PARENTAL CARE FOLLOWING DIVORCE IN THE REPUBLIC OF CROATIA

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ABSTRACT

The author explains family law rules concerning the exercise of parental responsibility (parental care) after divorce in Croatia. The new family legislation emphasizes the importance of encouraging parents to reach agreements and reduce manipulations of their children after divorce. Parents may divorce in simplified, non-contentious proceedings, having previously reached an agreement on their divorce and on how they will exercise parental care. If there is no agreement on the exercise of parental care, they divorce in civil contentious proceedings. In that case, a parent that does not live with the child is not entitled to exercise joint parental responsibility. Novum is that a child is considered a party in all court proceedings where the court decides on his or her rights. The child is represented by a special guardian appointed by a social welfare office that is an employee of the Center for Special Guardianship. The representation system provokes new challenges due to its implementation weakness.

The author carefully analyses legal situations where parents may represent their child jointly, one of them solely, or combined: jointly regarding the essential personal rights of the child, or one of them solely with regard to any other matters. Serious questions are raised because of significant limitations on the right to parental care of the parent who does not live with the child (as a part of the content of their human right to respect for family life). According to the author's opinion, these restrictions are not justified, especially concerning the goal to protect the child's best interests in post-divorce families.

KEYWORDS

parental responsibility
parental care
representation of children
divorce
special representative of the child
the best interests of the child

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1. Introduction

Parental care[1] is a family law concept providing the legal basis for parents to care for their children, which is also protected in the international system of human rights within the right of respect for private and family life (the case law of the European Court of Human Rights is particularly extensive, resulting from the application of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms),[2] which all states are bound to actively safeguard.

In the Republic of Croatia, parents have jointly and consensually exercised their rights since 1999, regardless of whether they live together or separately.[3] Croatia is among the first European countries that have incorporated in their national legislation the requirement laid down in Article 18 para. 1 of the Convention on the Rights of the Child prescribing that the 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have joint responsibilities for the upbringing and development of the child.' This requirement was preserved in the amended legislations of both 2003 and 2007,[4] whereby the subsequent family legislations of 2014 and 2015 departed from the previous regulations. The amendments were an attempt to prevent any manipulations by either parent, most frequently the mother, following a divorce (i.e., the termination of a family union). The following is stated in the statement of reasons in the Final Draft of the Family Act:

> The establishment of joint parental care must continue to be a rule on which the child's well-being is based. Therefore, the establishment of joint care must be conditioned by the parents' agreement on the establishment of joint parental care following divorce or the termination of extramarital union – a parenting plan for their joint parental care. On the other hand, in the circumstances of very conflicting parents' relationships, it is necessary to prescribe legislative possibilities where the court may render a decision on the basis of which only one parent will be entitled to exercise of parental care when this is in the interest of the child's well-being and when the parents are permanently incapable of reaching an agreement on their joint care and the model of their mutual communication in order to exercise it (a parenting plan to ensure joint parental care). A court decision on the exercise of parental care by one parent should prevent any situations where the child would be torn between two conflicting parents who are not

1 | Instead of the legal term 'parental responsibility' (*roditeljska odgovornost*) in the Croatian legal system, the term 'parental care' (*roditeljska skrb)* is used, and both terms have almost the same content. However, the new Family Act emphasizes the rights of children first, and parental responsibilities, duties, and rights come second. Hrabar, 2007, p. 271.
2 | The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950.
3 | Family Act, Official Gazette No. 162/1998.
4 | Family Act, Official Gazette Nos. 116/2003, 17/2004, 136/2004, 107/2007, 57/2011, 61/2011, 25/2013, 75/2014, 5/2015, 103/2015.

able to place the child's interest and well-being before their own interests, so that the child often becomes arms in their continuous conflicts and manipulations.[5]

The legislator has developed a rather complicated system of distinguishing the representation of the child regarding its personal rights by following the criterion of importance for the child and has envisaged various intensities and forms of parents' participation in making decisions. The legislator's intention has been to enhance legal security. However, since the relevant provisions are scattered throughout the legal text, the goal of achieving clarity has not been met.

The Family Act of 2014 had been criticized by the professional public, and after numerous requests to review its constitutionality, it was suspended by the Constitutional Court of the Republic of Croatia.[6] In the new Act adopted in 2015,[7] almost all the provisions from the suspended Act on parental care and its exercise after divorce were retained. It is still applied in that form, except for judicial intervention in the rule that joint parental care is possible only upon the parents' agreement (see infra).

The new family legislation has also brought some changes to divorce proceedings. Parents may divorce in simplified, non-contentious proceedings, having previously reached an agreement on their divorce and on how they will exercise parental care. They divorce in civil contentious proceedings if there is no agreement on the exercise parental care. Prior to divorce proceedings before the court, spouses who have common minor children must first undergo a counseling procedure at a social welfare office and possible mediation.

