmarried people from adopting the same child, although the court may authorise their adoption if they live together. However. We agree with Pylypenko Y.O. [39] that Ukraine should allow unmarried people to adopt a child if it has a civil partnership institution that allows either statutory registration or conclusion of a civil partnership agreement between such persons, subject to appropriate state or notarial registration; 5) children with only a mother can be adopted by a married man; 6) children with only a father cannot be adopted by a married woman; 7) children with only a mother or father who lose legal ties can be adopted by one man or woman; 8) adoptive parents must be of different genders (primarily due to the prohibition of same-sex marriage in Ukraine). However, it should be noted that the Verkhovna Rada of Ukraine passed the "Ratification of the European Convention on the Adoption of Children" Law on February 15, 2011. Modern adoption law is introduced in this Convention to maximise the child's best interests. Article 7 of the Convention enables two people of opposite sexes to adopt a child: a) married or b) in a registered partnership, if one exists; or c) one person. States may apply this Convention to married or registered same-sex couples. They may also apply the Convention to permanent same-sex and different-sex partnerships. The state can extend the Convention to same-sex couples, taking into account their national legislation, but this article does not require so. Parts 3 and 4 of Article 211 of the Ukrainian Family Code prohibit same-sex adoptive parents. Article 51 of the Ukrainian Constitution specifies that marriage requires free consent from both parties. Thus, national law prohibits same-sex adoptive parents and unmarried immigrants; 9) part 6 of Article 211 of the Ukrainian Family Code stipulates that a child's adoptive parent might be one man or one woman if only a mother or father lose legal links with the child due to adoption.

Pursuant to Article 213 of the Family Code of Ukraine, if there are several persons who wish to adopt the same child, a citizen of Ukraine has the priority right to adopt the child:

39 Pylypenko, Yuliia Oleksiivna, 2019, p. 359.

1) in whose family the child is being brought up
2) who is the husband of the mother, the wife of the father of the child to be adopted
3) adopting several children who are brothers or sisters
4) a relative of the child;
5) spouses.

In addition to qualifications, the Ukrainian Family Code lists many people who cannot be adoptive parents (Article 212). These people fall into various categories:

- first group, people who have limited legal capacity or are incapacitated; are registered or undergoing treatment in a psychoneurological or narcological dispensary; abuse alcohol or drugs; or have diseases approved by the central executive body responsible for state health policy cannot be adoptive parents. Examples include TB, HIV, etc[40].
- the second group includes persons who may not be able to ensure proper upbringing of children because they have already violated their obligations to raise them (persons deprived of parental rights, unless these rights have been restored; were adoptive parents (guardians, custodians, foster parents, foster carers) of another child, but the adoption was cancelled or declared invalid (custody, care or activities of a foster family or family-type children's home were terminated) through their fault) or were convicted of crimes against life and health, freedom, honour and dignity, sexual freedom and sexual inviolability of a person, and other crimes provided for in clause 10. 10 part 1 of Article 212 of the CCU, or have an unspent or unexpunged conviction for other crimes in accordance with the procedure established by law;
- the third group includes persons who, due to certain objective circumstances, will not be able to properly provide for the maintenance of children (persons who do not have a permanent place of residence and permanent earnings (income));

40 Pro zatverdzhennia Pereliku zakhvoriuvan', za naiavnosti yakykh osoba ne mozhe buty usynovliuvachem: Nakaz Ministerstva okhorony zdorov'ia Ukrainy vid 20.08.2008

- the fourth group includes persons who have other grounds that may interfere with the interests of the adopted child (foreigners who are unmarried, except when the foreigner is a relative of the child; stateless persons; married to a person who, in accordance with paragraphs 3-6, 8 and 10 of part 1 of Article 212 of the Family Code of Ukraine, cannot be an adoptive parent (for example, abusing alcohol or drugs or suffering from illness)). Other people with opposing interests may not be same-sex adoptive parents.

According to family law, the child, his or her parents or persons in loco parentis, or one of the child's spouses, if he or she is not the adoptive parent, must consent to adoption. European Court ruling A.K. and L. v. Croatia confirms this. This case concerned a mother with mild mental disability who had been divested of her parental rights. Her son had been put up for adoption without her knowledge, consent or participation in the adoption proceedings. The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention. It found that, by not informing the first applicant about the adoption proceedings, the national authorities had deprived her of the opportunity to seek restoration of her parental rights before the ties between her and her son had been finally severed by his adoption[41].

3.3. The child's consent to adoption

According to Article 218 of the Ukrainian Family Code, a child must consent to adoption if they are old enough. Adoption consent depends on the child's age and his state of health. Previously mentioned Article 12 of the Convention on the Rights of the Child is fully met by this clause. Article 12 states that States Parties shall ensure that a child who has the capacity to express his or her own views has the right to express those views freely in all matters affecting them and that those views shall be given due weight in accordance with age and maturity. The child shall have the right to be heard in judicial or administrative processes involving the child, personally or through a representative or other authority, in line with national law. The youngster must

41 A.K. and L. v. Croatia (2013). no. 37956/11

understand the legal implications of adoption before consenting. Children should be told by child welfare workers about their family ties to the new parents and their relatives, including the surname, name, patronymic, parents, etc.

In some cases, the law allows for a presumption of the child's consent to adoption. For example, an adoption may be carried out without the child's consent if the child is unaware of it due to age or state of health. In addition, a child does not need to consent to adoption if he or she lives in the family of the adoptive parents and considers them his or her parents. In such cases, the mere presence of the child in court during the adoption proceedings and obtaining the child's consent may cause harm to the child's psyche. When the child refuses to give such consent to the adoption, this should be considered as a significant circumstance that hinders the adoption process. In addition, the court may decide to adopt a child without his or her consent only when other circumstances are taken into account.

3.4. Parental adoption consent

Unparented youngsters are usually adopted. In some cases, a child's parents don't provide enough child support. If their parents consent, such children can be adopted. Article 218 of the Ukrainian Family Code requires free and unconditional consent. Unconditional means the parents or one of them cannot limit their child's adoption to one spouse. This article also indicates that an arrangement requiring the adoptive parent to pay a fee to the child's parents, guardians, or other relatives for consent to adoption is void.

Adult parents shall approve to adoption once the child is two months old so they can thoroughly contemplate their actions. Minor parents must also consent. The child's parents can withdraw their approval before the adoption is final.

Articles 221-222 of the Ukrainian Family Code outline how to get consent from a guardian, custodian, healthcare facility, or school to adopt a child. Adoption requires the agreement of a guardian (custodian) or a healthcare facility or educational institution if the child or his or her parents are un-

der guardianship or have no parents. Guardianship and custody authorities shall consent to the child's adoption if the guardian or custodian did not. The guardian (custodian), guardianship and custody authority, healthcare provider, or educational institution may not consent to the adoption if the court judges it is in the child's best interests.

The law enables adoption without parental approval. Article 219 of the Family Code of Ukraine allows parents to adopt a child without the child's consent if they are unknown, declared missing or incapacitated, deprived of parental rights, or do not live with the child for more than six months without valid reasons, do not show parental care and concern, or do not raise or maintain the child.

3.5. Consent of one of the spouses if the other spouse is not the adoptive parent

In Ukraine, adoption of a child by one of the spouses is allowed. The law requires that spouses who are not adoptive parents give their notarised consent to the adoption, as they will become the child's stepfather or stepmother and must take part in the child's upbringing. However, Article 220(2) of the Family Code of Ukraine allows adoption without the consent of the other spouse. This is possible if the spouse is declared missing or incapacitated, as well as in the presence of other important circumstances (for example, if the spouses have not lived together for a long time). The objection of one of the spouses to the adoption of another child does not prevent the court from filing an application for adoption and making a decision on it, if the court decides that the adoption of the child does not violate the important interests of the other spouse.

4. The adoption procedure

The Family Code of Ukraine enshrines a judicial procedure for adoption, which is also enshrined in most foreign countries, since only such a procedure provides significant guarantees for the protection of the rights of adopted children and adoptive parents. The adoption procedure is regulated by

the provisions of the Family Code of Ukraine (Articles 223-225), as well as by the provisions of the Civil Procedure Code of Ukraine (Chapter 5, Section IV).

Also, in Ukraine, candidates can utilise adoption services available through the 'Diya' portal. Users must first authenticate their accounts. Subsequently, they should enter the keyword 'adoption' into the search function. The user is then required to navigate to the 'Services' section and select the 'Adoption: registration by candidate' option. The next step involves clicking on 'Submit an application', completing the necessary personal and procedural information as prompted, selecting the appropriate category of the child intended for adoption, and submitting the application for review. Applicants may monitor the status of their request within the list of submitted services. If the individual's personal data is already recorded within the relevant registers, the portal will provide guidance throughout the registration process until completion. Additionally, applicants must furnish evidence of non-judgment, attaching scanned copies of relevant documents; this service can also be obtained at designated 'Diya' offices. Further documentation required includes proof of ownership or usage rights for the residence intended for the child's accommodation, as well as a health certificate issued in accordance with prescribed standards, obtainable from local healthcare facilities. Prior to final submission, applicants should carefully review all entered information; the entire process is free of charge and typically requires approximately thirty minutes. The application undergoes review within a period of five working days, after which, upon approval, an official from the child services department will conduct an on-site inspection to verify the suitability of the living conditions[42]. As of the end of 2023, Ukraine reported a total of 45,936 orphans and children deprived of parental care.

A mandatory element of adoption is the training of adoptive parents[43]. A new family-based care trainer training programme was approved by the Ministry of Social Policy[44]. The UNICEF Ukraine-supported project 'Monitoring the Needs and Support of Children in War' began training trainers for

42 https://diia.gov.ua/services/usinovlennya-reyestraciya-kandidatom

43 You must apply to the children's service at your home and write an adoption registration application in front of an employee. The spouse seeking adoption submits one application, signed by both spouses.

44 Pro vnesennia zmin do nakazu Ministerstva sotsial'noi polityky Ukrainy vid 19.08.2022

the new programme on September 13, 2022. The Ministry of Social Policy approved "Reforming Institutional Care and Education of Children in Ternopil Oblast" in 2019–2022. This initiative is driving. Four integrated groups found that the programme trained 80 Ternopil Oblast applicants for foster care and family-based care. The new programme has received favourable research response, public discussion, and further review. Some classes for foster parents, foster care candidates, guardians and custodians, adoptive parents, foster carers, and foster care candidates will be held together in the new curriculum. This lets candidates prepare individually by having a psychologist in class and safety and first aid training.

The potential adopter must appear in court to start adoption proceedings. They cannot apply through a representative. The child or adult without a mother or father or who has been abandoned must file such an application at their domicile. Article 252 of the Civil Procedure Code of Ukraine requires the application to include the applicant's name, address, and the child's surname, name, patronymic, age, and health status. Adoption applications may request changes to the child's surname, name, patronymic, date, place of birth, and applicant's mother or father record. A collegial court with one judge and two people's assessors hears adoption matters separately. A court must receive an adoption application to decide on adoption. T.A. Stoyanova[45] points out the prerequisites for such a person's right to apply to the court for adoption, which are mandatory for the initiation of a case, namely: 1) legal capacity and legal capacity; 2) jurisdiction of the court; 3) legal interest of the applicants; 4) compliance with the rules of jurisdiction; 5) proper execution of the application for adoption (payment of the state fee, submission of copies depending on the number of interested parties). In addition, she notes that persons wishing to adopt a child must also undergo state registration, and failure to comply with this procedure results in the impossibility of considering the adoption case due to the lack of the necessary documents, namely, a conclusion on the expediency of adoption issued on the basis of the relevant registration.

For filing an application for adoption, the applicant must pay a court fee in the amount of 0.1 of the minimum wage established by law as of 1 January

45 Stoianova, T. A., 2009, p. 9.

of the calendar year in which the application was filed (clause 5, part 2, Article 4 of the Law of Ukraine "On Court Fees"[46]). Such an application must include court fee receipts. An application must include a copy of the court fee payment receipt and the accompanying documents, if available: a copy of the marriage certificate and the other spouse's written consent, notarized, if one spouse adopts a child; a medical certificate of the applicant's health; a salary certificate or income statement; a document confirming the right to own or use the residential premises; and other documents required by law.

The Family Code of Ukraine (Article 223(2)) allows applicants to withdraw their adoption applications until the decision is made. The applicant can no longer withdraw the adoption application. If such an application is received after the decision but before it takes effect, the court cancels its decision and ignores it. The child's parents can withdraw their adoption permission before the court's ruling takes effect. The court overturns its ruling and continues the proceedings.

The court considers the application in a closed court session with the applicant, the guardianship and custody authority, and the child, if he or she is aware of the adoption by age and state of health, as well as any interested parties and others whom the court deems necessary to question.

