

THE REALISATION OF THE RIGHT OF THE CHILD TO EXPRESS HIS/HER VIEWS— HOW »VISIBLE« ARE CHILDREN IN CROATIAN FAMILY JUDICIAL PROCEEDINGS?²

ABSTRACT

The aim of the paper is to present some thoughts on the realisation of the right of the child to express his/her views in family judicial proceedings from the standpoint of substantive family law. The author shall try to prove that legal framework is in general adequate, although some changes are needed on the national level, particularly as regards bylaws. Nevertheless, the discrepancies between normative solutions and the practice shall be analysed, which reopens the question of real implementation of the right of the child to be heard. Hence, instead of a conclusion, several important questions shall be presented, in particular regarding the issues as to who

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should establish the views of the child, where, when and how it should be done, and most importantly, why should the child be enabled to exercise his/her right to express personal views in family procedures, with the general goal of making the children more »visible«.

INTRODUCTION

At the level of the international legal community, the right of the child to express his/her opinion in matters that concern him/her is a generally guaranteed and accepted right. The Convention on the rights of the child (1989), as the most important global legal document regarding the rights of the child, sets the criterion of the best interest of the child as the primary consideration in all actions regarding children. In ensuring that this principle is protected in all actions of state bodies, the courts of law and administrative authorities have to respect and promote the principle of the best interest of the child. A provision of the Convention on the rights of the child very relevant for the topic of this paper is Art. 12, which stipulates:

1. State 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.

These provisions form the basis of all other actions regarding children. However, as shall be shown, state parties often remain at the declaratory level and do not put in an extra effort for such rights to be fully implemented in practice. In order to enhance the implementation of this provision, the Committee on the rights of the child (2009) there is General comment No. 12. on the right of the child to be heard, as a means of further elaboration and interpretation of the Convention on the rights of the child. The European Union has, during the past decades, also confirmed its interest in the issues of children's rights. The most important document in that regard at this moment, from the substantive law aspect, is the Charter of fundamental rights of the European Union (2012) which stipulates in Art. 24 paragraph 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.*

As already accepted as a standard, children are guaranteed the right to express their views freely, and such views shall be taken into consideration in accordance with two cumulative elements: their age and maturity. Right to express one's views in a way »grows with the child« – namely, the more mature the child is, the greater the influence his/her views have on the decision-making process (Korać Graovac, 2012).

European convention on the exercise of children's rights (2010) adopted at the level of the Council of Europe, represents a good example of how global legal standards are further elaborated at the regional supranational level. Namely, it can be said that it complements Art. 12 of the Convention on the rights of the child and provides legal solutions in greater detail (Radina, 2014). It has opened a new legal area of children's rights, namely their procedural rights (Hrabar, 2012). In particular, this Convention (2010) guarantees the procedural rights of the child to be of utmost importance: the right to be informed and to express one's views in proceedings (Art. 3), the right to apply for the appointment of a special representative (Art. 4), as well as several other procedural rights (Art. 5).

The right of the child to be informed and to express his or her views in proceedings relates to the child considered by internal law as having sufficient understanding. The foundations of this right are the acknowledgement of the child as a subject, rather than the object of law (Hrabar, 2012:104). This is the only acceptable solution, since it is now clear that the individualisation, namely the specific approach adjusted to each and every child, is the only right path that should be followed.

Therefore one cannot but agree with the statement in paragraph 33 of the Explanatory report to the Convention (Council of Europe, 1996):

This text therefore represents a step forward in the recognition of children's rights in family proceedings concerning them. Children are no longer merely the subject of such proceedings, they may also participate. Even if they are not given the status of parties to the proceedings, they possess a number of rights which they may exercise. In this connection, the right to request relevant information and the right to be consulted give the child concerned an effective opportunity to express his or her own views. It is particularly important that children should receive all relevant information before decisions are taken concerning matters of great importance such as their residence.

One should not forget that there is an enormous danger of manipulation in the area of procedural rights and especially in the part of consultation with children. Namely, depending on the fact of who has consulted the child, when and how, the will and the views of the child can be created and hence manipulated (Hrabar, 2012). Furthermore, the right to be heard is solely the right, but never the

obligation of the child. Hence, the child has to be informed that he/she can at any point of the procedure decide not to participate any more, as emphasised in paragraph 134 of General comment No. 12 (Committee on the rights of the child, 2009).