In any family proceedings, as well as in divorce proceedings, the basic principle is the protection of the child's best interests. It is both the parents' right and duty to exercise parental care equally, jointly, and consensually. When they do not live together, they are obliged to regulate parental care through a specific parenting plan.[8] In fact, for some parents, this requirement, worded as the *ius cogens* norm, will be *lex imperfecta* because of their incapacity to reach an agreement.

Although the dissolution of a family union is a development affecting all members of a family in their individual capacity,[9] particularly children, divorce is a social issue because of an increase in various risks for both parents and children who continue to live with only one parent.

In 2020, as many as 5,153 marriages were dissolved in the Republic of Croatia (the divorce rate was 339.1 divorces to 1,000 marriages).[10] Government statistics

5 | Final draft of the Family Act, Government of the RoC [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080655/PZ_544.pdf (Accessed: 15 August 2022).
6 | Constitutional Court Decision No. U-I/3101/2014, Official Gazette No. 5/2015.
7 | The Family Act, Official Gazette Nos. 103/2015, 98/2019, 47/2020.
8 | Art. 106 of the Family Act of 2015.
9 | '... it could be argued that over a long term, women pay the greater financial price following a break-up, while men pay the greater social price.' Kreyenfeld and Trappe, 2020, p. 35.
10 | Statistical Information 2022, State Institute for Statistics, Zagreb, 2022, p. 21 [Online]. Available at: https://podaci.dzs.hr/media/dcph1du5/stat-info-2022.pdf (Accessed: 17 August 2022).

do not specify how many broken-up marriages involved children, but the Ministry responsible for families reports that in 2020, social welfare offices had received 7,499 applications for counseling preceding divorce, and that in 6,701 cases, counseling was completed. This number is higher than the number of actual divorces, which means that some spouses had given up divorce and, for some of them, court proceedings to bring their marriages to an end had not been completed. In 4,403 cases, the parents succeeded in agreeing on how to exercise their parental care, and in 631 cases, the courts decided on the sole care of a parent because no agreement had been reached.[11]

2. Divorce proceedings and decisions on parental care

As already stated earlier, through the reforms of 2014 and 2015, the Croatian legislator intended to create a normative framework to reduce the number of conflicts between spouses and to steer them to agreements on the legal consequences of their divorce affecting not only them but also their children, and to make it possible for children to express their opinions (in accordance with the Convention on the Rights of the Child and the Convention of the Council of Europe on the Exercise of Children's Rights).[12] The means used by the legislator offered parents a possible choice: either to agree on a divorce and all its consequences regarding children and resolve their legal relations in non-contentious proceedings, or their conflict would lead to contentious proceedings where a special guardian would be appointed to the child to represent them *ad litem*.[13] In this way, pressure is put on the parents to reach an agreement and not to engage in long-lasting and expensive proceedings in which their child would also take part, represented by *guardian ad litem*.

Spouses who want to break up their marriage and who have a common, minor child must first initiate the counselling procedure at a social welfare office.[14] Before the completion of counselling, they must draw up a plan on joint parental care.

11 | Annual statistical report on the applied social welfare rights, legal protection of children, youth, marriage, family, or persons deprived of civil capacity and the protection of physically or mentally incapacitated persons in the RoC in 2020, Zagreb, August 2021, p. 61 [Online]. Available at: https://mrosp.gov.hr/UserDocsImages/dokumenti/Socijalna%20politika/Odluke/Godisnje%20statisticko%20izvjesce%20u%20RH%20za%202020.%20godinu.PDF (Accessed: 17 August 2022).

12 | Cfr. Rešetar, 2018.

13 | There are some justified warnings that 'such a solution by the legislator may result in agreements which cannot be considered as such because the parties (or more often one party), entered into them being afraid of the consequences not to agree with some or all the points contained in the plan on joint parental care, or in fear of court proceedings.' Therefore, they do not reflect the parties' true will, which calls into question their implementation and viability as the time passes. Čulo Margaletić, 2021, p. 72.

14 | Art. 54 para. 1 of the Family Act of 2015.

Unless they reach an agreement, they must attend the first mediation session,[15] except in situations where the professionals employed at the social welfare office or family mediators have established that, because of domestic violence, equal participation of both spouses is not possible, or one or both spouses lack business capacity and are not capable of comprehending the meaning and legal consequences of the proceedings despite the existence of professional assistance, if one or both spouses are incapable of reasoning, or if a spouse's permanent or temporary residence is unknown.[16] Furthermore, divorce proceedings may only be initiated by the spouse who has attended the first mediation session,[17] except in circumstances where no mediation should be organized.