After evaluating adoption applications, the court decides on the adoption. The court must consider the health and financial situation of the person wishing to adopt a child, his or her marital status and living conditions, attitude to raising a child, the reasons why the person wants to adopt, and the reasons why the other spouse does not want to be an adoptive parent if only one spouse has filed an application for adoption. If the foregoing prerequisites are met and the prospective adopter can provide stable and harmonious conditions for the child, the court declares them the adopter. A person cannot be denied adoption because they have or may have children.

It should be noted that in Ukraine, the court may decide to adopt an adult who does not have a mother or father or has been deprived of their care in exceptional cases. The court takes into account the marital status of the adopter, especially the absence of children, as well as other important cir-

46 Pro sudovyi zbir: Zakon Ukrainy vid 8.07.2011

cumstances. Although the legislator does not establish a specific list of such circumstances, it can be assumed that they may include such things as the loss of the adopter's only child at an advanced age; the existence of actual family circumstances between the potential adopter and the adopted child before the latter reached the age of majority, but the adoption was not carried out for various reasons, etc. According to Z. Romovska[47], this special type of foster care was widespread throughout Ukraine, when single and elderly couples took in a young married couple if one of them was an orphan. At the time, it was called 'marrying young to the farm'. Such a young couple was obliged to respect them, manage their household well and bury them after their death, and in return they received a plot of land and other property as an inheritance.

In the case of adoption of an adult[48], the courts must also establish additional circumstances, including the need for adoption and the impossibility of establishing another legal relationship between the person to be adopted and the person who wants to do so (making a will, etc.). We should agree with V.I. Truba, who notes that the adoption of an adult should be open to prevent abuse by participants in legal relations on the adoption of an adult, to facilitate the search for relatives if necessary[49].

At the same time, the application for adoption should not be motivated by a desire to achieve a legal consequence other than the legal registration of a family relationship (which may already exist in fact). It is also necessary to find out whether the adoptive parent has children of his or her own. The law does not prohibit the adoption of an adult by a person who has his or her own children, but this fact should be taken into account based on the circumstances that determine the possibility of the natural children to be heirs. In each particular case, the court may take into account other circumstances when deciding on the adoption of an adult, such as the reasons for the persons wishing to adopt, the possibility of their cohabitation, their marital and health status, as well as other circumstances of significant importance.

47 Romovs'ka, Z.V., 2009, p. 446.

48 Pro praktyku zastosuvannia sudamy zakonodavstva pry rozghliadi sprav pro usynovlennia i pro pozbavlennia bat'kivs'kykh prav : Postanovy Plenum Verkhovnoho sudu Ukrainy vid 30.03.2007

49 Truba, V.I., 2014, p. 74.

The moment of adoption is the day when the court decision on such adoption comes into force. In order to make changes to the birth record of an adopted child or adult, a copy of the court decision is sent to the civil registry office at the place of the decision. On the basis of such a decision, the civil registry office shall make appropriate changes to the birth record of the child or adult and issue a new birth certificate with these changes. The previously issued birth certificate is cancelled.

5. Legal consequences of adoption

In Ukraine prospective adoptive parents are permitted to take a child into their family prior to the court's official decision, a policy enacted by the Government based on recommendations from the Ministry of Social Policy. To formalize guardianship prior to adoption, prospective adoptive parents must submit an application to the child welfare service responsible for the child's place of residence or stay. The decision to establish guardianship with subsequent adoption is made if the candidates have a positive opinion regarding the advisability of the adoption and its alignment with the best interests of the child, as well as if they have submitted an application for adoption to the court. The child welfare service that issued the decision to establish guardianship transmits a copy of this decision to the child welfare service at the prospective adoptive parents' place of residence. The latter service is tasked with visiting the family, involving social service centre employees or social workers to monitor the child's upbringing and well-being. Upon the court's decision on adoption becoming effective, guardianship is terminated, and the child continues to reside within the family as a biological or adopted son or daughter. Prospective adoptive parents, whether married jointly or individually, must submit an application to the child welfare service at their place of residence after meeting the child. The child welfare service then makes a decision regarding the appointment of guardianship and facilitates the child's return to Ukraine to the prospective adoptive family to proceed with the adoption process. The duration of the guardianship prior to adoption is set at three months but can be extended until the court's adoption decision is legally enforced. Should the candidates fail to submit

a court application for adoption within this period, the guardianship decision is cancelled, and the family is removed from the register of prospective adoptive parents. Additionally, the child welfare service conducts family visits to monitor the conditions and environment in which the child in care is being raised. The adoption procedure has been refined and improved by the Ministry of Social Policy as part of the operational plan for implementing the Strategy for Ensuring the Right of Every Child in Ukraine to Grow Up in a Family Environment for 2024–2028[50].

Once a court decision on adoption enters into force, it gives rise to certain consequences, namely:

1) Personal and property rights and obligations between the parents and the adopted person, as well as between the adopted person and other relatives by descent, are terminated. However, in this case, we should agree with the statement of Bagach E.M.[51], who notes that the loss of legal ties does not mean the loss of blood kinship with parents and other relatives by descent and at the same time does not create blood relations with the adoptive parent and his or her relatives. For example, the court may allow a marriage between the adoptive parent's own child and the child adopted by the adoptive parent, as well as between adopted children. In the legal literature, 'full' adoption means the termination of legal ties with parents and other relatives by birth. According to Ukrainian law, an adopted child may have personal and property rights and obligations as a mother (father), grandparent or grandchild. In the case of adoption of a child by one person, these rights and obligations may be retained at the request of the adopter (male or female). In addition, if one of the child's parents has died or divorced a person declared incapacitated by a court, and the child's other parent has remarried and wishes to adopt the child, the child's grandparents or siblings have the right to file an application with the court to preserve the legal relationship between them and the child being adopted. The court considers such an application together with the application for adop-

50 Strategy for Ensuring the Right of Every Child in Ukraine to Grow Up in a Family Environment for 2024–2028

51 Simeinyi kodeks Ukrainy: Naukovo-praktychnyi komentar, 2010, p. 577.

tion and grants it if it is beneficial for the child. 'Incomplete' adoption is an adoption, which isin the interests of one of the parents, grandparents, brothers or sisters by descentRegardless of the type of adoption, an adopted child retains the rights to pension, other social benefits, and compensation for loss of breadwinner that he or she had before the adoption (Article 234 of the Family Code of Ukraine).

2) Mutual personal non-property and property rights and obligations arise between the adopted person (and in the future – between his/her children and grandchildren) and the adopter and his/her relatives by descent. In other words, not only mutual family personal non-property and property rights and obligations arise between adoptive parents and adopted children (the adoptive parent is obliged to raise the child, take care of his or her health, physical, spiritual and moral development, protect his or her rights and interests, provide material assistance, etc.), but also rights and obligations provided for by other branches of legislation (civil, pension, labour, administrative, housing, etc.). For example, adopted children inherit after the adoptive parent, as well as their own children (Article 1260 of the Civil Code of Ukraine), adoption is one of the grounds for acquiring Ukrainian citizenship (Article 6(1)(5) of the Law of Ukraine "On Citizenship"[52]), etc. The adopted child has not only rights and obligations towards the adopter, but also his or her relatives by descent (the adopted child becomes a grandson to the adopter's parents), as well as the adopter's descendants and his or her relatives by descent (the adopted child's children become grandchildren of the adopter and, accordingly, great-grandchildren to the adopter's parents). Adoptive parents receive the legal status of father and mother, and adopted children receive the legal status of a child (son or daughter). The adopter is granted rights and imposed obligations in relation to the child he or she has adopted to the same extent as the parents have in relation to the child, and the adopted person is granted rights and imposed obligations in relation to the adopter to the same extent as the child has in relation to his or her parents. As already men-

52 Pro hromadianstvo: Zakon Ukrainy vid 18.01.2001

tioned, the applicant (adopter) may request in the application for adoption of a child to change the surname, name, patronymic, date, place of birth of the child, and to register the applicant as the child's mother or father. These issues are regulated by Articles 229-231 of the Family Code of Ukraine.

3) Making an entry in the Book of Birth Registers, according to which the adopter may be recorded as the mother, father of the child or an adult. In this case, if a child who has reached the age of seven is adopted, the child's consent is required to register the adoptive parent as the mother or father, unless the child lives in the adoptive parents' family and considers them his or her parents. The court may also decide to change the information about the child's place of birth and date of birth (the child's date of birth may be changed by no more than six months). In addition, adoption may also result in a change of the surname, name and patronymic of the adopted person[53]. The Family Code of Ukraine sets out some rules for such changes:

– if the adoptive parents are both a woman and a man and if they are registered as the child's parents, the child's surname and patronymic are changed accordingly;
– at the request of the adoptive parents, the child's name may be changed. Such a change requires the child's consent. Such consent is not required if the child lives in the adoptive family and is used to the new name;
– if the adoptive parent is registered as the child's father, the child's patronymic is changed accordingly;
– if an adult is adopted, his or her surname, name and patronymic may be changed in connection with the adoption at the request of the adopter and the adopted person.

Thus, an adopted child becomes a full member of the new family as a daughter or son, and receives the same rights and obligations as a biological children.

53 Rishennia № 110342210 vid 02.04.2023 po spravi 456/1186/23

6. Termination of the adoption

Adoptive parents may face penalties for violations of family rights and interests, including late payment of alimony, additional childcare costs and overdue childcare costs. They may also face invalidation of the adoption, cancellation or deprivation of their rights. Cancellation of an adoption can be a family law liability only if it is contrary to the interests of the child and does not ensure his or her family upbringing. Such measures of the adoptive parent's liability as recognition of the adoption as invalid, cancellation of the adoption and deprivation of the adoptive parent's rights are disadvantageous measures of personal, property and organisational influence, which are applied exclusively in court to the guilty person who committed the unlawful act in the adoption, and entail other legal consequences[54].

The grounds for termination of adoption are:

1) recognition of the adoption as invalid (Articles 236, 237, 240, 241 of the Family Code);
2) cancellation of the adoption (Articles 238, 239, 240, 241 of the Family Code)
3) deprivation of the adopter of parental rights (Article 242 of the Family Code).

We should agree with L.M. Zilkovska, who notes that the legal fact of termination of adoption may be actions, inaction, and an event cannot be the basis for termination of adoption[55].

6.1. Declaring an adoption invalid

An adoption carried out in violation of the requirements stipulated by law is or may be declared invalid. Article 236 of the Family Code of Ukraine provides for a list of grounds for declaring an adoption invalid, which is exhaustive and not subject to extended interpretation. Based on a literal analysis of

54 Yefremova, I.O., 2018, p. 93.
55 Zilkovs'ka, L.M., 2016, p. 301.

the provisions of Article 236 of the Family Code of Ukraine, the grounds for declaring an adoption invalid can be divided into two groups:

a) grounds on which an adoption is declared invalid by a court decision:

– adoption without parental consent;

– fake adoption. A court may declare an adoption fictitious if the adoptive parent did not want the real consequences of the adoption to occur (e.g., parental rights and obligations), if the adoption was done for mercenary reasons (e.g., to get childbirth benefits), or if forged documents were used. The guardianship and custody authority's finding on adoption expediency, the adoptive parents' health certificate, their written consent to adopt, and other documents may be included. The court must prove the adoption is invalid in this situation.

b) grounds on which an adoption may be declared invalid by a court decision:

– absence of consent of other bodies and persons interested in the adoption, other than the child and parents;

– adoption of the child of the other spouse without intending to continue marital relations with him/her at that moment in the future[56]. In this case, the court needs to find out not only the grounds that may lead to the recognition of the adoption as invalid, but also their impact on the relations arising from the adoption, in particular on the interests of the child.

Legal effects of invalidating an adoption: 1) an invalid adoption is annulled from the moment of its implementation; 2) the adoptive parent, his or her relatives, and the adopted child lose their rights and obligations, while the child, his or her parents, and other relatives by descent restore theirs; and 3) the 'parental legal relationship' between the child and his or her birth parents is restored. Children under 14 are transferred to them at the request of their parents or relatives. The child's permission determines their residence after 14. The child is returned to the guardianship and custody authority as a 'state child'[57], if there are no parents or relatives; 4) the adopted person's birth record must be renewed. This restores the pre-adoption record. A court

56 Simeine pravo, 2015

57 Omovs'ka, Z.V., 2009, p. 462.

ruling invalidating the adoption prompts the state civil register authority to update such a record. Part 5 of Article 237 of the Ukrainian Family Code restores the child's surname, name, and patronymic. The child is entitled to continue to be called by the surname, name, and patronymic he or she received in connection with the adoption at his or her request; 5) the court may order the recovery of child support from the child's adoptive parent for a period not exceeding 2 years if the child has no parents or the parents are unable to support him or her, provided the adoptive parent can provide financial assistance. A claim to invalidate an adoption does not have a limitation period because the relations emerging from adoption are continuing. Invalidating the adoption nullifies the judicial ruling that allowed it.

6.2. Cancellation of adoption

In addition to the procedure for declaring an adoption invalid, the Family Code of Ukraine also provides for the possibility of cancellation of adoption. Both cancellation of adoption and recognition of its invalidity are possible only after consideration of the case in the proceedings and only by a court decision.