As shall be presented in the following chapters, the research conducted in Croatia, regarding divorce proceedings, as well as proceedings for the implementation of measures for the protection of personal rights and interests of a child, confirms that guaranteed procedural rights, and in particular the right of the child to be heard, considered to be the most important one (Hrabar, 1996) are constantly breached. Not only that such a procedure is not in line with the Convention on the exercise of children's rights, but it is also a violation of principles and rules as provided by an instrument of soft-law, namely the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Committee of ministers of the Council of Europe, 2010). The aim of the Guidelines, as stated in paragraph 3, is »to ensure that, in any such proceedings, all rights of children, among which the right to information, to representation, to participation and to protection, are fully respected with due consideration to the child's level of maturity and understanding as well as to the circumstances of the case. Respecting children's rights should not jeopardise the rights of other parties involved« (Committee of ministers of the Council of Europe, 2011).

Furthermore, it should be noted that the participation of children in general is a priority of the Council of Europe's Strategy on the rights of the child 2016-2021, along with the promotion of equal opportunities for all children, a life free from violence for all children, child-friendly justice for all children and the rights of the child in the digital environment (Council of Europe, 2016). In order to evaluate the real impact of the aforementioned documents, it is necessary to analyse the present national legal framework and endeavour to foresee the impact that the changes of the family law legislation might have in this area.

NATIONAL LEGAL FRAMEWORK

Croatian legal framework in regards to the protection and promotion of children's rights in general is satisfactory. Croatia is a member state of all relevant international treaties which aim at promoting the legal position of children in judicial proceedings such as the Convention on the rights of the child or the European convention on the exercise of children's rights, the provisions of which have been presented in the introductory chapter. However, national legal framework in the field of recognising the importance and the value of taking into consideration the views of children in judicial proceedings is still to be developed in all legal areas.

Croatian Constitution

The Constitution of the Republic of Croatia (1990, 1997, 2000, 2001, 2010, 2014) incorporates three provisions relevant for the protection of family and children in particular. Firstly, family enjoys special protection of the state. Furthermore, the state protects children and provides social, cultural, educational, material and other conditions fulfilling the implementation of the right to a dignified life. Finally, it is the duty of all to protect children (and helpless persons). The latter provision should be understood as the legal basis of all considerations regarding children in general, including the area of participation of children in court proceedings. It is the duty of the society, represented by administrative and judicial bodies, to protect the children, also by making them »visible«.

Family act

The Croatian family-law system has been long considered as a modern and an adequate legal framework for the protection of the rights of the child in regards to various family-law institutes (e.g. parental care, adoption, guardianship). The changes during the last decades were carefully planned and systematically implemented. Unfortunately, the line of continuity has been broken. In September 2014, the new Family act (2014) entered into force. By the Decree of the Constitutional court of the Republic of Croatia, the proceedings for the review of the constitutionality of this act were instituted; such proceedings are considered to be abrogated at the moment of entry into force of the newest act. Namely, shortly after the procedure before the Constitutional court was instituted, the legislative procedure for passing the new act, in general quite similar to the suspended one was commenced. This new Family act of 2015 entered into force in November 2015 (2015). It is not possible therefore to evaluate its effects completely, but one cannot but fear that certain provisions might remain completely ineffective.

There is a plethora of other new or amended provisions in the Family act relating to the realisation of the right of the child to express his/her views, which are in general good in intention, but sometimes poor in realisation. Let me mention just two examples. First, as regards the plan on common parental care (as a formal document a novelty in Croatian family law, which describes a written understanding of parents on the means of implementation of common parental care in circumstances in which the parents of the child do not live permanently in family union), the parents are obliged to inform the child with the contents of the plan, as well as to allow the child to express his/her views in accordance with the child's age and maturity; such views shall be respected in line with the welfare of the child.

This plan, if accepted by the court, becomes a part of the divorce decree passed in an extra-contentious procedure.