If the spouses succeed in reaching an agreement and making a plan for joint parental care, they will be divorced in non-contentious proceedings and the court will approve of the plan having established that the spouses had previously attended legal counseling at the social welfare office and that the content of the plan is thorough and in conformity with the child's well-being.[18] In the parenting plan, they must specify the place and address of the child's residence, the time the child will spend with each parent, the method of exchanging information when agreeing on decisions that are important for the child, when exchanging important information concerning the child, the amount of maintenance that must be paid by the parent who does not live with the child, and the model of resolving other disputable issues. They may also regulate other essential issues for exercising their parental care.[19]

The parenting plan must be made in writing. Only after having been approved by the court will it be considered an enforceable document. The decision to approve the plan on joint parental care need not be reasoned, and an appeal is allowed only in exceptional cases.[20]

The parents' duty is to acquaint the child with the content of the plan regarding their joint parental care. This is a condition for it to be recognized in the proceedings under Regulation Brussels IIbis and Brussels IIter.[21]

15 | In literature, mandatory mediation is often criticized as potentially counter-productive and the introduction of a pre-mediation procedure is proposed. See Majstorović, 2017, pp. 138 and 139.

16 | Art. 332 of the Family Act of 2015.

17 | Art. 54 para. 3 of the Family Act of 2015.

18 | Art. 465 para. 1 of the Family Act of 2015.

19 | Art. 106 of the Family Act of 2015.

20 | An appeal may be lodged for substantial violation of civil proceedings or because consent was given under misapprehension or under coercion or fraud, or if to render a decision, not all the conditions laid down in this Act have been fulfilled. Art. 467 para. 1 of the Family Act of 2015.

21 | Art. 11: A judgment relating to parental responsibility shall not be recognised: ... (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought; ...
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, repealing Regulation (EC) No 1347/2000. Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in

Often, parents abandon the agreement; the most frequent reason being the level of maintenance, so that divorce proceedings then continue as a marital dispute (contentious proceedings).[22]

According to the data obtained from the Ministry responsible for social welfare, as many as 4,138 plans for joint parental care were made in 2020, but the court approved only 3,130 of them.[23] It is not clear from the statistical data whether the parents subsequently gave up the agreement or the court refused to approve it.

Contentious divorce proceedings (marital disputes) are more complex, last longer, and are more expensive and often unpredictable for the parties when it comes to their parental care decision. In a marital dispute, the child is also a party to the dispute and will be represented by a special guardian from the Special Guardianship Center.[24] The child is entitled to get to know, in the appropriate manner, the important circumstances of the case, receive advice, and be allowed to express their opinion, as well as to be informed about the possible consequences of the acceptance of the opinion. The child's opinion will be taken into account in accordance with their age, maturity, and well-being.[25] The provision laying down the procedure sets forth that the court must make it possible for the child to express their opinion unless the child is against it. The lower limit of the child's age was not determined.[26]

If the child is older than 14, the court may get the child's opinion in an appropriate place and, if necessary, in the presence of a professional. If the child is younger than 14, they will give their opinion through a special guardian or other

matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) also provides for the right of the child to express his or her views (Art. 21): '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.'

22 | According to a qualitative research carried out before the legislative changes in 2014, when there was no such pressure for making an agreement on parental care, spouses (parents) were differentiated depending on whether they managed to reach an agreement on parental care in accordance with the following variables: professionals' assessment on the parents' willingness to cooperate on the issues of parental care, the husband's and the wife's perception that the reason for their divorce is the other spouse's violence, the husband's belief that the reason for divorce are emotional/psychic and communication problems of his partner and the wife's perception that emotional distancing was the main reason for the conflict which has led to a divorce. A good predictor that an agreement will be reached turned out to be the parents' cooperation regarding parental care already during the break-up of the family union. Štifter et al., 2016, p. 294.

23 | Annual Statistical Report, see footnote 7.

24 | A special guardian is a lawyer who has passed their Bar exam and is employed at a special guardianship office whose activities are provided for by a separate Act (*Zakon o centru za posebno skrbništvo*/Act on Special Guardianship Centre) Official Gazette, No. 47/2020).

25 | Art. 86 of the Family Act of 2015.

26 | Art. 360 of the Family Act of 2015.

professional person.[27] The concept of 'an appropriate place' implies that such a place exists in the court building or elsewhere.[28]

A special guardian of the child, the court, or a professional employed at a social welfare office must inform the child about the case, its development, and possible outcome in a way that is appropriate to the child's age and maturity, taking also into consideration that it will not endanger the child's development, upbringing, or health.

In the reports of the Ombudsperson for Children of 2014, there was a permanent emphasis on the deficiencies in the application of the concept of a special guardian,[29] primarily because of the large number of cases and insufficient numbers of employed special guardians. Such a situation leads to potential violations of the right to a fair trial or the violation of the procedural rights of the child, which are satisfied only formally. In practice, special guardians are not able to meet the high requirements placed before them by family legislation.

Despite these obstacles, a special guardian plays a very important role when passing the child's opinion, especially in cases where both parents are equally competent.

27 | Art. 360 para. 2 of the Family Act of 2015.