Article 238 of the Family Code of Ukraine sets out the grounds for cancellation of adoption, namely:

1) adoption is contrary to the interests of the Child, does not provide the Child with family upbringing;
2) the child suffers from dementia, a mental or other serious incurable illness, which the adopter did not know and could not have known at the time of adoption;
3) the adopter and the child have developed, regardless of the will of the adopter, a relationship that makes it impossible for them to live together and for the adopter to fulfil his or her parental responsibilities[58]. Cancellation of adoption is possible both in the presence of fault in the actions of the adoptive parent and in the absence of faulty behaviour of the adoptive parents, when, due to circumstances beyond the control

58 Postanova VS Imenem Ukrainy vid 25.03.2020

of the adoptive parent, the relations necessary for the normal development and upbringing of the child have not been established. But in this case, it should also be borne in mind that if the court considers that the cancellation of the adoption is contrary to the interests of the Child, and there are grounds for normalising the relationship between the adoptive parent and the adopted child, the claim for cancellation of the adoption will be dismissed, and the adoptive parents may be asked to take measures to establish a relationship with the child[59]. For example, according to the ruling, the decisions of the courts of first instance and appeal to dismiss the claim were upheld. In accordance with parts one and two of Article 14 of the European Convention on the Adoption of Children (revised), ratified by Law of Ukraine No. 3017-VI of 15 February 2011, the decision of the competent authority is the only way to cancel or invalidate an adoption. The interests of the child shall prevail. An adoption may be cancelled before the child reaches the age of majority, only in serious legal cases. The first part of Article 238 of the Family Code of Ukraine states that an adoption may be cancelled by a court if: 1) it is contrary to the interests of the child or does not provide the child with family upbringing; 2) the child suffers from dementia, mental disease or other serious incurable illness, which the adopter did not know and could not have known at the time of adoption; or 3) the relationship between the adopter and the child has developed that makes it impossible for them to live together and for the adopter to fulfil his or her parental responsibilities. The courts correctly concluded that the claim was dismissed, finding that the plaintiff had not proved the existence of grounds for cancellation of the adoption under Article 238(1) of the Family Code of Ukraine. The cassation appeal argued that cancellation of the adoption would not be contrary to the interests of the child, as the child did not want to communicate with his father. The Court of Appeal noted that the cancellation of the adoption causes moral suffering for the child, which is especially dangerous for adolescents. The allegation that the ex-wife does not allow the children to enter the flat, hides them, and takes other actions that prevent the father

59 Simeine pravo Ukrainy, 2008, p. 136.

> from fulfilling his duties is only evidence of a conflict with the ex-wife. However, the existence of a relationship between the plaintiff and the child does not indicate that the adoption is not in the best interests of the Child, nor does it indicate that the father cannot fulfil his parental responsibilities[60].

The possibility of cancelling an adoption in respect of an adult, in accordance with the provisions of family law, depends on the moment of adoption, namely before or after the person reaches the age of majority. Thus, if the adoption was carried out before the adoptee reached the age of majority, then, as a general rule, it is impossible to cancel such an adoption. The legislation provides for only one exception, according to which an adoption may be cancelled after the child reaches the age of majority if the unlawful behaviour of the adoptee or the adoptive parent threatens the life or health of the adoptive parent, the adopted child or other family members (for an example, the adoptee or the adoptive parent commits an attack on the life of each other or other family members, etc.)

In the case of adoption of a person who has already reached the age of majority, its cancellation is possible only in two cases: first, if there is a mutual consent of the adopter and the adopted person; second, at the request of the adopter or the adopted person in the absence of established family relations, the achievement of which is the purpose of adoption.

Article 240 of the Family Code of Ukraine provides for a list of persons entitled to file a lawsuit to cancel or invalidate an adoption, namely, parents, adoptive parents, guardian, custodian, guardianship and custody authority, prosecutor, as well as an adopted child who has reached the age of 14. It should be noted that this list is not exhaustive, as some legal acts provide for the possibility of other persons to file a claim. In particular, Article 31(3)(3) of the Law of Ukraine "On Ensuring Organisational and Legal Conditions for Social Protection of Orphans and Children Deprived of Parental Care"[61] provides for the right of foster parents (spouses or unmarried individuals who have taken at least five orphans and/or children for upbringing and co-

60 Postanova Kasatsiinoho tsyvil'noho sudu vid 25.04.2019

61 Pro zabezpechennia orhanizatsiino-pravovykh umov sotsial'noho zakhystu ditei-syrit ta ditei, pozbavlenykh bat'kivs'koho pikluvannia : Zakon Ukrainy vid 13.01.2005

habitation, deprived of parental care, and who, by decision of the guardianship and custody authorities, have been granted the status of foster parents) to file a claim with the court to cancel the adoption or invalidate it in respect of the children who lived with them and were placed for adoption. There is no statute of limitations on the claim for cancellation of adoption. Following the implementation of a court ruling that declares an adoption null and void or cancels it, the court is required to send a copy of the ruling to the state civil registry office where the child's birth was registered. Within one month, the registry office will then make the necessary amendments to the child's birth record based on the court's decision to cancel or invalidate the adoption.

6.3. Legal consequences of the cancellation of adoption

In the event of a cancellation of adoption, unlike the recognition of adoption as invalid, the rights and obligations arising in connection with adoption between the child and the adoptive parent and his or her relatives are terminated for the future. Another consequence of the cancellation of an adoption, similar to the recognition of an adoption as invalid, is the restoration of rights and obligations between the child and his or her parents and other relatives by descent.

After the adoption is cancelled, the child is handed over to the parents or other relatives at the request of the parents or other relatives, or if this is not possible, the child is placed under the care of a guardianship and custody agency. In addition, the child has the right to retain the surname, name, and patronymic that he or she received in connection with the adoption, or at his or her request, he or she is assigned the surname, name, and patronymic that he or she had before the adoption.

The Family Code also provides for special legal consequences of the cancellation of adoption if it is cancelled on the grounds that the adoption is contrary to the interests of the child or that the child is not provided with family upbringing. In such cases, if the child is not handed over to the parents, the court may decide to preserve the child's right to live in the residential premises in which he or she lived after the adoption and/or to recover

child support from the person who was the child's adoptive parent, provided that the latter can provide financial assistance.

6.4. Termination of parental rights of an adopted parent

The Family Code of Ukraine has implemented a new provision, which allows for the termination of parental rights not only for biological parents, but also for adoptive parents. According to Article 242 of the Family Code of Ukraine, a person who adopts a child and is registered as their mother or father can have their parental rights taken away for the same reasons as biological parents. These reasons include avoiding their responsibilities as a parent, mistreating the child, being a chronic alcoholic or drug addict, exploiting the child in any way, forcing the child to beg or become a vagrant, or being convicted of a deliberate crime against the child.

It is important to highlight a specific disadvantage of the clause on the removal of parental rights from the adoptive parent in this situation. One limitation is that only a parent who has formally voiced their desire and has been officially registered in the Birth Registration Book by the child's biological mother or father can have their parental rights revoked. One must concur with L.A. Baranov's[62] assertion that all adoptive parents are bestowed with parental rights, regardless of whether they are officially recorded as the child's mother or father. The deprivation of parental rights should be regarded as a punitive action, an extraordinary means of exerting influence on an adoptive parent who neglects their parental duties, motivated by the necessity to provide the utmost protection of the child's rights. Hence, this penalty can only be enforced through legal proceedings and is contingent upon a thorough, comprehensive, and unbiased evaluation of all aspects pertaining to the situation. Nevertheless, the Supreme Court has ruled that the plaintiff, who is the child's biological mother, had inherent parental rights over the defendant. These rights were granted to her by a court ruling that initially revoked her parental rights but was later overturned. Revoking a court ruling on the termination of parental rights nullifies its

62 Simeine pravo Ukrainy, 2009, p. 224.

ramifications, including the entitlement to adoption. Given that the child's mother had her parental rights revoked throughout the adoption process, the court's decision to nullify the adoption reinstated her rights as a parent. Therefore, the adoption necessitated the mother's assent[63].

The deprivation of parental rights has specific consequences outlined in Article 166 of the Family Code of Ukraine. These consequences include: 1) the adopter loses personal non-property rights towards the child and is no longer obligated to raise the child; 2) the adopter is no longer the child's legal representative; 3) the adopter loses the entitlement to benefits and state aid provided to families with children; 4) may not be an adoptive parent, guardian or foster parent; 5) cannot receive in the future the property rights related to parenthood that she could have had in case of her disability (the right to child support, the right to a pension and compensation for damage in case of loss of the breadwinner, the right to inheritance); 6) lose other rights based on kinship with the child. Furthermore, the adoptive remains obligated to financially support the child. If the adopter's parental rights are terminated, the court has the authority to order the payment of child support upon the request of the plaintiff or at its own discretion. According to Part 2 of Article 242 of the Family Code of Ukraine, if an adoptive parent who has been stripped of their parental rights dies, the child has the right to inherit on an equal basis. These clauses enable us to view the termination of parental rights as both a kind of accountability for the adopter and a safeguard for the adopted child.

The CCC of the Supreme Court upheld the decision by which the plaintiffs were denied cancellation of the adoption and deprived of their parental rights. The Supreme Court issued the relevant ruling in case No. 175/1713/20 (proceedings No. 61-189св22) on 23 June 2022[64]. The plaintiffs legally adopted a minor child, who subsequently exhibited character flaws and inappropriate conduct. Consequently, they petitioned the court to nullify the adoption. The guardianship and custody authority submitted a counterclaim seeking to terminate the adopted parents' parental rights and obtain

63 Postanova Verkhovnoho Sudu u skladi Ob`iednanoi palaty Kasatsiinoho tsyvil'noho sudu vid 05.09.2022

64 Rishennia Verkhovnoho Sudu vid 23.06.2022

compensation for their failure to fulfil their parental obligations adequately. The trial court rejected the first claim and partially accepted the counterclaim, as the prospective parents were cognizant of the child's medical condition and behavioural traits resulting from a challenging upbringing prior to the adoption. The Court of Appeal reversed the lower court's ruling and affirmed the first claim, asserting that, irrespective of the adoptive parents' intentions, they were unable to live together with the child and fulfil their parental responsibilities. The counterclaim was rejected[65]. The Supreme Court, composed of the panel of judges of the Third Judicial Chamber of the Civil Court of Cassation, overturned the decision of the Court of Appeal and upheld the decision of the court of first instance, noting that the child was adopted by the parents and lived with them for 2.5 years, after the deterioration of relations with the child, the adoptive parents did not seek professional help to establish the causes of the boy's inappropriate behaviour and evaded assistance in resolving the issue of his psycho-emotional state. Instead, they returned the boy to the guardianship and custody authority and did not visit him after that, so there was no reason to cancel the adoption, and the Supreme Court deprived them of parental rights and recovered alimony from the couple in favour of the person (institution) that would act as the child's legal representative (adoptive parent).

The adoptive parent's parental rights may be restored if the adoptive parent applies to the court in case of a change in the adoptive parent's behaviour and the absence of circumstances that were the basis for the deprivation of parental rights. In this case, the court makes a decision if it is in the child's best interests. Restoration of parental rights is not possible if the child has reached the age of majority at the time of the court hearing or if the child has been adopted and the adoption has not been cancelled or invalidated by the court. Clause 7 of the Resolution of the Plenum of the Supreme Court of Ukraine[66] states that if both an application for adoption and an application for restoration of parental rights are submitted to the court at the same time, these applications should be combined and reviewed together. Additional-

65 Bakonina, O., 2022.

66 Pro praktyku zastosuvannya sudamy zakonodavstva pry rozhlyadi sprav pro usynovlennya i pro pozbavlennya ta ponovlennya bat'kivs'kykh prav: Postanova Verkhovnoho sudu Ukrayiny vid 30.03.2007

ly, if a child has not been taken into their family for upbringing within two months after birth, the entry about the child in the Book of Births should be made in accordance with Article 135 of the Family Code of Ukraine.

The distinction between the institutions of deprivation of parental rights and cancellation of adoption can be summarised as follows: - Deprivation of parental rights allows for the possibility of restoration, whereas cancellation of adoption does not provide for such a possibility according to the Family Code of Ukraine. - Deprivation of parental rights does not sever the relationship between the adoptive parent and the child, while cancellation of adoption results in the termination of this relationship. - Deprivation of parental rights does not exclude the child from being considered a legal heir, whereas cancellation of adoption does. - In cases where the adoptive parent is deprived of parental rights, the child remains in their family environment, giving them the opportunity to be cared for by their "legal" grandparents and receive financial support from them. Revoking the adoption denies the child the chance to benefit from this opportunity[67].