However, the analysis of 52 randomly chosen court decisions, we conducted in February 2017 at the Municipal civil court in Zagreb, shows that such a plan poses far more questions than it provides answers regarding the child's position, but this issue surpasses the scope of this paper. It should be mentioned that the Family Act of 2014 had not foreseen the opinion of the child or the acceptance of the opinion to be a part of the plan at all. The Family Act of 2015 introduced this part as well, but in eleven out of 52 analysed plans in procedures commenced in accordance with the new Act, the parents used and the courts accepted the (»old«) plans not containing this information. Secondly, five plans and corresponding court decrees do not provide any agreement nor information regarding the opinion of the child, these parts simply remain unanswered. Thirdly, it is interesting to notice that in two plans all other information is printed out, and it is only the issue of the child's opinion that is written by hand. The difference in approach is visible also in regards to the age of the child. For instance, some parents marked that they have informed the child who is six years old of their legal issue and claim they have accepted the child's opinion. However, some parents believe that their child at the age of seven is not mature enough to be informed. It is also worth emphasising that the court is almost deprived of the »as real as« possible insight into the situation and we can only hope that the plans on common parental care, as approved by the court, are really in the best interest of the child.

The second example concerns the realisation of rights of the child to express his/her views in the obligatory counselling and family mediation procedures. Namely, in accordance with almost identical provisions (*sic!*) of Art. 325 paragraph 3 and Art. 329, paragraph 2, during the obligatory counselling procedure, a child can be allowed to express his/her views, if the parents consent to it. Also, as one of the particular goals of the obligatory counselling before commencing the court procedures regarding the exercise of parental care and personal relationships with the child, Art. 330 sets the aim to inform the participants in the procedures of the duty of the family members to talk to the child and take his/her views into consideration. Finally, the child can be allowed to express his/her views in the family mediation procedure, again if the parents consent to it (Family Act, 2015, Art. 339, paragraph 2). Notwithstanding the faith the legal system has in parents, who are first in line to protect their children, the fact that the children's participation depends upon the decision of the parents cannot be considered to be a proper solution. On the one side, it is contrary to the strengthening of the procedural position of children which characterises the new Act. On the other side, as M. Parać Garma correctly warns us, even in procedures in which the interests of parents and intere-

sts of children are not directly in conflict, the fact remains that the parent primarily defends his/her own interests, realises his/her own wishes and it hence remains an open question whether he/she wants to and also knows how to recognise the interests of the child (Parać Garma, 2012).

LESSONS FROM THE COURT AND ADMINISTRATIVE PRACTICE AND THE RECOMMENDATIONS OF THE COMMITTEE ON THE RIGHTS OF THE CHILD

During the last fifteen years, only a limited number of research attempts have been made in this field in Croatia. Rešetar conducted a research of court divorce decrees involving minor children, which were passed in 2003 at the three largest municipal courts in Croatia – Zagreb, Split and Osijek (Rešetar, 2011). Within the representative sample of 113 cases decided upon by the Municipal court in Zagreb, only in four decisions, which makes for only 3.5 per cent of the cases, was it noted in the case files that children had been given the opportunity to express their preferences about custody and contact with a social welfare professional. »None of the decrees noted that the judge directly solicited a child's preference. It is possible, of course, that these procedures were followed by social welfare professionals, but that the procedure was not noted in the records« (Rešetar and Emery, 2008:72). The situation was the same in Split: the views of the child were established in three per cent of the cases, while in Osijek only in one per cent of the cases were the views of the child established, and even then by the social welfare centre (Rešetar, 2011).

Radina completed an interesting research of court practice in the procedures aimed at protecting the personal interests and welfare of the child. Namely, the Croatian family-law system prescribes numerous measures that administrative and judicial bodies implement in order to secure the protection of children's rights. Radina (2012) has investigated the extra-contentious files of the Municipal court in Split; cases in which the Court has decided upon such measures, in the period of the years 2009, 2010 and 2011. Out of the representative sample of 79 cases, in none of the cases is there a notion that the court has had direct contact with the child. Additional conclusion from the research conducted has shown that the reason of the age of the child is not an obstacle, since for instance in eight out of 28 cases analysed dating from 2009, the children involved were older than 12 (Radina, 2012). In all of the cases analysed in the three-year period, the social welfare centre has had direct contact with the child, whenever it was deemed necessary, but this cannot be considered to be sufficient at all.