28 | Since March 2022, a total of 16 family divisions have been organized within municipal courts in country centers. At present, only some of them have appropriate spatial and other conditions.
'Family Division of the Municipal Court in Novi Zagreb is a positive example of how to create pleasant environment within the courts for children who take part in court proceedings. We hope that such environments will contribute to make the experience less traumatic for children.' said the Minister responsible for social welfare when visiting a Family Division of the Municipal Court in Zagreb. [Online]. Available at: https://mpu.gov.hr/print.aspx?id=25981&url=print (Accessed: 7 September 2022).

29 | 'The concept of special guardianship is an important link in the judicial protection of children... However, as we have already repeatedly emphasised, this legal concept reveals many deficiencies. It has become quite clear that 18 special guardians of legal profession, territorially positioned in Zagreb, Rijeka, Osijek and Split are objectively not able to represent children's interests. During 2021, 8,017 children had to be represented in the proceedings before competent bodies and one guardian, on average, was supposed to see to the protection of interests of 445 children in 293 cases. Apart from representing children, special guardians also represent adults (3517 cases in the course of 2021), every guardian is thus annually engaged in approximately 488 cases. In 2105 proceedings involving children, of a total of 22,202 scheduled hearings, special guardians were present at only 3,330 of them (15%). They claim that because of excessive work load, they are often in a situation where they alone have to decide which hearings to attend. ... Indeed, the duty of a special guardian is not only to attend the hearings, filing complaints or motion on behalf of the child, but primarily a direct contact with the child, acquainting the child with the special guardian's role, with the case, the child's right to express his or her opinion, informing the child about the possible consequences of the acceptance of its opinion and the possible final outcome of the proceedings. In addition, special guardians are obliged to speak with the parents to get to know their family situation and to be able to assess the best interest of the child.' Report on the work of the Ombudswoman for Children for 2021, Zagreb 2022, pp. 104, 105 [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2022-04-01/154306/IZVJ_PRAVOBRANITELJ_DJECA_2021.pdf (Accessed: 17 August 2022).

3. Parental care

3.1. Historical development

The Basic Acts on the Relations between Parents and Children (1947, 1956, 1965) and Marriage and Family Relations Acts 1978 and 1989)[30] used the concept of *parental right ('roditeljsko pravo').* According to these Acts, both parents had parental rights and they both exercised them. Naturally, if one of the parents died, or was proclaimed dead, was unknown, or was deprived of their parental right, only the other parent had those rights (*nudum ius*). The parent, whom the court had entrusted the child for custody after a marital dispute (dispute over divorce, annulment of marriage, or following the pronouncement of a marriage as inexistent), or upon a social welfare office's decision after the termination of a marital or extramarital union, solely 'exercised his or her parental rights.' Under these Acts, only one parent would exercise their parental rights when the other parent was deprived of legal capacity, was a minor, or had died.

The parent who did not live with the child had the right to personal relations with the child, the duty to contribute to the child's maintenance, the right to complain to the competent body if dissatisfied with the other parent's decision, and the right to seek the decision, entrusting the child for custody, to be changed (change of the decision on parental care).

According to the then-existing solutions, the parent whom

> the child was not entrusted to, lost only the possibility of exercising parental right, because in such case, the law provided for the transfer of exercising parental right only to the parent who was entrusted custody (Art. 13 of the Basic Act on the Relationship between Parents and Children).[31]

The Convention on the Rights of the Child had an impact on the family legislator, such that the Family Act of 1998[32] brought about significant changes in terms of who was entitled to exercise parental care. Under this Act, both parents exercised parental care for the child regardless of whether they lived together.

Only one parent exercised parental care based on a decision made by the social welfare office if the other parent was prevented, deprived of business capacity, or if their actions endangered the child's well-being. In addition, the social welfare office could decide

> that some duties had to be carried out by the parent who the child did not live with, like, for instance, to care for the child's health, education, out-of-school

30 | Marriage and Family Relations Act, Official Gazette Nos. 11/1978, 27/1978, 45/1989, 59/1990, 25/1994.
31 | Prokop, 1966, p. 170.
32 | Family Act, Official Gazette No. 162/98.

activities, to represent the child in some situations, to manage the child's property, and the like.[33]

The parent who did not live with the child was entitled to seek the social welfare office's decision aimed at protecting the child's well-being (on the parent's request, *ex officio* or upon a complaint) in the case of a dispute on exercising parental care, a dispute between parents on exercising the child's rights regarding contacts, or change of the decision on whom the child would live with.[34]

The Family Act of 2003 stated that the court was a competent body for any decisions on parental care because administrative proceedings did not guarantee full jurisdiction.

The solutions of 1998 and 2003 provided the impetus for positive changes in the direction of a generally accepted idea of the need for equal parenthood following divorce. In practice, fathers started to show greater interest in active care of the child with whom they no longer lived in a family union. In cases where one of the parents showed greater capacity, competent bodies were able to individualize their decisions regarding the division of rights and duties between parents. If parents disagreed with some decisions regarding how parental care should be exercised, they, as well as the child, could initiate non-contentious court proceedings.