Possible consequences for adoptive parents who violate family rights and interests include the imposition of a penalty (fine) for late payment of alimony, the application of the inflation index to the entire period of delayed payment of additional childcare costs, charging an annual interest rate of three percent on the overdue amount of additional childcare costs, invalidation of the adoption, cancellation of the adoption, and the removal of parental rights from the adoptive parent. In family law, the cancellation of an adoption is only applicable in one specific scenario: where the adoption goes against the best interests of the child and fails to provide them with a proper family environment[68]. The adopter's liability is determined by measures such as invalidation of adoption, cancellation of adoption, and deprivation of parental rights. These measures are imposed by the court on individuals who have committed unlawful acts in the context of adoption. They have negative consequences for the personal, property, and organisational aspects of the guilty party, and may also result in other legal repercussions.

67 Simeyne pravo Ukrayiny, 2002, p. 258.
68 Yefremova, I.O., 2018, p. 93.

7. The secret of adoption

Adoptive parents, while welcoming a child into their family through adoption, want to keep the fact that they are not the child's biological parents a secret, particularly from the youngster. Revealing the reality of adoption can have serious repercussions and may render the adoption itself futile. The Ukrainian family law includes a provision for the concept of adoption confidentiality. The necessity for such an establishment arises from the fact that when a child is adopted, they become a part of the family as if they were born into it. Consequently, revealing the fact of adoption can potentially harm the bond between the involved parties. Assuming a child is adopted at a young age and perceives the adoptive parents as their own, it can be inferred that the bond between them is indistinguishable from that of a biological family. This thesis was confirmed by the European Court in the case I.S. v. Germany (no. 31021/08) from 5 June 2014 the applicant in this case complained of not being able to have regular contact and receive information about her biological children who had been adopted by another couple. She submitted that the German courts' decisions on contact and information with regard to her children had breached her rights, in particular, under Article 8 (right to respect for private and family life) of ECHR. She alleged that she had been promised a 'half-open' adoption, entitling her to contact with and information about the children, which had not been respected. The ECtHR held that there had been no violation of Article 8 (right to respect for private and family life) of the Convention finding that, by consenting to the adoption, the applicant had knowingly given up all rights as regards her biological children. The arrangements concerning her right to regularly receive information about them had in particular been based on a mere declaration of intent by the adoptive parents. The German courts' decision to favour the children's interest in developing in their adoptive family without disruption over the mother's right to respect for her private life had therefore been proportionate[69]. However, if the child is later informed of such facts, the genuine bond between the adopted child and the adoptive parent may greatly diminish. According to Article 227(1) of the Family Code

69 I.S. v. Germany (no. 31021/08) from 5.06.2014

of Ukraine, an adoptive parent has the legal right to keep the fact of adoption a secret from the child they have adopted. They can also request that anyone who knows about the adoption, both before and after the child becomes an adult, keeps this information confidential. If revealing the adoption secret could potentially endanger the child's well-being, he has the legal entitlement to withhold that information. dependent on the study of this provision, it may be inferred that the adopter has the right to keep the fact of adoption a secret from the child they have adopted. Therefore, the decision to preserve the adoption as a secret should be solely dependent on the adopter's will. Scientists observe[70] that adoptive parents have the ability to decide how they will handle the disclosure of secrets to their child. This matter solely pertains to the adoptive parents and their individual choice, which should be determined by their own perspective on the circumstance.

The family law of Ukraine provides a legal protection for the confidentiality of adoption to both Ukrainian nationals and international individuals who are citizens of a country that has a legal aid treaty with Ukraine. The confidentiality of adoption by foreign individuals who are nationals of countries with whom Ukraine has legal aid agreements is guaranteed by the following measures:

1) the adopter has the right to conceal the fact of adoption from the child adopted by him/her and to demand non-disclosure of this information by persons who became aware of it both before and after the child reaches the age of majority. The adopter also has the right to conceal the fact of adoption from the child if disclosure of the adoption may harm the child's interests.
2) if a child under the age of seven is adopted, officials, upon discovering the child's consent to adoption, are obliged to take measures to ensure the secrecy of the adoption from the child (part 3, Article 227 of the Family Code of Ukraine).
3) Persons who, in connection with the performance of their official duties, have access to information on adoption (registration of persons wishing to adopt a child, search for a child for adoption, submission of

70 Pys'menna, O.P., Zadorozhna, I.Yu., 2016, p. 110.

an application for adoption, consideration of an adoption case, supervision of the rights of the adopted child, etc.), as well as other persons who have learned of the fact of adoption, are obliged not to disclose it, including when the adoption is not secret for the child (part 1, article 228 of the Family Code of Ukraine).

4) information on adoption is issued by the court only with the consent of the adopter, except when such information is required by law enforcement agencies, a court in connection with a civil case or criminal proceedings (part 2, Article 228 of the Family Code of Ukraine).
5) a person who has filed an application for adoption may wish to be recorded in the Birth Registration Book as the mother, father of a child or adult. The court shall satisfy such an application by the adopter in the adoption decision if it is in the child's best interests (Article 229 of the Family Code of Ukraine).
6) The person who filed the adoption application may wish to change the information about the child's place and date of birth. In the adoption decision, the court changes the information about the child's place and date of birth if it is in the child's best interests. The date of birth of a child may be changed for no more than six months (Article 230 of the Family Code of Ukraine).
7) The adopted person's surname, name and patronymic are changed in accordance with the procedure established by law (Article 231 of the Family Code of Ukraine).
8) Persons who disclose the secret of adoption are liable under the law (Article 228(4) of the Family Code of Ukraine): - Criminal. Article 168 of the Criminal Code of Ukraine establishes liability for disclosure of the secret of adoption. If the disclosure of the secret of adoption took place against the will of the adopter, the perpetrator is punishable by a fine of up to 50 tax-free minimum incomes, or community service for up to 240 hours, or correctional labour for up to 2 years. In case the same act is committed by an official or employee of a medical institution who became aware of the adoption in the course of their duties or work, or if it entailed grave consequences, the perpetrator shall be punished by a fine of up to 200 tax-free minimum incomes, or restraint of liberty

for up to 3 years, or imprisonment for the same term, with or without deprivation of the right to hold certain positions or engage in certain activities for up to 3 years; - Civil liability. Such liability is carried out in the form of compensation for property damage (compensation for damage related to additional costs of moving to another area, treatment of a morally injured child in medical institutions) and moral damage, which consists of mental suffering caused by the unlawful behaviour of the perpetrator[71]; if the acts of disclosure of the secret of adoption were committed by an official, he or she may be subject to disciplinary liability.

An adopted child has the entitlement to maintain confidentiality, even from themselves, regarding the knowledge of their adoption. Nevertheless, after the child turns fourteen, they are entitled to obtain information regarding their adoption.

Simultaneously, the Family Code of Ukraine imposes limitations on the confidentiality of adoption for foreigners in some instances involving Ukrainian citizen children. According to Article 285 of the Family Code of Ukraine, if a person from a country without a legal assistance treaty with Ukraine wants to adopt a Ukrainian child, certain conditions must be met.

1) The adoption is not considered confidential if it is not kept confidential in the state where the adopter permanently lives and where the child is going to be relocated.
2) The information is not considered confidential if the individual does not have a permanent residence in Ukraine.

Therefore, Ukrainian citizens, foreigners who are citizens of a country that has a legal assistance agreement with Ukraine, and foreigners who are citizens of a country that does not have a legal assistance agreement with Ukraine, are entitled to adoption confidentiality, as long as they have permanent residency in Ukraine. If the adopter is a citizen of a state that lacks a contract with Ukraine for the supply of legal assistance, and if the adopter does not have a permanent residence in Ukraine, then the adoption cannot be kept confidential.

71 Simeyne pravo Ukrayiny, 2008, p. 134.

The confidentiality of adoption is upheld through the obligation of discretion, which is imposed on all individuals, including those who have been provided with information by the adoptive parent[72]. Various techniques are employed to safeguard the confidentiality of adoption. Primarily, family law mandates that officials with access to adoption-related information during their official duties must refrain from exposing such information. This is particularly applicable when the adoption pertains to an individual seeking to adopt a child, the geographical location of individuals desiring to adopt a child, the submission of an adoption application, and the evaluation of an adoption case. Officials such as judges, assessors, court clerks, administrators, representatives of the applicant for adoption, and representatives of guardianship and custody authority are included in this category. Furthermore, according to Ukrainian legislation, officials are required to maintain the confidentiality of the adoption process from the child, specifically if the child is below the age of seven and has given consent to the adoption. This requirement is not just applicable to officials, but also to those who have become cognizant of the adoption. Unless compelled by the court in a civil or criminal proceeding, the disclosure of adoption-related information is contingent upon the adopter's consent. Granting the adopter the right to be officially documented as the child's father or mother in the Birth Registration Book serves as an extra measure to ensure the confidentiality of the adoption process.

8. The amount and procedure for receiving financial assistance for an adopted child

Many laws and regulations govern the receipt of financial assistance for an adopted child. However, the most important of these are the CMU Resolution No. 1751 "On Approval of the Procedure for Appointment and Payment of State Assistance to Families with Children"[73], the Laws of Ukraine "On

72 Romovska, Z.V., 2009, p. 459.

73 Pro zatverdzhennia Poriadku pryznachennia i vyplaty derzhavnoi dopomohy simiam z ditmy: Postanova Kabinetu Ministriv Ukrainy; Poriadok vid 27.12.2001

State Assistance to Families with Children"[74] and "On Amendments to Certain Legislative Acts of Ukraine on State Support for Families that Adopted a Child from Among Orphans or Children Deprived of Parental Care"[75].

Presently, the allocated sum of aid stands at UAH 41280 (EUR 1,035). Payments commence incrementally over a span of three years, commencing from the day of adoption. The adopter will get an initial payment of UAH 10,320 as soon as the decision to give the allowance is confirmed. The remaining payments will be made in equal monthly installments of UAH 860 over a period of 36 months or three years. This stipend is provided for each child who is adopted, in the event that multiple children are adopted. Consequently, the subsequent adopted children, starting with the second and third, will also get a sum of UAH 41,280. This amount will be disbursed through the allowance system, following the same payment procedure. This benefit is granted to those who have legally adopted a child on or after 1 January 2009, regardless of whether they are already receiving other forms of benefits for their adopted or biological children.

Allowances are granted to families who have adopted and are currently raising an orphan, a child who lacks parental care, or a child whose parents have given their agreement for adoption. If the child is adopted by a married couple, one of them will be eligible to receive the benefit. The spouses determine their respective roles as husband or wife. Spouses who adopt the child of their partner will not be eligible for help. Support will only be offered if the child is adopted from a third party.

To be eligible for state assistance related to adoption, you must submit an application to the Centre for Social Protection of the Population (CNAP) located in your place of residence or to the relevant social protection authorities. The executive bodies of village, town, and city councils can also accomplish this task. The candidate personally submits an application for financial help. A valid identification document, typically a passport, is necessary. The organisation responsible for providing and disbursing the aid

74 Pro derzhavnu dopomohu sim'yam z dit'my: Zakon Ukrayiny vid 21.11.1992

75 Pro vnesennya zmin do deyakykh zakonodavchykh aktiv Ukrayiny shchodo derzhavnoyi pidtrymky simey, yaki usynovyly dytynu z chysla ditey-syrit abo ditey, pozbavlenykh bat'kivs'koho pikluvannya. Zakon Ukrayiny vid 23.09.2008

must evaluate the application within a period of ten days. This governing body has the authority to determine whether to approve or deny the provision of aid.

In the event that the applicant disagrees with this decision, they have the option to lodge an appeal with the District Administrative Court. The provided aid may be revoked in compliance with the legislation. This can occur when the individual receiving the allowance loses their parental rights, voluntarily relinquishes their responsibility for raising the child, misuses the funds and neglects to provide adequate care and upbringing for the child, or is incarcerated or detained by a court order. Additionally, it is important to acknowledge the presence of issues such as a deficient familial culture, parental neglect or unawareness in child upbringing, inadequate focus on the child's spiritual and moral development, and other related concerns.

Furthermore, it may encompass issues such as: 1. Corruption and inequitable behaviours within healthcare and social protection organizations; 2. Inadequate dissemination of knowledge and limited public consciousness Adoption and its potential are often overlooked by a significant number of individuals. This issue can be resolved by implementing a campaign aimed at distributing and facilitating access to information regarding adoption. 3. Issues pertaining to the process of making decisions. 4. Adoption procedures that are protracted and intricate. 5. Insufficient progress in the establishment of the guardianship system; 6. Insufficient parental training initiatives; 7. Inadequate child protection mechanisms. 8. Inadequate readiness of children's households for the rearing of their children; 9. Socioeconomic conditions in the nation. Many couples seeking to adopt a child may encounter challenges such as poverty, unemployment, and limited access to education and healthcare facilities[76].