It should be also noted that in the »Combined third and fourth periodical report submitted by the Republic of Croatia to the Committee on the rights of the child« in December 2010 (Government of the Republic of Croatia, 2010), it is stated that the child is entitled to ask for the protection of his/her rights before the competent bodies, which are in turn obliged to inform the social welfare centre of such. As the state mentions, the social welfare centres as a rule inform the child in an appropriate way (with the assistance of a psychologist or a social worker) on the important circumstances of the case, be it divorce of the parents or custody issues. The state claims it had asked through administrative supervision, that the centres which were not adhering to that practice, correct the situation and also that different procedures are asked for in the procedures regarding measures for the protection of the welfare of children, as well as all family-law institutes in general.

A student research conducted in Zagreb in 2011, regarding the measures for the protection of personal and property interests of the child, revealed that in not so much as one of a total of 28 cases analysed is it visible when and how it was and who provided the child with the information that a procedure is under way, nor are the views of the child visible, although it was stated in the files that the opinion of the child had been heard (Korać Graovac, 2012). Another student research was conducted in 2013 regarding a particular measure for the protection of the personal interests of the child – the deprivation of the parent of the right to live with his/her child and raise the child (Dojčinović, 2014). The 26 decisions analysed were passed from 2010 until 2013, during which period only four children whose interests were the subject matters of the procedure were enabled to express their views (Dojčinović, 2014).

In the Alternative report submitted to the Committee by the Croatian ombudsman for children, it is stated that the principle of participation of children is not sufficiently implemented, that the adults accept it mainly on the declaratory level and that there is no systematic education of experts working with children on the implementation of this principle. Hence, the Ombudsman for children recommends that all professionals in all systems working with and for children are systematically educated on the right of the child to participate (Ombudsman for children, 2013:9).

The Committee on the rights of the child is, as emphasised in the Concluding observation regarding the latest Croatian report of 2014 (Committee on the rights of the child, 2014), still concerned that children's views are not adequately implemented in practice in all matters that affect them, including judicial and administrative proceedings and that there is insufficient training of professionals working with and for children (paragraph 24). Hence, in the light of its general comment No. 12, the Committee recommends in paragraph 25 that Croatia take measures to

strengthen the right of the child to be heard, in particular by considering establishing systems and/or procedures for social workers and courts to comply with the right of all children to be heard as well as to ensure that professionals in the judicial, welfare and other sectors dealing with children systematically receive appropriate training (Committee on the rights of the child, 2009).

Since the Family Act of 2015 has been in force for only little more than a year now, its practical implementation cannot be validly evaluated at this point, however a partial analysis of the final divorce decrees and judgements of the Municipal civil court in Zagreb conducted in November 2016 and again in February 2017, showed that the situation as regards court practice has not changed in this area with the new Act. The basic deficiencies that were present in the past, still burden the implementation of the right of the child to express his/her opinion as regards matters that concern the child.

In 26 randomly chosen contentious divorce files, as regards marriages during which a common child is born, in only three of them has a final judgement been passed. In thirteen cases the plaintiffs withdrew their divorce suits. It is interesting to notice that in two cases the spouses merely changed procedural roles, but withdrew the suits anyhow. In ten cases the divorces suit is considered to be withdrawn, since the plaintiff has not provided the prescribed documents, namely the report of the obligatory counselling conducted and/or the report on the first family mediation meeting.

From the final judgements of the court it is not visible in any of them that the child has been allowed the possibility to express his/her views. The children were seven; five and three; six, four and two years old respectively. As already mentioned above, it is the possibility of the child to state his/her opinion, and it is to be taken into consideration in accordance with the child's age and maturity. It can well be presumed that the judges considered the children too young to be heard, which is logical at least, but a note should have been made in the court judgement.

CROATIAN REALITY – HOW TO MAKE CHILDREN MORE »VISIBLE« IN PRACTICE?