Some deficiencies of such a solution were, for example, unclear determination in individual and concrete cases of how and in what form parents exercised their parental care, the unresolved issue of the legal change of the child's place of permanent residence, or the problems that could arise if the parents could not agree on moving to another country. Various conflicts related to divorce were in the limelight of the media, exhausting the professional services of social welfare offices. Therefore, a reform of family legislation was initiated with the main intention of reducing any negative consequences of divorces permeated by various conflicts.[35]

33 | Art. 99 para. 2 of the Family Act of 1998.
34 | Korać Graovac, 2017, p. 7.
35 | Ibid.
According to the Statement of Reasons accompanying the Family Act of 2014, the main motive for the change of regulation of parental care was to limit the parents' options in the cases of highly conflicting divorces:
'Exercising joint parental care continues to be the rule on which the child's well-being is based. Therefore, the exercise of joint parental care must be conditioned by the parents' agreement on its accomplishment following divorce or the termination of a marital union – by a parenting plan on joint parental care. In the circumstances of the parents' high conflicting relations, it is necessary to provide for the legal possibilities that the court renders a decision according to which only one parent will be entitled to solely exercise parental care when this is essential for the child's well-being and when the parents are permanently incapable of reaching an agreement on their joint parental care and the model of their mutual communication regarding its exercise (a plan for joint parental care). A court decision on exercising parental care by only one parent ought to prevent situations where the child is torn between the parents who are in permanent conflict and who are incapable of putting the child's interest and well-being before their own interests whereby the child becomes arms in their constant conflicts and manipulations.'

3.2. Joint parental care and sole parental care

The Family Act of 2015 stipulates that parental care 'comprises responsibilities, duties and rights of parents, with the aim of protecting child's welfare, personal and proprietary interests' and that 'parents are obliged to exercise it in conformity with the child's development needs and capabilities'.[36]

As regards the content of parental care, the legislator outlines the right and duty to protect the child's personal rights to health, growth, care, and protection, their upbringing and education, the development of contact when they do not live together, determination of the child's place of residence, and the right and duty to manage the child's property and to represent their personal and proprietary rights and interests.[37]

When parents do not live together, the child's place of residence can only be with one of the parents,[38] although the child may spend a significant amount of time with the parent with whom they do not live. In such a case, joint parental care is more probable because it is in the interest of the child that the parents are capable of reaching an agreement on how parental care should be exercised.

In practice, we come across situations where parents, who do not live together, mostly come into conflict over how their personal relations should be handled, the amount of maintenance and its regular payment, the issue of representing the child (particularly when changing the child's permanent or temporary residence), as well as over decisions regarding which parent should live with the child.

As a rule, both parents hold the right to parental care. The parent who is deprived of the right to parental care and the parent whose child is adopted will lose that right as soon as such circumstances set in.

When both parents must exercise parental care and are obliged to exercise it equally, jointly, and consensually; if they do not live together, they must lay down its exercise in a parenting plan on joint parental care, or their agreement may be approved by a court's decision in non-contentious proceedings.[39]

The Family Act of 2015 expressly states that if the parents fail to make and agree on their joint parental care (or to agree during court proceedings), the court must specify the parent who will exercise parental care.[40] Naturally, it is the parent with whom the child lives.

When in a dispute, a parent refuses joint exercise of parental care (i.e., by not accepting the proposed agreement), they must prove that the sole exercise of parental care is in favor of the child's well-being.[41] The relevant legal provision is a kind of threat against the parent who refuses the agreement, and it places *onus probandi* on them that joint parental care is not in the child's interest. The court may determine whether the parent, who solely exercises parental care, will represent the child in their essential personal rights alone (see infra) or whether it must

36 | Art. 91 para. 1 of the Family Act of 2015.
37 | Art. 92 of the Family Act of 2015.
38 | Art. 96 of the Family Act of 2015.
39 | Art. 104 of the Family Act of 2015.
40 | Art. 105 para. 3 of the Family Act of 2015.
41 | Art. 105 para. 4 of the Family Act of 2015.

be with the consent of the other parent. In all other matters, the parent with whom the child lives will solely represent the child.

Indeed, the legislator bases his legislative solution on the premise that joint parental care is the best solution for the child. At the same time, the legislator 'punishes' the parent who has failed in reaching an agreement by completely neglecting the fact that it takes two to make an agreement.

When the court has rendered a decision on parental care that is not based on an agreement, the parent who does not live with the child is seriously limited in exercising parental care. The Family Act does not hide this fact because there is an article entitled 'The Rights of the Parent Whose Right to Exercise Parental Care is Limited'.[42] The parent is thus limited in representing the child, and this has been strongly criticized by family law theoreticians.[43]

This legislative solution was modified by case law according to which the court is empowered to award

> exercise of joint parental care in the case of parents not living together, and in the case the matter has not been regulated by an agreement based on joint parental care plan under Art. 106 of the Family Act, or by parents' agreement reached during judicial proceedings, as well as if it appears to be in the best interest of the child.[44]

Although such competence is not derived from Article 104 para. 3 of the Family Act, it is entirely compatible with the Convention on the Rights of the Child. [45]

This position has been taken in conformity with General Comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration.[46] Regular courts seldom interpret legislation by directly applying international documents that provide for human rights. This decision, rendered by the Civil Division of the County Court in Zagreb and subsequently followed by others, both lower and county courts, is a welcome development.