76 Pavliuk, N.M., 2023, p. 200.

9. Adoption of children by citizens of Ukraine residing abroad and foreigners

Adoption of a child who is a citizen of Ukraine but resides outside Ukraine is carried out in accordance with Article 282 of the Family Code of Ukraine[77]. According to Article 31 of the Decree of the President of Ukraine of 2 April 1994 No. 127/94 "On the Consular Statute of Ukraine"[78], the adoption of a child who is a citizen of Ukraine and resides outside Ukraine is carried out by a consul. In this case, the adoption procedure is regulated by Chapter 18 of the Family Code of Ukraine, Resolution of the Cabinet of Ministers of Ukraine No. 905 of 8 October 2008 "On Approval of the Procedure for Conducting Adoption Activities and Supervising the Observance of the Rights of Adopted Children"[79], etc. If the adopter is not a citizen of Ukraine, the adoption of a child who is a citizen of Ukraine requires a permit from the central executive body implementing state policy in the field of adoption and protection of children's rights**.** Ukrainian government should allow foreign adoption organisation representative offices to work in Ukraine if they have a permit. All these organisations should be inspected annually by their country's competent authorities, have qualified staff, monitor and report on the child's consular registration, living conditions, and upbringing, and have experience adopting special needs children[80].

There are three different approaches used by neighbouring states of Ukraine and EU member states when it comes to determining the procedure for foreign nationals adopting children. The first approach is to have a national regime for foreigners that is similar to that of the citizens of the respective state (e.g. Latvia). The second approach is to have conflict of laws applicable to adoption relations, as defined in the civil code of Ukraine. The third approach is to allow the adoption of a child by a foreign national. In Poland, adoption is permitted if there is a familial relationship between the adopter and the adopted child, or if the adopter has already adopted a sib-

77 Simeinyi kodeks, 2002.
78 Pro Konsulskyi statut Ukrainy: Ukaz Prezydenta Ukrainy; Statut vid 02.04.1994
79 Pro zatverdzhennia Poriadku provadzhennia diialnosti z usynovlennia ta zdiisnennia nahliadu za dotrymanniam prav usynovlenykh: Postanova Kabinetu Ministriv Ukrainy vid 08.10.2008
80 Hubanova, O.V., 2011, p. 13.

ling. Foreign individuals desiring to adopt a child in Bulgaria are required to acquire authorization for intercountry adoption from the Minister of Justice. In contrast, in Belarus, one must acquire a written adoption authorization from the Minister of Education, secure the child's agreement for adoption, undergo a one-year registration process, and demonstrate that there is a lack of interest among Belarusian residents to adopt the child. In order to engage in intercountry adoption, people of the Republic of Moldova must formally submit an application to both the Ministry of Health, Labour and Social Protection of the Republic of Moldova and the Department of Social Security and Family Protection. It is crucial to consider the child's ethnicity, culture, religion, language, and other significant variables[81].

The adoption of a Ukrainian child by a foreigner, conducted by the authorities of the child's country of residence, is only considered genuine if previous authorization is obtained from the National Social Service of Ukraine[82]. An adoption of a Ukrainian citizen's child by a foreigner in their country of residence, without the approval of the National Social Service, will not be recognised as valid in Ukraine. However, it will be considered valid in the nation where the adoption takes place[83]. The determination regarding the adoption of a child relies on the documentation maintained at the respective consular office or diplomatic mission of Ukraine for a duration of ten years, following which they are transferred to the archive.

9.1. Adoption of a child of Ukrainian citizenship by a foreigner

The adoption of a Ukrainian child by a foreigner in Ukraine follows the regulations outlined in Chapter 18 of the Family Code of Ukraine, with consideration for the details specified in Article 283. In particular, a child may be

81 Solovei, A., 2022, p. 164.

82 Pro zatverdzhennia Poriadku provadzhennia diialnosti z usynovlennia ta zdiisnennia nahliadu za dotrymanniam prav usynovlenykh: Postanova Kabinetu Ministriv Ukrainy vid 08.10.2008 r.

83 A consular office or diplomatic mission of Ukraine sends the documents specified in subparagraphs 1-3, 5-12 of paragraph 33 of the Procedure for Adoption and Supervision of Adopted Children's Rights, approved by Resolution of the Cabinet of Ministers of Ukraine No. 905 of 8 October 2008, to the Ministry of Social Policy to obtain a permit to adopt a Ukrainian citizen living abroad.

adopted by a foreigner under the following conditions: 1) if there is no citizen of Ukraine willing to adopt the child or take him/her into his/her family; 2) if the child has been registered for at least one year with the central executive body implementing the state policy in the field of adoption and protection of children's rights; 3) the child has reached the age of five; 4) the child is guaranteed rights to the extent not less than that established by the laws of Ukraine. Pogoretska asserts that intercountry adoption is only considered when it is not feasible to keep a child in their original context[84]. Moseychuk A.I. notes that it is inappropriate to impose a moratorium on the adoption by foreigners of children who are citizens of Ukraine, but it is necessary to create an appropriate regulatory framework, first of all, to conclude international agreements between Ukraine and other states whose citizens take children for adoption, in order to ensure proper control over the observance of the interests of the adopted child, while ensuring the priority of national adoption. Furthermore, we should concur with her suggestion to endorse the ratification of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993. This convention includes provisions aimed at safeguarding the rights of adopted children[85]. Article 24 of the Law of Ukraine "On Protection of Childhood" allows foreigners to adopt a Ukrainian citizen child if all other options have been exhausted. The service for children creates a registration and statistical card, the child's social passport, in the Unified Electronic Database of Information on Orphans, Children Deprived of Parental Care and Families of Potential Adoptive Parents, Guardians, Foster Parents, and Foster Parents on the day of registration locally. The service for children's affairs creates a triplicate questionnaire of a child who may be adopted in the Unified Data Bank and places him or her on the regional register if no one wants to adopt or guard them within a month of local registration. If no one wants to adopt or guard the child within a month of the child's stay on the regional registration, one copy of the questionnaire and documents are sent to the National Social Service of Ukraine, which checks the questionnaire and documents, registers the child for adoption in the centralised register, and enters infor-

84 Pohoretska, N.V., 2011, p. 612.
85 Moseichuk, A.I., 2020, p. 188.

mation about him or her in the Book of Children for Adoption. The Unified Data Bank stores registration dates. The National Social Service maintains records on Ukrainian expatriates and foreign individuals seeking to adopt a child resident in Ukraine. Non-native individuals desiring to legally take custody of a child living in Ukraine must formally present their request to the National Social Service[86].

According to Article 283, Part 2 of the Family Code of Ukraine, adoption can take place before the one-year registration period expires or before the child turns five, under the following conditions: 1) The adopter is a relative of the child. 2) The child has a disease listed as chronic viral hepatitis B or C, a disease caused by the human immunodeficiency virus (HIV) resulting in malignant tumours, malignant tumours at stages II - IV, combined immunodeficiencies, phosphorus metabolism disorders, consequences of inflammatory diseases of the central nervous system (with severe paresis and paralysis accompanied by cognitive deficiency), epilepsy, spastic cerebral palsy, blindness in both eyes or one eye, congenital absence of the auricle,

86 Case file includes: 1) a notarized adoption candidate registration application; 2) four copies of a Ukrainian or foreigner's passport or other identity document; 3) a decision on applicants' adoptive parenting potential. The conclusion must include the address, living conditions (number of bedrooms, description of the child's residence room, number of people who will also live in the room, their gender and age, availability of conditions), biographical data, family composition, etc. 4) approval from the applicants' country's competent government to enter and live with the adopted child; 5) a notarized commitment of the applicant (in duplicate) to the National Social Service and the consular office or diplomatic mission of Ukraine to ensure: registration of the child with the relevant consular office or diplomatic mission (naming the office, mission, and address) within one month after the child enters the country of residence; and the adopted child's right to retain citizenship. 6) the other spouse's notarized written permission to the adoption of the child, stating the cause for adoption by one spouse only, unless otherwise authorised by law; 7) an issuing authority or notary-certified certificate of employment with a six-month salary or a copy of the prior calendar year's income declaration; 8) a notarized copy of the marriage document registered with the competent authorities of the country (in duplicate); 9) a health certificate for each applicant; 10) a document on the verification of the facts of presence or absence of a criminal record for each applicant issued by the competent authority of the country of residence; and 11) a document confirming the right of ownership or use of the residential premises, indicating its total and living area 13) a document issued by the competent authority of the applicant's country of residence in the prescribed form or, in the absence of such a document, a notarized written consent of the applicant to the processing of personal data about him/her and the adopted child in all competent authorities of the country of residence (in triplicate) until the adopted child turns 18; 14) information from the competent authority of the applicant's country.

congenital malformations of the heart cavity and connections, heart septum, congenital absence of a limb, Down syndrome, etc.[87]; 3) If one sibling is at least five years old and has been registered with the central executive body responsible for adoption and child protection for at least one year, all siblings can be adopted into the same family. 4) Foreigners have expressed interest in adopting a child who is a sibling of a child they have previously adopted.

Foreigners who are citizens of Ukraine have a preferential right to adopt a child who is a citizen of Ukraine: 1) relatives of the child; 2) citizens of states with which Ukraine has concluded an agreement on the provision of legal assistance. This is due to the fact that such an agreement contains legal norms that regulate the grounds, conditions and procedure for the adoption of children left without parental care[88].

Children are adopted by judicial order. The court hears the case of a foreigner adopting a Ukrainian child with the participation of the applicant (applicants), the authorised executive body, and the child, if he or she is aware of the adoption by age and health condition, as well as interested parties and other persons the court deems necessary to question. Case consideration without the applicant is grounds for decision cancellation. Ukrainian citizenship remains with an adopted child until age 18. Article 8 of the Convention on the Rights of the Child and other international treaties grant adopted children the right to retain their national identity, including citizenship.

Under Ukrainian law, foreigners or Ukrainian citizens abroad must get

87 Pro zatverdzhennia Pereliku zakhvoriuvan, yaki daiut pravo na usynovlennia khvorykh ditei bez dotrymannia strokiv perebuvannia na obliku v tsentralnomu orhani vykonavchoi vlady, do povnovazhen yakoho nalezhat pytannia usynovlennia ta zakhystu prav ditei, a takozh do dosiahnennia dytynoiu piaty rokiv: Nakaz Ministerstva okhorony zdorov'ia Ukrainy vid 27.12.2011

88 In particular, these issues are regulated in Article 37 of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (between the CIS countries, 1993), Article 36 of the Treaty between Ukraine and the Czech Republic on Legal Assistance in Civil Matters (2001), Article 29 of the Treaty between Ukraine and the Republic of Estonia on Legal Assistance and Legal Relations in Civil and Criminal Matters (1995).), Article 30 of the Treaty between Ukraine and the Republic of Poland on Legal Assistance and Legal Relations in Civil and Criminal Matters (1993), Article 28 of the Treaty between Ukraine and the Republic of Latvia on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1995), etc.

the National Social Service's permission to adopt a child. This agency manages international adoption. Currently, the National Social Service does not assess cases or grant consents/permits for foreigners and Ukrainian nationals abroad to adopt children. Due to the active hostilities, it is impossible to ensure high-quality verification of foreign citizens' documents who want to adopt a child, ensure contact between the candidate and the child, find out the child's opinion on adoption by this candidate, and obtain opinions and consents from the parties involved.

9.2. Adoption of a non-citizen child residing in Ukraine

Adoption involving a foreign element is governed by the personal law of both the child and the adopter, as recognised in private international law. The principle mentioned is established in both Article 69[89] of the Law of Ukraine "On Private International Law"[90] and Article 284 of the Family Code of Ukraine. According to Article 284, the adoption of a foreign child who is currently living in Ukraine can be done by either Ukrainian citizens or foreigners who are residing in Ukraine based on general criteria.

A child who is a non-native and currently lives in Ukraine may be eligible for adoption if they meet one of the following criteria:

1. They are an orphan or have been deprived of parental care.
2. was relinquished at a maternity hospital or another healthcare facility or declined to be accepted by parents or other relatives (in such instances, the child may be eligible for adoption once they reach two months of age).

89 Poriadok usynovlennia hromadianamy Ukrainy abo inozemtsiamy dytyny, yaka ye inozemtsem i prozhyvaie v Ukraini, rehuliuietsia Haazkoiu konventsiieiu pro zakhyst ditei ta spivrobitnytstvo v haluzi mizhderzhavnoho usynovlennia vid 29 travnia 1993 r. (ne ratyfikovana Ukrainoiu), Yevropeiskoiu konventsiieiu pro usynovlennia ditei (perehlianuta) vid 27 lystopada 2008 r. (ratyfikovana Ukrainoiu 1 veresnia 2011 r.), hlavoiu 18, st. 284 SK Ukrainy, Postanovoiu KMU vid 8 zhovtnia 2008 r. № 905 «Pro zatverdzhennia Poriadku provadzhennia diialnosti z usynovlennia ta zdiisnennia nahliadu za dotrymanniam prav usynovlenykh» toshcho.

90 Pro mizhnarodne pryvatne pravo: Zakon Ukrainy vid 23.06.2005 r.

3. was abandoned or discovered (in this scenario, the individual may be adopted two months after being found).

The individual eligible to adopt a child who is a foreigner and lives in Ukraine may be either a Ukrainian citizen or a foreigner residing in Ukraine. They must be legally competent and at least twenty-one years old, unless they are a relative of the child. Additionally, the adopter must be at least fifteen years older than the child they intend to adopt.