Since the new Family act has recently entered into force, the practice shall reveal, probably only in a few years, how good the new system really is. Numerous open questions remain. Therefore, at this point, it is important to accentuate the following important issues, hoping for them to be guidelines in all family civil proceedings including, in one way or another, the children. The issues shall be addressed by attempting to answer the classical questions: who, where, when, how and

why? The theoretical answers shall also be linked to the provisions of the new Bylaw on the ways of establishing the views of the child (further: Bylaw, 2015). In general, it might be said that this piece of legislation is yet another example of the »normative optimism approach«, which defines that all challenges can be resolved by introducing a new act.

As regards the first question – **who should establish the views of the child?**, the answer is not a simple one, but the person establishing the views of the child has to be a professional, most likely a psychologist, a psychiatrist or a social worker, but by all means a specially educated person who is able to make contact with a child, define his/her views and report them back to the court. The role of the court regarding the child has to be an active one, notwithstanding the child's role in the procedure. The court has to decide upon the case, with particular concern for the children, in other words the protective role of the court has to be fulfilled, as stipulated for instance by Art. 8 of the European convention on the exercise of children's rights.

The fact that the child can suffer emotional damage, as for instance during the divorce proceedings of the parents, is sufficient reason for the need to assist the child. Parać Garma (2012) correctly notices that a judge cannot flatter him/herself that the experiences of one's own private life as well as consulting adequate literature are sufficient for conducting a conversation with a child. Therefore, one cannot judge the life situation of other people on that basis, and particularly not those of children. Of course, there have always been and always will be exceptions to the rule, in »ideal« cases when the child is mature enough to understand the possibility he/she is offered, the parents approve of the realisation of this child's right, the judge is competent and also backed up with support from social care services and an expert in child psychology, the result is as good as expected (see for instance: Judgement of the Municipal civil court in Zagreb, Business number: 34 O2-1897/10). Unfortunately, such cases rarely occur in family law proceedings.

The Law on juvenile courts (2011, 2012, 2013, 2015) on the other hand contains several provisions which could be a model for further improvement of family civil procedures regarding children. First, the juvenile judges and state attorneys must have a significant proneness for the upbringing, needs and interests of the youth as well as to have basic knowledge in the fields of criminology, social pedagogy, youth psychology and social work with youths (Law on juvenile courts, 2011, 2012, 2013, 2015, Art. 38). Also, laymen from the circle of professors, teachers and other professionals having experience in educational work with youths are appointed for youths who participate in the court council chamber (Law on juvenile courts, 2011, 2012, 2013, 2015, Art. 41). Finally, the attorney defending the minor is appointed from within the group of attorneys-at-law with the expressed prone-

ness in the field of upbringing and care for the youth, named as such on the list of youth attorneys kept by the Croatian bar association (Law on juvenile courts, 2011, 2012, 2013, 2015, Art. 54).

In accordance with the new Bylaw (2015), a child older than 14 expresses his/her view independently, while the views of a child younger than 14 are established by a professional (i.e. a psychologist or another professional with the knowledge and skills to establish the views of a child), or a special guardian if he/she has special knowledge and skills needed for communication with the child and to establish the views of that child. If this is not the case, the special guardian shall use the help of a professional. As an exception to the rule, several professionals of different educational backgrounds can be involved in the procedure, if it is considered to be necessary taking into consideration developmental, health and other difficulties or particularities of the child. Analysis of the envisaged procedure however makes one fear that the system is neither prepared for nor capable of fulfilling such a goal.

As for the second question - **where should the child be heard**, the answer is quite clear. Less stressful is an out-of-courtroom contact, on special premises designed to be less formal and more adjusted to the child, and also possibly with the appearance of the courthouses having been changed as well as the attires of the judges.

The appropriate place, in accordance with Art. 5 of the new Bylaw (2015), is understood as the premises outside the courtroom and adapted to the work with the child, in which it is necessary to secure privacy, security of the child and undisturbed work. This may be special premises in the court building, special premises in the social welfare centre, the Centre for special guardianship and other premises as defined by the court. It is also possible to establish the views of the child *via* a video link. Furthermore, it is possible to allow the views of the child to be established in the home of the parents, or foster parents or other physical or legal person with whom the child resides, if the necessary conditions of privacy, security and the opportunity to work undisturbedly are fulfilled. As interesting as this may seem, the fact nevertheless remains that most of the courts in Croatia do not have financial resources to implement these provisions in their daily work. This might well be the most important criticism as regards the Bylaw (2015), since it oversees the fact that insufficient budgetary resources are secured for these matters, making the normative solutions only a list of good wishes.