42 | Art. 112 of the Family Act of 2015.
43 | Cfr. Korać Graovac, 2017, pp. 51–73.
44 | The Zagreb County Court's Legal Opinion of June 4, 2019.
45 | This point is additionally confirmed in the article written by Artuković Kunšt (2019). judge of the Zagreb County Court.
46 | Art. 3 para. 1 of the Family Act of 2015.
67. The Committee is of the view that shared parental responsibilities are generally in the child's best interests. However, in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. In assessing the child's best interests, the judge must take into consideration the right of the child to preserve his or her relationship with both parents, together with the other elements relevant to the case. General Comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration (Art. 3, para. 1), Committee on the Rights of the Child.

4. Exercise of parental care after divorce

4.1. Contacts

The parent who does not live with the child is entitled to contacts, except when this right has been limited or forbidden by the court decision.[47]

Article 121 of the Family Act of 2015 stipulates that contacts with the child may be made directly, in the form of meeting or getting together, or by the child's staying with a person entitled to establish contact with the child, or indirectly, through various means of communication, by sending letters, gifts, or by giving information in connection with the child's personal rights to a person who is entitled to such information, or by giving it to the child.

The parent, or any other person living with the child, has the duty and responsibility to make it possible and to encourage contact with the other parent.[48]

It is possible that the court may order that contacts must take place under the supervision of a professional appointed by the social welfare office, the other parent of the child, or another close person.[49] This measure is very expensive (because the State must pay such professional person) and it is, by nature, a short-term measure (lasting for up to six months or not longer than a year). The intention of this measure is to overcome the most difficult period of constant conflict between parents because supervision is, as a rule, ordered for both parents. At the same time, the measure is meant to fulfil the positive obligation of the State to guarantee the right of respect for family life to both the child and their parents.

Interference or obstruction of contacts is the most frequent method of manipulation during and after divorce, and prevention is extremely difficult. They are often combined with negative messages and qualifications given on account of the parent with whom the child does not live and by the parent with whom they live; consequently, the child refuses contact with the former. However, the parent who does not live with the child may manipulate by sending negative messages to the parent, or regarding the parent with whom the child lives, by criticizing the other parent's upbringing methods and abusing, in such a way, their contact with the child and encouraging the child's resistance to the parent with whom they live.[50]

The punishment to enforce a decision for the failure to organize contacts can be in the form of a fine or imprisonment.[51]

A novelty in the legislation is an express provision on the right of compensation by a person who is bound to make it possible for a parent to establish contacts. Compensation must be the result of not observing the court's enforcement document

47 | Art. 95 para. 1 of the Family Act of 2015.
48 | Art. 95 para. 3 of the Family Act of 2015.
49 | Art. 124 of the Family Act of 2015.
50 | Manipulation is manifested in many ways. Maljuna, Ajduković and Ostojić, 2020, p. 26.
51 | Art. 523 of the Family Act of 2015.
There has been some criticism by theoreticians because the procedure of handing over the child is not foreseen and because no gradation of the means of enforcement is envisaged. Pavić, Šimović and Čulo Margaletić, 2017, pp. 193 and 194.

on the establishment of contacts.[52] The Family Act refers to the provisions of the law of obligations, and it can be concluded that both material and non-material damages are involved. Such proceedings are still very rare, although many children do not establish contact with the parent with whom they do not live.[53] There are no indirect sanctions for the parent who does not establish contacts with the child.[54]

Nevertheless, some of such cases were brought to an end before the European Court of Human Rights, where the violation by the Republic of Croatia was established in favor of the fathers who had brought actions before the Court in Strasbourg.[55]

To reduce parental conflicts, complex professional work and efforts are needed, but it is difficult to find sufficient numbers of the right professionals to carry out the supervision and the necessary resources to be able to do the work. Beside the professionals, we also need appropriate space for making contacts between parents and children possible, especially when there is a danger that a parent, who does not live with the child, will stay alone with the child in any place or situation.

4.2. Parental representation of the child

According to provisions of the Family Act 2015, parents may represent their child jointly, one of them solely, or combined: jointly with regard to the essential personal rights of the child, or one of them solely with regard to any other matters.

When parents represent their child jointly, as mentioned above, they are obliged to come to terms and reach an agreement. It is sufficient for one parent to represent the child, and it is considered that the other parent has given their consent. For certain statements of will, express consent from the parent who exercises parental care is needed, and in the case of some particular statements, consent must be given in writing. As far as any other statements are concerned, the form of consent is not prescribed.