According to Article 9 of the European Convention on the Adoption of Children of 27 November 2008, adoption of a child is only allowed if the adopter has attained the legally determined minimum age, which must be at least 18 years and no more than 30 years. An optimal age difference of at least 16 years should be considered between the adopter and the child, prioritising the child's best interests[91]. Part 1 of Article 211 of the Family Code of Ukraine sets the minimum age requirement for adoptive parents at twenty-one years-of-age, in accordance with the standards outlined in the European Convention on the Adoption of Children. Nevertheless, it is necessary to align part 2 of Article 211 of the Family Code of Ukraine with European norms, specifying that an individual seeking to adopt must be at least sixteen years older than the child they intend to adopt.

Adoptive parents can include spouses. If a child's legal relationship with their only mother or only father is terminated due to adoption, a single man or single woman may become the child's adopter. There is no restriction to the number of children that one person can adopt[92].

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91 Yevropeiska konventsiia pro usynovlennia ditei (perehlianuta) vid 27.11.2008 r.

92 Persons who are: 1) of the same sex; 2) have low legal competence; 3) have been pronounced incapable; 4) have lost parental rights without restoration; 5) adopted another child but had to cancel or invalidate the adoption due to their fault; 6) use booze or drugs; 7) lack a permanent residence and income; 8) suffer from diseases approved by the central executive body responsible for health care policy (tuberculosis, HIV disease, organic, including symptomatic, mental disorders, schizophrenia, schizotypal disorders, personality and behavioural disorders in adulthood, mental retardation, Alzheimer's disease, fourth-stage cancer, etc.). 10) have been convicted of crimes against life and health, freedom, honour and dignity, sexual freedom and inviolability, public safety, public order, and morality in the field of trafficking in narcotic drugs, psychotropic substances, their analogues or precursors, as well as Articles 148, 150, 150-1, 164, 166, 167, 169, 181, 187, 324, 442 of the Criminal Code of Ukraine, or have an unspent or unexpunged conviction for other crimes.

If several people want to adopt the same foreigner who lives in Ukraine, a Ukrainian citizen who is a relative of the child, the husband or wife of the child's mother or father, or who adopts several children who are brothers, sisters, or in whose family the child is raised has priority. If several foreigners want to adopt the same foreigner living in Ukraine, a relative or a citizen of a state with which Ukraine has an agreement on legal assistance has priority.

Foreign children in Ukraine can be adopted with parental consent. Parents must consent unconditionally to adoption. Child must be two months old to get parental approval for adoption. Both parents must consent if the child's parents are minors. Notarized parental consent to adoption is required. Before the adoption court ruling takes effect, the child's parents might withdraw their consent. Foreign children living in Ukraine must consent to adoption if they are old enough. Adoption consent depends on a child's age and health. Children must understand adoption's legal repercussions. Adoption is done without consent if the child is too young or sick to know. Adoption does not require consent if a child lives with the adoptive parents and considers them parents. Article 219 of the Family Code of Ukraine allows the adoption of a foreigner living in Ukraine without the consent of the parents if they are unknown, missing, incapacitated, deprived of parental rights, or have not taken the child to their family within two months of birth.

Citizens of Ukraine or foreigners living in Ukraine who want to adopt a foreign child apply to the court. The court considers 1) the state of health and financial situation of a Ukrainian citizen or foreigner residing in Ukraine who wishes to adopt a child, his or her marital status and living conditions, and attitude to raising a child; and 2) the reasons why the person wants to adopt; 3) why the other spouse does not want to be an adoptive parent, if only one spouse has applied for adoption; 4) the correspondence between the person wishing to adopt a child and the child, and how long this person has been caring for the child; 5) the child's identity and health condition; and 6) the child's attitude towards the adopter.

9.3. Adoption of a child by a foreigner or a stateless person

Adoption by a foreigner or a stateless person is carried out in Ukraine in accordance with the laws of Ukraine, unless otherwise provided by international treaties of Ukraine[93]. The Hague Convention must be ratified in Ukraine to ensure the rights of adopted children by foreigners[94].

The Ministry of Social Policy of Ukraine is responsible for providing foreigners who are candidates for adoption with information about children who may be adopted and issuing referrals for them to meet the child, with priority given to candidates for adoption who are relatives of the child; wish to adopt a child who is a brother or sister of a child previously adopted by them; wish to adopt a child suffering from a disease included in the list of diseases approved by the Ministry of Health of Ukraine that give the right to adopt a child under the age of five, as well as without observing the terms of the child's registration with the Ministry of Social Policy[95].

Foreign candidates for adoption meet the child at his/her residence in the presence of a representative of the service for children, employees of the child's or other institution, foster parents, guardians, and trustees. Candidates for adoption may meet the child at the children's service or in another region at the request of foster parents, foster carers, guardians, or custodians.

To obtain the written consent of the Ministry of Social Policy of Ukraine for the adoption of a child, foreigners must submit a relevant application, a conclusion on the feasibility of adoption and its compliance with the child's interests, copies of the documents specified in paragraph 73 of the Proce-

93 Haazkoiu konventsiieiu pro zakhyst ditei ta spivrobitnytstvo v haluzi mizhderzhavnoho usynovlennia vid 29 travnia 1993 r. (ne ratyfikovana Ukrainoiu), Yevropeiskoiu konventsiieiu pro usynovlennia ditei vid 27 lystopada 2008 r. (ratyfikovana Ukrainoiu 1 veresnia 2011 r.), hlavoiu 18, st. 286 SK Ukrainy, Postanovoiu KMU vid 8 zhovtnia 2008 r. № 905 «Pro zatverdzhennia Poriadku provadzhennia diialnosti z usynovlennia ta zdiisnennia nahliadu za dotrymanniam prav usynovlenykh» toshcho.

94 Berezovska, K.I., 2018, pp. 270-276; Berezovska, K.I., 2019, p. 6.; Zaborovskyi, V.V., Hechka, K.V., 2015, p. 69.

95 Pro zatverdzhennia Pereliku zakhvoriuvan, yaki daiut pravo na usynovlennia khvorykh ditei bez dotrymannia strokiv perebuvannia na obliku v tsentralnomu orhani vykonavchoi vlady, do povnovazhen yakoho nalezhat pytannia usynovlennia ta zakhystu prav ditei, a takozh do dosiahnennia dytynoiu piaty rokiv: Nakaz Ministerstva okhorony zdorov'ia Ukrainy vid 27.12.2011 № 973.

dure for conducting adoption activities, and oversight of adoptee rights[96]. The Ukrainian-language, notarized application must include the following: surname, name, patronymic, address of foreigners applying for adoption, Ministry of Social Policy registration number, date of birth, place of residence (stay) of the child to be adopted, etc. The National Social Service reviews the adoptive parents' consent application and documentation within 10 working days. Unless the MIA finds compromising information in the law enforcement agencies of the foreigners' home state, their residence state, or the Interpol General Secretariat, the application is considered within 10 working days. If needed to clarify papers or verify new circumstances, the application may be delayed for up to 20 working days. The court at the child's domicile hears foreign adoption applications. After examining all relevant factors, the court decides on adoption or refusal.

9.4. Monitoring intercountry adopted children's rights

The state of origin of the child and the adoptive parents' state defend the rights and interests of intercountry adopted children under international law. In Ukraine, consular offices and diplomatic missions, on behalf of the Ministry of Foreign Affairs, keep records of children adopted by foreigners and living outside Ukraine and supervise their rights until they turn 18 (Article 287 of the Family Code of Ukraine). Ukrainian consular offices or diplomatic missions review adoptive parents' reports on the child's living conditions and health and report to the Ministry of Foreign Affairs on adopted children's rights by February 1. The Ministry of Foreign Affairs of Ukraine sends information to the Ministry of Social Policy by March 1. After the child turns 18, the relevant Ukrainian consulate office or diplomatic mission keeps reports from adoptive parents on the child's health and living conditions for three years. The guardianship and custody authority that oversees the rights of an adopted child living in Ukraine (Article 235 of the Family Code of Ukraine) destroys the documents after this period.

96 Pro zatverdzhennia Poriadku provadzhennia diialnosti z usynovlennia ta zdiisnennia nahliadu za dotrymanniam prav usynovlenykh: Postanova Kabinetu Ministriv Ukrainy vid 08.10.2008

The children's service receives a verified adoption decision from the court. It is issued in four copies for foreigners or Ukrainian citizens living abroad who adopt a child. The Service for Children sends two duly certified copies of the court decision on the adoption of a child to the National Social Service of Ukraine within five days of its entry into force to deregister the child and candidates for adoptive parents and submit the court decision to the Ministry of Foreign Affairs of Ukraine.

To supervise the rights of adopted children living outside Ukraine, the National Social Service sends to the MFA within one month of receiving the court decision on the adoption of a child: a copy of the court decision; a written commitment of the candidates for adoptive parents, as provided for in subparagraph 5 of paragraph 33 of the Procedure for Conducting Adoption Activities and Supervising the Observance[97]. After obtaining the documentation from the National Social Service, the MFA orders the relevant consular office or diplomatic mission of Ukraine to register the child and monitor his or her rights within one month.

Thus, there are many issues despite the law's rigorous regulation of regulating adopted children's rights in intercountry adoption. We agree with O.V. Gubanova[98] that the main urgent issues are the inability of consular officers to visit adoptive families due to their small number, the absence of Ukrainian diplomatic missions in some countries, and the lack of adoption registration. Ukrainian consular offices or diplomatic missions safeguard adopted children's rights when they learn of violations. If the causes of the child's rights violation cannot be eliminated, the Ukrainian consular post or diplomatic mission at the adopted child's residence helps resolve the adoption cancellation or invalidation issue within its authority.

The Ukrainian consular office or diplomatic mission helps return the child back to Ukraine when the adoption is revoked. The service for children places such a child at the orphanage or child without parental care.

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97 Pro zatverdzhennia Poriadku provadzhennia diialnosti z usynovlennia ta zdiisnennia nahliadu za dotrymanniam prav usynovlenykh: Postanova Kabinetu Ministriv Ukrainy vid 08.10.2008

98 Hubanova, O. V., 2011, p. 9.

10. Adoption with the implementation of martial law

Under martial control, the process of adopting children in Ukraine remains unchanged and it has not made easier[99]. The adoption of children under martial law is conducted only in line with the legislation of Ukraine. During times of war, adoption of children is limited to regions without active hostilities and where the state authorities of Ukraine and local self-government bodies are functioning normally. Adoption is only considered for children whose family background has been thoroughly investigated. Furthermore, the courts are currently unable to fully exercise their authority, thereby hindering the organisation of the adoption process in numerous regions of Ukraine. Authoritative information regarding children available for adoption can solely be obtained from the children's service at the location where the child is registered and exclusively shared with prospective adoptive candidates.

On June 1, 2023, the Government implemented certain measures to enhance the safeguarding of children's rights[100]. Specifically, it let foreign individuals who are married to Ukrainian nationals to legally adopt the child of their spouse during a period of martial law. Unregistered children who have become orphaned due to the armed conflict are ineligible for adoption.

Potential adoptive parents must demonstrate their eligibility for adoption and gather the requisite documentation in order to be registered[101]. The adoption procedure can only commence at that point. It is important to mention that under martial law, the process of adopting a child remains unchanged and uncomplicated. The adoptive parents must first familiarise themselves with the child before submitting an application to the Children's Service. In their application, they express their wish to adopt a child and

99 Osoblyvosti usynovlennia dytyny pid chas voiennoho stanu. Korotko pro holovne. (2023).

100 Prem'ier-ministr: Uriad ukhvalyv nyzku rishen, shcho spriamovani na posylennia zakhystu prav ditei. (2023).

101 An application for registration as adoptive parents; a copy of the applicant's passport or other identity document; a salary certificate for the last 6 months or a copy of the income declaration for the previous calendar year certified by the SFS; a copy of the marriage certificate (if the applicants are married); a health certificate for each applicant; and a notarized written consent from the other spouse to the adoption.

await a determination on the suitability of adoption and its alignment with the child's best interests. The court of the child's place of residence is responsible for making the decision on adoption.

Applicants are not registered as candidates for adoption if: the submitted documents do not meet the requirements; the submitted documents contain corrections or additions not certified in the prescribed manner; the applicants (or one of them) cannot be adoptive parents in accordance with Article 212 of the Family Code of Ukraine; the age difference between the child to be adopted and the applicants is less than fifteen years; the amount of the total income for each family member is less than the subsistence minimum established by law; the applicants' living quarters are in unsatisfactory sanitary and hygienic condition; it is impossible to arrange a place for classes and a separate bed for the child in the applicants' living quarters; during the examination of the applicants' living conditions and interview with them or when studying their documents, circumstances or conditions that may have negative consequences for the upbringing and development of the child were revealed; they refused to sign the act.