The answer to the third question – **when should the child be heard** consists of several elements. The issue as to when to make the child heard in general depends on the child's age and maturity. The new Family Act (2015, Art. 360) as well as Croatian Bylaw (2015, Art. 2) define that the court is obliged to allow a child older than 14 to express his/her views, unless the child opposes it. The notion of

a child's opposing statement unfortunately remained completely unclear, especially as regards the fact of who shall establish such a notion and on what grounds. Furthermore, practice has already taught us that the judges are reluctant to communicate with children directly, and with younger children in particular, and it is not unlikely that they shall use this provision to evade implementing the right of the child to be heard.

Instead, it should have been accentuated in a clear manner that it is not the obligation of the child to express his/her views, it is solely a possibility. The adults cannot shift the level of responsibility to the child. Therefore, the expression »unless the child opposes it« puts an unnecessary burden on the child. Also, the legal system has not provided any particular protection in such situations of all the children concerned, for instance the children with disabilities.

Furthermore, in accordance with the Bylaw (2015), the court shall allow a child younger than 14 to express his/her views, with the assistance of a special guardian or another professional. In that regard, further provisions shall have to be developed, since this is only the beginning of the meaningful implementation of the right of a child to be heard in practice. It is unclear why the element of maturity was omitted, but the answer goes beyond the scope of this paper. Hence, the same issue remains in both cases. Namely, the principle of cumulating of age and maturity, as legacy of the Convention on the rights of the child is not respected. It should be emphasised that the provision of Article 7 of the Bylaw (2015) cannot be considered sufficient in this view. Furthermore, in regards to children younger than fourteen, the discretionary powers of the judge are unnecessarily widened. There are plenty of ways as to how to establish the views of the child, e.g. by analysis of their drawings or body language.

The answer to the question **how should a child be heard** should be guided by the primary principle of *non nocere*. In accordance with Art. 7 of the new Bylaw (2015), establishing the views of a child includes the preparation of the child, the assessment of the child's capacity and maturity as well as expressing the views of the child. Of course, if the child does not understand the procedure or if the child is not capable of expressing his/her views or if establishing the views of the child represents danger for the development, upbringing and health of the child, this procedure shall be adjourned.

The fact of how seriously the views of the child have been taken into consideration has to be a part of the decision of the competent body. If the child has not been heard, this fact would also have to be entered into the file. It is beyond any doubt that the child is not to be exposed to additional stress, inconveniences and also to loyalty conflicts (Parać Garma, 2012).

In accordance with the new Bylaw (2015), the child always expresses his/her views without the presence of parents, guardians or other persons caring for the child (Art. 4). Expressing of views shall be done in the form of a conversation, rather than an interrogation, in an encouraging environment, so the child shall feel secure and respected and his/her opinion shall be seriously heard and taken into consideration (Bylaw, 2015, Art. 7, paragraph 1, subpara 3). It remains an open question as to how to reconsider this article in light of the already mentioned Art. 360 of the Family act.

Although systematised at the end of this questions list, the question **why should a child be heard** is by far the most important one. Croatian practice shows that until now, children have been practically invisible in family judicial proceedings. The possible reason for not hearing the child might be as follows. Namely, considering the fact that when the social welfare centre in many family-law cases has already established direct contact with the child, the courts are not prone to do so as well. It could be well presupposed that the judges feel reluctant regarding hearing the child, above all for the lack of professional knowledge on how to communicate with the child properly, especially when the case concerns younger children. Finally, the parents often do not believe that a child should be given the possibility to express his/her opinion. Only as an illustration, let us mention what is stated in the plan on common parental care, now a part of a court decree, in a case in which the parents have not allowed the seven-year-old child to express his/her opinion, while »there is no dispute between the parents regarding custody of the child, nor as any other issues regarding joint custody« (R1 Ob-708/2016, case finally decided upon by the Municipal civil court in Zagreb). It seems that education is necessary for all – judges and parents as well, the latter in the scope of wider acknowledgement of the legal status of a child.