Written consent is required for decisions on the child's personal rights specified as essential in Article 100 of the Family Act of 2015: for changing the child's

52 | Art. 126 of the Family Act of 2015.

53 | According to the official data in 2020, as many as 2,083 children did not exercise their right to contacts with the other parent, or they did exercise it, but in the scope lesser than what was stated in the court decision (because of the manipulative behavior of the parent with whom they lived). As many as 352 children were exposed to manipulation by the parent with whom they lived at the time their personal relations under supervision took place. (Annual statistical report on the applied rights to social welfare, the legal protection of children, youth, marriage, family, and persons deprived of business capacity and the protection of physically or mentally handicapped persons in the Republic of Croatia in 2020).
On the other hand, 'a special problem is the protection of the rights of children whose parents, after divorce, refuse to exercise their parental duties and obligations towards the child.' Report on the Ombudswoman's Work, 2021, p. 26.

54 | Cfr. Korać Graovac, 2018.

55 | For example: Case Ribić v. Croatia, Application No. 27148/12, Judgment from 2nd April 2015, paras. 88–89 and 92–95 and Case Jurišić v. Croatia, Application No. 29419/17, Judgment from 16th January 2020, paras. 105–111.

personal name,[56] for changing the child's permanent or temporary residence,[57] the selection or change of the child's religious affiliation, and when parents give their consent for the recognition of paternity given by their minor child when they become a parent.[58]

The parents' consent may be replaced by the consent of the social welfare office if it establishes that the child's moving will not have any substantial impact on the realization of contacts with the other parent and if it establishes that the registration of permanent or temporary residence is crucial for the protection of the child's rights and interests.

A parent who cannot get the other parent's consent regarding the aforementioned representation must seek the court to render a decision on which parent is to represent the child in a particular case. When the parents' consent in the proceedings of recognition of paternity cannot be obtained, paternity will have to be established by the court or by recognition after a minor parent reaches legal age.

The other parent's written consent is also necessary when representing the child regarding some valuable property or regarding the child's property rights in cases of alienation or encumbrance on immovables or movables entered into public registers, or movables of higher value, disposition of stock or business shares, disposition of inheritance, acceptance of encumbered gifts, refusal of offered gifts, or disposition of other real property rights depending on the circumstances of a particular case.[59] Apart from written consent, approval must also be given by the court in non-contentious proceedings. Special protection must be provided to minors whose parents enter into contracts with natural or legal persons in connection with the child's sports, artistic, or similar activities, and the matter concerns a disposition of the child's future property rights and gains. The approval must be obtained from the court, but any contractual obligations may only last until the child reaches the age of majority.[60]

When dealing with decisions that are crucial for the child, it is presumed that the other parent has given consent. These are decisions that may have a significant impact on the child, such as the establishment of personal relationships with close persons, decisions on special medical procedures or treatments, and the selection of schools.[61] Naturally, it is important that the parent, before the representation, informs the other parent about it, because, in some situations, it is impossible

56 | In line with family legislation, the change of a minor's personal name is provided for in the Personal Name Act, Official Gazette Nos. 12/2012, 70/2017 and 98/2019.
57 | Change of permanent residence is provided for in the Residence Act, Official Gazette Nos. 144/2012 and 158/2013.
58 | More: Lucić, 2021.
59 | Art. 101 paras. 1 and 2 of the Family Act of 2015.
60 | Art. 101 paras. 3 and 4 of the Family Act of 2015. Cfr. Hrabar, 2021.
61 | Art. 108 para. 3 of the Family Act of 2015.
A special problem can be the diversification of everyday life issues from those that are of great importance for the child. A problem may be an everyday life issue and at the same time a matter of great importance for the child. For example, a tourist trip can be a part of the child's everyday life while a journey to a war-torn or a turbulent country may also be a decision of extreme importance. See Schnitzler, 2010, Rn. 118, cited in Maganić, 2012, pp. 139 and 140.

to rectify possible negative consequences of some decisions (e.g., in the case of medical surgeries).

Parents who exercise parental care may entrust their child to a third person for up to 30 days, and if for a longer period, their statement must be certified by a notary public.[62] However, the social welfare office need not be informed about such long period, and the parent does not even need to seek the office's approval, which is certainly the legislator's omission. At the time of economic migration, it is again possible that the choice of the person with whom parents entrust their child is not adequate (too-old parents, not-interested relatives). The issue of the child's representation has also not been solved appropriately.

It is expressly provided that every parent is entitled to make everyday decisions when they are with the child, as well as any other family member who resides with the child, upon the parents' consent. It is quite clear, even without any regulation, that in urgent situations, when there is a direct danger to the child, each parent is entitled, without the consent of the other parent, to make decisions on undertaking the necessary actions in accordance with the child's well-being. However, other parents must be informed as soon as possible. The same right is exercised by any other family member or person responsible for the child while they are in an educational institution.[63]

If parents cannot agree to their parental care and exercise it, they may seek the court to render a corresponding decision. Either the parent or the child may bring court proceedings after they have completed the procedure of mandatory counseling.