In Ukraine's state of emergency or martial law, the government resolved the issue [102]:

- Ukrainian citizens registered as adoptive parents can care for orphans, children deprived of parental care, and children temporarily displaced outside Ukraine.
- The services for children of regional, Kyiv city state (military) administrations at the child's place of residence on local or regional registration (regardless of the level of registration) familiarise candidates for adoptive parents who want to guard, custody, or adopt a child and issue a referral for acquaintance with the child in the order of priority. If foster parents or foster carers consent to placing a child in a foster family or family-type children's home and notify the service for children in writing, one of them may meet the child. The children's service to which the referral was issued arranges for the child's acquaintance with the rela-

102 Pro vnesennia zmin do deiakykh postanov Kabinetu Ministriv Ukrainy shchodo provadzhennia diialnosti z usynovlennia ta vlashtuvannia ditei-syrit, ditei, pozbavlenykh batkivskoho pikluvannia, v sim'i hromadian Ukrainy pid chas voiennoho stanu Postanova Kabinetu Ministriv Ukrainy vid 01.06.2023

tives and determines if the child agrees to be placed in a family, at the child's home outside Ukraine, or via video conference.

- Ukrainian citizens living in Ukraine can adopt children temporarily displaced from institutions outside Ukraine.
- The adoption process involves meeting the child at their place of residence abroad with the institution's head or authorised employee. The service for children to which the referral was issued may participate in a video conference with the child's family at their request.
- The institution's head or an authorised employee informs the child's family, in particular via video conference (with recording equipment), of the child's available documents.
- Adoption of siblings separated following one's relocation outside Ukraine.
- Candidates for adoptive parents must prepare court documentation for the adoption of a child under guardianship or custody. Legal procedures govern the adoption of a guardian or custodian child.
- A referral for meeting the child is issued to the service for children's affairs at the institution, and if it does not exercise its powers, to the service at the residence (stay) of foster parents, foster parents, or candidates for adoption who want to take the child under guardianship or custody.
- One of the spouses may be designated guardian or caretaker of the child for three months, with the decision extended until the court decides on adoption. Candidates for adoption must file a court application within a certain timeframe or be judged to have declined to adopt. The guardianship and custody authority at the child's residence (stay) will decide the child's placement or adoption once the guardian or custodian decision expires.
- Create the State Service of Ukraine for Children as a central executive body, directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Social Policy, to implement state policy in the areas of children's rights, social support for families with children, health improvement and recreation, family-based upbringing, and adoption.[103]

103 Deiaki pytannia Derzhavnoi sluzhby u spravakh ditei: Postanova Kabinetu Ministriv Ukrainy vid 29.09.2023

In Ukraine, it will be allowed to register children for adoption if the children's service does not exercise its powers or does not have access to the Unified Database of Orphans and Children Deprived of Parental Care and the families of potential adoptive parents, guardians, foster parents, foster carers, etc.

The government also changed the Procedure for Granting Status to a Child Affected by Military Action and Armed Conflict. They streamlined the process for temporarily displaced children. Children from Donetsk and Luhansk oblasts and across Ukraine can now claim the status of a child affected by hostilities and armed conflicts. This adjustment allows youngsters to obtain free meals and future Russian Federation compensation.

10.1. Modifications to the adoption process in 2022

The initial modifications to the adoption procedure were implemented on May 24, 2022, marking the first alterations since the commencement of the war. A comprehensive set of documents and a protocol have been devised to facilitate the retrieval of an adopted child, specifically in the event that the child is temporarily relocated outside of Ukraine during a state of emergency or martial law. This process involves the presence of an official from a Ukrainian consular post.

Additional procedural modifications were implemented on May 31, 2022. Specifically, they cater to the following: The adoption processes are being digitised and a unified electronic database is being created for orphans, children without parental care, and potential adoptive families (as well as guardians, trustees, foster parents). This database is maintained in the Unified Information and Analytical System 'Children'.

This would significantly streamline the process of submitting and receiving the required documents by potential adopters, expedite the verification of the provided documents by the competent authorities, and simplify communication among the actors involved in the adoption procedure.

The child's information, including health condition and changes in appearance, is introduced and regularly updated in the Unified Data Bank.

This allows prospective adopters to easily access and monitor information about a specific child.

Citizens of Ukraine have the opportunity to get guidance on the adoption process through both in-person consultations at the Children's Service and online.

To seek guidance regarding the process of adopting a child, you can submit an application for consultation via the Diia portal, which has just introduced a new Adoption service. The forthcoming phase in the advancement of this service will entail the ability to seek the designation of a candidate for adoption in Diia.

Citizens of Ukraine have the ability to submit an application for adoption candidature, along with the necessary papers, in both paper and electronic format, not limited to their place of residence.

Electronic documents are submitted via a personal account on the Unified State Web Portal of Electronic Services. Several documents are automatically generated by the system using data from several databases, state registers, and information systems. Consequently, there is no requirement to individually obtain and submit these documents, as clarified by the Ministry of Social Policy.

Furthermore, the adoption procedure will automatically display pertinent papers, such as a certificate of completion for a training course on raising orphans and children deprived of parental care, in the personal account of prospective adoptive parents.

The established timeframe for the verification of the application and response by the Children's Service is 5 working days after receiving the application. The inspection of the applicants' living conditions will take place 5 working days after the verification of the application. Additionally, the applicant is required to complete a training course on raising orphans and children deprived of parental care within the specified timeframe.

11. Conclusion

The process of child adoption is undertaken with the objective of ensuring the child's well-being and establishing a stable and harmonious environment for their existence. The primary objective of adoption, as a distinct entity under family law, is to offer a secure upbringing in a family for orphans and children who need parental care under specific circumstances. Adoption is the most suitable choice for orphans and youngsters who lack parental care. Intercountry adoption is a fundamental aspect of private international law that aims to support children who lack parental care by placing them with suitable families.

The Law of Ukraine No. 936-VIII, enacted on 26.01.2016, made amendments to the Law of Ukraine "On Protection of Childhood" with the aim of enhancing social protection for children and providing support for families with children. These amendments introduced the concept of 'ensuring the best interests of the child' in accordance with universally recognised international standards. 'Ensuring the best interests of the child' as stated in Article 1 of the Law of Ukraine "On Protection of Childhood" refers to the implementation of actions and decisions that are specifically targeted towards meeting the unique requirements of the child, considering factors such as their age, gender, health condition, developmental characteristics, life experiences, family background, cultural and ethnic background. Additionally, the child's opinion is taken into consideration if they have reached an appropriate age and level of development to express it. As to Article 8 of the Law of Ukraine "On Protection of Childhood", each child is entitled to a level of living that is adequate for their physical, intellectual, moral, cultural, spiritual, and social growth. Parents or individuals acting in loco parentis have the responsibility to establish the essential conditions for the holistic development of the child, in accordance with the laws of Ukraine. An adopted child possesses the same rights and responsibilities as the biological offspring of the adoptive parent. The relatives of an individual likewise possess identical rights and responsibilities as their biological relatives. Adopted children forfeit their individual and asset entitlements and are exempted from their responsibilities towards their biological parents and relatives. Monetizing

adoption is strictly prohibited. According to Article 24 of the Law of Ukraine "On Protection of Childhood," foreign individuals are permitted to adopt a Ukrainian child only if all other options for placing the child in the care, guardianship, adoption, or rearing of Ukrainian residents have been fully explored and exhausted.

Therefore, it is necessary to submit an application to the Service for Children's Affairs in order to be officially registered as adoptive parents. Along with the application, you must provide the required documents as mandated by the law, including copies of identification documents, marriage certificates, salary certificates, health certificates, and proof of ownership or legal use of residential premises, among others.

The process of adopting children is exclusively carried out in a court of law, where the court residing in the child's place of residency makes the final decision on the adoption. The process of adopting a child necessitates obtaining the youngster's consent. Adoption is only possible for children who have been officially registered. The Service for Children and the National Social Service of Ukraine maintain comprehensive records of both adopted children and prospective adoptive parents. The register includes children who lack parental care, orphans, and children whose parents have consented to adoption. In cases where parents do not give their consent for the adoption of a child, the child may only be adopted under specific circumstances. These circumstances include situations where the parents are missing, incapacitated, unknown, or have been deprived of their parental rights in relation to the child to be adopted. Additionally, if the parents fail to bring the child into their family within two months after birth, as stated in Article 135 of the Family Code of Ukraine, the child may also be eligible for adoption.

Only the children's service in charge of child registration has the authority to access information about the child to be adopted and establish communication with them. Ukrainian law mandates that government and local officials must take all necessary actions to ensure that a child is raised by their original parents or other relatives, in order to promote the child's secure and balanced growth. Nevertheless, in the present era, during periods of conflict, when it is unfeasible to precisely ascertain the conditions of both

orphaned children and prospective adoptive parents, child welfare agencies may opt to temporarily place children without parental care in the care of acquaintances or relatives, foster families, or family-style residential facilities.

The adoption dynamics in Ukraine have remained rather stable over the previous three years, with the exception of the hurdles presented by the full-scale invasion. Currently, 1656 individuals who are interested in becoming adoptive parents have initiated the adoption process. Simultaneously, there are 15697 children who have been officially enrolled for adoption[104].

It should be noted that in 2024, the Ministry of Social Policy improved the adoption procedure: candidates for adoption were given the opportunity to take a child into a family before a court decision; the recommendation of age, gender, number of children that a person or family can adopt was cancelled so that candidates are provided with information about a larger number of children on the register.

Beyond these arid statistics lay several additional particulars and human emotions. There is a high demand for foster parents to care for thousands of children. However, it is important for foster parents to be aware of the following key points: - Many potential adoptive parents prefer to adopt children under the age of 5, but a significant number of children in need of adoption are teenagers. - More than 10% of children available for adoption have disabilities. - It is not permissible to separate siblings who are in need of foster care.

The general criteria for foreign nationals to adopt Ukrainian children still apply, although there are certain distinctions and subtleties. An individual from another country is eligible to legally take on the parental rights of a child who is a citizen of Ukraine, provided that the child is at least five years old and has been officially registered with the appropriate governing body for a minimum of one year. If the child is five years old or less and meets the one-year age requirement, he or she may be adopted in the following cases. The child is considered a relative of the adopter if they are a sibling in the same family and meet the following criteria: they have reached the age

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of five and have been registered with the relevant executive authority for at least one year. Additionally, the disease of the sick must be on the list of diseases approved by the central executive authority responsible for healthcare policy. Foreign individuals who possess the right of priority are eligible to adopt a child who is a citizen of Ukraine. The child's parents are residents of the states that have concluded mutual legal assistance agreements with Ukraine . These states include Poland, Lithuania, Latvia, Romania, Moldova, and Georgia. The adoption of a child by a foreigner necessitates the approval of the pertinent executive entity responsible for formulating state policies regarding adoption and safeguarding children's rights. The executive authority submits a formal request to the Ministry of Internal Affairs of Ukraine, seeking to secure access for foreigners who are adopting a child to potentially incriminating information held by law enforcement authorities of other countries and the Interpol General Secretariat. Foreigners are only granted the privilege to adopt after gaining a favourable opinion. Until the age of eighteen, an adopted child retains Ukrainian citizenship.

Adoption is a formal process in which a court grants permission to an individual who wants to bring a child into their family. This is done in accordance with specific legal requirements and processes. This legislation aims to govern specific legal ramifications pertaining to a particular form of legal association between the adoptive guardian and the adopted offspring. The legal relationships between parents, which are regulated by civil and family law, possess a subjective character, encompassing the reasons for their formation, termination, and nature.

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Summary – Best practices in the regulation of adoption

Edit KRISTON*

Article 20 of the Convention on the Rights of the Child (hereinafter: the Convention) is clear when it states that any child who is temporarily or permanently deprived of his or her family environment or who cannot be left in that environment in his or her own interest is entitled to special protection and assistance from the State. States provide this special protection by establishing rules on adoption, which allow the child to receive alternative care similar to the original family environment. The enforcement of the child's best interests is a central element of adoption, which can be consistently and equally traced in the regulations of the countries examined in this volume. The peculiarity of national regulations is that, in accordance with the content of the Convention, it seeks to achieve a twofold aim with the possibility of adoption. The first is to provide a family environment for children where their biological parent is unable to properly care for them, thereby their proper physical, moral and mental development are not ensured. The other goal is to better protect the interests of the child, so that children who are forced to grow up without their biological parents have the same opportunities as the other children, who growing up in the original family environment. According to national rules States that accept and authorise adoption should therefore ensure that the best interests of the child prevail and also adoption of a child is authorised only by competent authorities, that such an adoption may be appropriate for the child and that potential adoptive parents are capable of providing adequate care for the child, and any other rights granted to the child to contact with blood relatives if necessary. According to the Article 21 of the Convention States shall also recognize inter-country adoption as a form of adoption.

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The aim of this volume is to present the good practices of adoption systems in the examined states Their common feature is that the principle of the best interests of the child fully prevails. The national regulations have undergone many changes in relation to adoption in recent years, which results in the national legislation having many common elements. A similar regulatory environment certainly encourages adoptions, as it can also increase the efficiency of inter-country adoptions.