Moreover, education is by all means an extremely useful tool for preventing the fear and uncomfortable feeling of judges (Matić, 2012). In that regard, particular importance has to be paid to the psychological education of judges which would lead to a »constructive, non-stigmatising and non-victimising conversation with the child« (Hrabar, 2012: 111). It could also be a prevention of parents' fear as regards the participation of children in family proceedings.

However, as Rešetar and Emery (2008: 73) suggest, the aim (of such actions or omissions rather) might as well be that it is the goal of the professionals to keep the children out of the middle of their parent's practice. Emery even goes a step further, claiming that »when children are asked their opinion in contested custody cases, they are, in fact, being given a developmentally inappropriate responsibility of *making an adult decision*« (Rešetar and Emery, 2008: 73) or as he also puts it »we run the risk of turning the children into substitute parents« (Emery, 2003: 627).

In any case, the lack of awareness of judges and other professionals in different roles involved in civil procedures, especially family law procedures regarding children, could be the greatest obstacle for the hearing of children. Otherwise, as James, James and McNamee (2004:193) warn us »practitioners risk rendering (children) powerless by denying them the opportunity to participate in the process of making potentially life-changing decision«.

The new turn towards the recognition of new procedural rights of the child, as well as more efficient legal protection, demands the reorganisation of the judiciary system. The ideal direction would include the establishing of family courts or at least family-law departments in the courts, which would, like juvenile criminal courts, have continuous professional support from psychologists, social pedagogues and social workers. This idea has been long supported in Croatian family law theory (e.g. Jakovac-Lozić, 2001).

It should be concluded from the above paragraphs that it would be wise when implementing future legislative amendments to analyse the checklists contained in the »Implementation handbook for the Convention on the rights of the child« (UNICEF, 2007). Although not an official instrument, this list is beyond any doubt extremely useful to consider in making a decision regarding children's rights. Namely, it is rather obvious from the new Croatian legislative solutions that at least three questions were not given adequate attention: the budgetary analysis and allocation of necessary resources; development of mechanisms for monitoring and evaluation; as well as making the implications of Art. 12 widely known to adults and children.

To conclude, at this point of development of Croatian family law as regards the right of the child to express his/her views, changes are still needed. Normative optimism is simply not a right path to follow. The changes made so far, as could have been the case in other family law systems as well, are, as James et al. put it, »simply reactive and instrumental, that is, not based on a belief that children should be involved with the courts or that the legal process should change in order to accommodate children« (James, James and McNamee, 2004: 189), but simply, as Masson states »on a need to comply with international standards« (James, James and McNamee, 2004:189).

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OSTVARIVANJE PRAVA DJETETA NA IZRAŽAVANJE MIŠLJENJA - KOLIKO SU DJECA »VIDLJIVA« U OBITELJSKIM SUDSKIM POSTUPCIMA U HRVATSKOJ?

SAŽETAK

Cilj rada je predstaviti neka od razmišljanja o ostvarivanju prava djeteta na izražavanje mišljenja u obiteljskim sudskim postupcima sa stajališta materijalnoga obiteljskog prava. Autor će pokušati dokazati da je pravni okvir općenito adekvatan, iako su potrebne neke izmjene na nacionalnoj razini, posebice u pogledu pravilnika. Osim toga, analizirat će se raskorak između normativnih rješenja i prakse, što otvara pitanje stvarnog ostvarivanja prava djeteta da se čuje njegovo mišljenje. Stoga će se umjesto zaključka iznijeti nekoliko važnih pitanja, posebice što se tiče osoba koje bi trebale utvrditi mišljenja djeteta, kada, gdje i kako bi se to trebalo učiniti i najvažnije, zašto bi djetetu trebalo biti omogućeno ostvarivanje prava na izražavanje mišljenja u obiteljskim sporovima, s općim ciljem da se poveća »vidljivost« djece.

Ključne riječi: pravo djeteta na izražavanje mišljenja, Konvencija o pravima djeteta, Obiteljski zakon, Pravilnik o načinu utvrđivanja mišljenja djeteta, raskorak normativnih rješenja i stvarnosti.



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