If a parent frequently initiates court proceedings, the court may entrust sole parental care completely or partially to the other parent, which is a kind of threat against the quarrelsome parent.

A parent solely represents the child in particular situations in accordance with the decision on parental care rendered by the court and when they make everyday decisions.

It is clear from the above that the parent who does not live with the child is in a much weaker legal position because, in the case where joint parental care is not exercised, they do not have any impact on the way it is exercised. When disagreeing with certain actions or decisions of the parent who represents the child, the other parent can only inform the social welfare office about the need to protect the child's rights and interests. They may seek a decision on parental care to be changed (so that the child lives with them), but cannot bring court proceedings to obtain the court's decision on whether a particular action by the parent who lives with the child is in accordance with the child's best interests.

The parent who does not live with the child is left with the right and duty to exchange information about preserving the child's health and consistent

62 | Art. 102 of the Family Act of 2015.

63 | Art. 110 of the Family Act of 2015.
This provision has been taken in its entirety from the Principles of European Family Law regarding parental responsibilities recommended by the Commission on European Family Law. Principle 3:12.

upbringing as well as about school and out-of-school activities. They are entitled to receive only the information on the essential circumstances regarding the child's personal rights, on the condition of having a justified interest in the measure not being in contradiction with the child's well-being.[64] However, it remains to be seen how case law interprets these legal standards.

5. Conclusion

As the main goal, the new family legislation emphasizes the importance of encouraging parents to reach agreements and reduce manipulations of their children after divorce. A tool for achieving this goal has been some form of threat, even punishment, against the parent with whom the child does not live because he will not be granted joint parental care after divorce. After the Croatian family legislation from 1978 to 2014 promoted the principle of joint parental care as a general and desirable rule, this constituted a significant change. Since there is no serious multidisciplinary research showing whether the goal has been achieved, the results may be assessed only according to the number of reached agreements (plans on parental care or agreements before the court), as well as the number of subsequently conducted proceedings on parental care. However, the numbers are not sufficient. It is questionable whether serious limitations on the right to parental care of the parent who does not live with the child (as a part of the content of their human right to respect for family life) are proportionate to the desirable goal of reducing manipulations. Regular courts have recognized possible violations, and in conformity with General Comment No. 14 of the Committee on the Rights of the Children, they started adjudicating by determining joint parental care even when there was no agreement between the parents, if this was in the best interests of the child.

However, other questions arise in this respect. A formal plan of joint parental care and agreement before the court, in reality, very often shows many substantial weaknesses, so that parents, even following the reached agreement, rather often initiate court proceedings. In divorce proceedings without any reached agreements, children get a special guardian whose possibilities and functions, in practice, are insufficient to ensure the prescribed participation of children. Therefore, because of the weakness of the system and inactive guardians, the child's procedural rights are violated.

Indeed, fathers' equality is rather jeopardized, as it has a minor influence on most decisions concerning their children.

However, mothers are advantaged as those who live with the child for natural and legal reasons, particularly when children of younger age are involved, but also because of stereotypical images of mothers. In the course of 2020, upon the termination of a family union, in about 80% of cases, social welfare offices proposed that children should live with their mothers. Research has shown that this

64 | Art. 112 para. 3 of the Family Act of 2015.

number is even larger.[65] At the same time, because of realistically insufficient child maintenance, their economic position is, as a rule, more difficult.

A major weakness of family law protection lies in the system of social welfare. The law *per se* and the rendered judgments were never able, and will never be able, to solve all the misfortunes of broken families. It is the duty of the State to do everything it can to preserve parenthood in the legal and every other sense. In this respect, the accessibility and charge-free services of family teams, counseling services, family therapy sessions, and mediation professionals (psychologists, lawyers, and social workers) are of utmost importance.

As Tolstoi puts it: 'All happy families are alike; each unhappy family is unhappy in its own way.' It is the task of society to ease the burden of an unhappy family as much as possible if not for adults, then certainly for the children. This awareness requires that when it comes to divorce, the system must be flexible, and it must make it possible for institutions to properly attune their family law and social protection to the current situation.

65 | A research activity of 2018 regarding the fathers' experiences during their divorce proceedings shows that in 91% of cases, children continued to live with their mothers and only in 8% of cases with their fathers. Fathers criticized the professionals working at social welfare offices for giving preference to mothers, for being dominantly a women's profession, for suggesting inappropriate agreement to alleviate court proceedings, and for dedicating insufficient time to parents in the counseling procedure.
Croatian Chamber of Social Workers (Hrvatska komora socijalnih radnika) and Croatian Association for Equal Parenthood (Hrvatska udruga za ravnopravno roditeljstvo), 2018 [Online]. Available at: https://hksr.hr/istrazivanja (Accessed: 1 September 2022).

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