The principle of the best interests of the child is clearly reflected in the legislation of all the countries examined. In view of this, it is important to point out that, in all the national regulations examined, the adoption of minor children is preferred, which is also in line with the provision of the Convention, according to which adoption should function primarily as a legal institution replacing parental care. It is necessary to create a suitable family environment for the child, in which his development can be ensured in the same way as that of his peers brought up in traditional conditions. As a result, adoption of a minor always comes to the fore. However, in Romanian and Polish law we can find the exceptional case of adult adoption. In this case, however, it is a condition that the adoptive parents shall start to take care of and raise the person to be adopted during his or her minor years, i.e. here the goal set by international standards is also achieved. It is also important to emphasise that all national regulations uniformly provide for the possibility of adopting siblings. However, we see different solutions to this in national legislation, since there are cases where specific legal provisions guaranteeing that siblings are adopted together, while there are states where there is no specific legal regulation, yet practice shows the application of the same approach. This type of solution can not only help children integrate more easily into the new family environment and thus reduce the difficulties, anxieties and reservations associated with adoption but also helps children to preserve their right to retain their identity.

National regulations vary in terms of which forms of adoption are permitted. All of the national regulations examined include closed adoption, i.e. the identities of the adoptive and biological parents remain mutually concealed, and the fact of the adoption itself is not disclosed to the child's immediate environment. States emphasize that, in view of cultural characteristics

and the social recognition of adoption, this form is still a priority in practice. However, many countries also offer the possibility of open adoption, which can be a better solution, especially in cases where the child already has sufficient judgment, and his or her individual personality and identity have already been formed and, of course, due to his or her age and maturity, he or she knew his biological parents before adoption. The solution of Serbian law whereby adoption can take place on the basis of an agreement between the child's biological parents, the child and potential adoptive parents should definitely be highlighted. This solution reflects the fact that the biological parent admits that he or she is unfit to properly care for the child, so the child can only be provided with the right conditions and essential elements for his or her development in a different family environment. However, it is important to point out that such an agreement may even lead to abuse, as well as to the objectification of the child and the primacy of possible material interests over the best interests of the child. This is why Hungarian legislation apply the rule that adoption cannot serve a profit-making purpose but must focus solely on the interests of the child – this provision appears to be important and absolutely necessary.

It can also be seen from studies that the developed numerous good practices can be effective primarily in cases where adoption takes place in case of adoption of a newborn or an extremely young child. It should be noted that national reports almost without exception mention situations specific to the adoption of children as difficult. These include, on the one hand, the adoption of children over six years-of-age and the assessment of the specific situation of children with illnesses. Given that all national legislation puts the best interests of the child as a primary consideration, so the difficulties arising from such situations are easily manageable. This principle also helps to check whether potential adoptive parents are aware of the specific situation of these children and the future difficulties – which is certainly a good practice. Highlights include national regulations that provide highly detailed and advance information to potential adoptive parents and extend the assessment of parents' suitability to cover these specific needs.

A comparison of national regulations also shows that adoption itself is an ultima ratio against the incompetence of biological parents. Every State

seeks to separate a child from his or her natural family environment only in situations, which prove harmful to the child. For this reason, all regulations seek to ensure that the biological parent decides primarily whether he or she wants to raise his or her own child and, making a responsible decision, comes to the position that he or she is unfit to do so. Obviously, there are situations, for example, where the parents do not live or are in an unknown place and the measures to trace them fail, with the result that it is unnecessary to wait for the consent of the biological parent or even the biological family to place the child in the family environment. However, national legislation also points out that adoption can also be seen as a measure to eliminate harmful parental behaviour and thus an environment that could be considered toxic or dangerous for the child. We can draw this conclusion from the fact that all national regulations contain a solution for cases where the biological parent is deprived of the right to decide the fate of the children, i.e. his or her consent is not required for the adoption order. One of the recurring and most common elements of this is when the biological parent is unsuitable for ensuring the proper physical, moral and mental development of the child due to his or her behaviour or long-term circumstances or lifestyle, thus he or she is unable to ensure the child's best interests.

The other side of the issue is the selection of potential adoptive parents. All national regulations are consistent with the need for public authorities to proceed with caution when selecting potential adoptive parents and during the adoption process. The legislation of each of the States examined designates the authority or the court itself to carefully examine the legal and practical criteria for prospective adoptive parents and based on these findings, decide whether to allow the adoption. This kind of close control and state intervention is certainly in the interests of the child, and it is particularly good practice in all the States examined. In addition, these procedures place great emphasis on proper examination of future parents and their environment. Almost without exception, all regulations contain the list of circumstances and elements to be examined in detail, while others contain a list of circumstances and elements to be examined using a framework adapted to practical needs, thus further facilitating professionals to find a family environment suitable for the child and adapted to his or her individual needs.

In addition to examining the educational background of a potential parent wishing to adopt, the legal criteria almost without exception also include the appropriate age. All the States examined agree that parenthood should be linked to a certain age, but States set different age limits in this regard. There are also regulations that link the possibility of adoption to the full legal capacity of the adoptive parent. The age difference between a potential adoptive parent and a child is also present as a criterion in many examined regulations – Czech law is special, because the minimum age difference of 16 years can be reduced with the approval of the authorities. Nationality of the parties also examined by the authorities during adoption. However, it is important to emphasise that this does not mean that these national regulations do not allow for the international adoption of children, but merely that domestic, national adoption is preferred. The explanation given by the examined national regulations is that it is in the child's best interests to be integrated into a new family in his or her socio-cultural environment, since cultural differences and different social backgrounds can create significant obstacles to the future success of adoption. However, as has been pointed out, all the national legislation examined provides for the possibility of international adoption where it is in the child's interest. In addition, each state strives to promote adoptions that is in line with the family model that is socially and socio-culturally present in its country. Accordingly, adoption by couples, especially spouses, is emphasized in all national regulations, but it should be noted that no State is averse to solutions that deviate from the traditional family model from the point of view of sociology, especially if such adoptions serve the best interests of the child.

In the context of adoption procedures, two important factors are in conflict which have to be observed in all national legislation. One of them is the time factor. For all the States examined, it is desirable that children shall be placed in a suitable family environment as soon as possible, which can be facilitated in particular by shortening procedural deadlines. A significant number of national regulations aim to ensure that the procedure is carried out quickly and efficiently in a way that brings the best outcome to the child. However, the other factor is to ensure the primacy of blood relationships. By this, the regulation of the States means that biological parents should be given the opportunity to properly consider their declaration of refusal to

care for and raise the child, i.e. their consent to the adoption of the child. All studies point out that national legislators, without exception, give biological parents the opportunity to reconsider their decision and possibly come to the decision that they want to raise their child themselves. National regulations differ in terms of reflection periods, but it is clearly a good practice for biological parents to decide whether to maintain or possibly withdraw their previous declaration after the birth of the child, i.e. after having met the child.

In line with the requirements of international law, it is also important to emphasise that the national regulations examined guarantee that the child's opinion is taken into account in the context of adoption procedures. This, too, is regulated by different legal instruments in the national legal systems examined. In many cases, we find that after reaching a certain age, the child can decide for himself or herself whether or not to consent to adoption. At the same time, it is certainly a good practice and in line with international standards that most of the States do not necessarily link this right to age, but to the child's ability to express his or her will. This is important and a good solution because the Convention itself does not set an age limit for a child's judgment and an opportunity to express his or her own will. Obviously, however, practical experience has led the legislators to find a solution to link the child's consent to the adoption procedure to a specific age in certain national rules, but, as has already been pointed out, these national rules also allow the decision of a child of a lower age who is able to express his or her will.

It is also a good practice that all national legislation shall test whether the cohabitation of potential adoptive parents and the child will work in the future. To this end, almost all of them use mandatory placement, i.e. they monitor and assess over a certain period of time whether the adoption is likely to be successful or not. This solution does not only give those concerned the opportunity to reconsider their decision, but also make it possible to guarantee the child's integration and development in the given family, thus effectively serving his or her interests.

It is important to emphasise that all the national legislation examined provides for the possibility of simplified adoption of certain categories of

persons in addition to the traditional case of adoption (i.e. adoption of spouses, partners or single parents). This may be the case where the step-parent wishes to adopt his or her spouse's child, or even the presence of adoption by relatives in some national legislation. In these cases, the legislator seeks to lay down rules for the conduct of the adoption procedure quickly and more easily, taking into account the prior and special relationship between the parties concerned. The peculiarity of these cases is that, on the one hand, there is a prior relationship between the potential adopter and the child, and on the other hand, there is a greater emotional connection with those concerned. Consequently, it is of particular importance that the legislature assesses these specific circumstances differently.

It is also a good practice that the national regulations examined recognise and apply the institution of adoption follow-up. Within this framework, after the success of the adoption procedure the participating authorities and bodies pay increased attention to the success of the adoption for a further period of time. This will make it possible for those authorities to intervene as soon as possible in the interests of the child if any serious difficulties arise after the adoption has been authorised. The duration of the follow-up varies between national regulations, but all the States examined agree that it shall be carried out within a period, which is in the best interests of the child.

There are also many similarities in the regulation of the States examined regarding the legal effects of adoption. The main legal effect of adoption is the breaking of legal relations between the biological parent and the child, in particular with regard to the exercise of parental authority. The latter right is acquired by the adoptive parents, as a result of which all rights and obligations related to the child belong to them. This means that the legal relationship is now between the child and the adoptive parents, as well as between the child and the family members of the adoptive parents. A special solution is one of the types of adoption in Poland, the so-called incomplete adoption, based on which the relationship is established only between the child and the adoptive parents. It is also typical that, in addition to family law effects, legal consequences of a different nature (e.g. inheritance law) also develop similarly. This is because all national legislation treats adoption as if the child were originally the biological child of the adoptive parents, i.e.

there is no difference between the legal status of the biological child and the adopted child. There are solutions that leave some rights to the biological parent, but this is related to which form of adoption is regulated in the State. Accordingly, where open adoption is available, legislation clearly supports arrangements for keeping touch between the child and the biological parent if necessary. This is certainly a good practice, especially when adopting an older child who is already aware of the fact of adoption itself and its consequences. His own established identity may necessitate that he is not completely separated from his biological parent. Czech law has a special rule, it exceptionally provides for the possibility of inheritance after the blood and the adoptive family as well, especially with regard to the legal consequences of inheritance.

In this context, the question of whether the adopted child has access to data relating to adoption and, in addition, whether he or she can know the circumstances of his or her ancestry, is of particular importance. The Convention clearly states that children have the right to know their family roots and their own identity, but the issue is much more complex at the level of national regulations. One of the reasons for this is that the personal data of the biological parent that the child wishes to know considered as sensitive data, the disclosure of which may take place with the consent of the data subject based on the general principles of data protection. In addition, it is important to note that, although adoption is a legal institution serving the interests of the child, the child's need to know the identity of his biological parents must not prejudice the privacy and self-determination of the biological parents. Indeed, the right of the biological parent to refuse to disclose his/her data is a right recognised by the States examined and can be regarded as a counterbalance to the rights of the child. That right strikes a balance between the legal situation of data subjects. However, there are situations in life, especially with regard to health data, where refusal to disclose data can give rise to serious abuse on the part of the biological parent. In addition, the child's right to health and physical integrity is seriously violated by the fact that the health data of the biological parents are not disclosed. Therefore, it is definitely considered as a good practice that in such special cases, such as the diagnosis of genetic diseases, only health data can be explicitly disclosed by hiding the identity data of the biological parent, but without

the consent of the parent. However, we also see examples where the child's right to identity is enforced exclusively, and accordingly, in the Czech Republic, a child can request access to documents related to adoption from the age of 12.

Finally, mention should also be made of the case where, although the adoption itself is successful, over time and with the development of the child, unforeseen problems arise that the parties are unable to find a solution. Therefore, the national legislation of the States examined allows adoption to be dissolved or terminated. Even in these cases, there are significant differences in the details of national regulations, but it is a common element and certainly a good practice that national rules allow for the dissolution or termination of adoption solely in the interests of the child. In almost all States, it is under investigation whether adoption is impossible to maintain and whether termination is in the best interests of the child.

The regulation of adoption and the elaboration of the most effective procedural rules of adoption that consider the best interests of the child have always been the subject of debates during the development of law. In modern legal systems, the best interests of the child, the rights of biological parents, adoptive parents, and secrecy and transparency are typically at the focus of the regulation, and the legislator must find the appropriate balance along the harmonising of these interests. The aim of this book is to examine the regulation of adoption in a comparative legal context, including the best international practices. The importance of the relevant national regulations is also increased by the fact that there is no uniform European Union regulation in this area. In this way, the book creates a scientific basis from which Hungarian legislation and legal practice can also draw. The volume can contribute not only from a legal and technical point of view, but also from a socio-political and child protection point of view to the fact that the institution of adoption really serves the best interests of the child.