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# CHILD REPRESENTATION IN CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

*Summary:* Representation of the child is an integral part of the institution of parental responsibility. Holders of parental responsibility, usually the parents, represent their child equally, jointly and consensually both in everyday life and in administrative and judicial proceedings. However, in certain life situations a conflict between parents may appear (such as separation, divorce, child abduction, partial deprivation of legal capacity etc.), so the question arises as to which one of them should represent the child? Would representation of the child by only one parent disrupt the principle of parental equality as well as the equality of sexes? In certain life situations a conflict of interests between the parents and the child may appear (because criminal, misdemeanour or family law proceedings for the protection of the rights and welfare of the child have been initiated against one or both parents etc.), and the challenge for the legal system is how to ensure objective and impartial representation of the child and his/her best interests? These are both social and legal problems that will be elaborated through relevant academic sources and recent case law of the European Court of Human Rights.

*Keywords:* child's representation, child's right to be heard, the best interest of the child, guardian ad litem, conflict of interests

## 1. INTRODUCTION

Representation of the child is primarily a right and a duty of parents and is an integral part of the institution of parental responsibility. The purpose of parental responsibility is to enable children to exercise their rights. The parents (biological or adoptive), as holders of parental responsibility, usually represent their child equally, jointly and consensually both in everyday life and in administrative and judicial proceedings.

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Problems arise when there is no agreement between the parents about the best interests of their child. In such life situations when there is a conflict between the parents (due to separation, divorce, child abduction, partial deprivation of legal capacity etc.), an inevitable question is which one of them should represent the child and whether representation of the child by only one parent would be in line with the principle of primary protection of the best interest of the child.

Besides that, a conflict of interests may also appear between the parent(s) and the child (because criminal, misdemeanour or family law proceedings for the protection of the rights and welfare of the child have been initiated against one or both parents etc.). The question that arises in such circumstances is how to ensure objective and impartial representation of the child and his/her best interests? This represents a considerable challenge for the legal system, especially if we accept the approach that children's rights and welfare are one of the highest values and a part of the public order.

Therefore, in this paper we will analyse relevant international as well as domestic legal instruments on children's participation rights with a special emphasis on the child's right to impartial legal representation in cases of conflict of interest between him/her and his/her most obvious legal representative – the parent(s).

The second part of this paper contains a review of relevant jurisprudence of the European Court of Human Rights (ECtHR) concerning the issue of children's representation, particularly in proceedings pending before that court. In the conclusion, suggestions for a more effective protection of the child's right to be heard will be proposed, which mainly concern ensuring independent representation in proceedings before the ECtHR, with the aim of strengthening the protection of the best interests of the child in circumstances where the interests of the child and the parents are or could be in conflict.

## 2. THE CHILD'S IMPARTIAL LEGAL REPRESENTATION IN CASES OF CONFLICT OF INTEREST – INTERNATIONAL LEGAL FRAMEWORK

It is the primary duty and a right of the parents to take care of their children and to protect their rights and interests. This certainly includes the right to represent the child and not only within the framework of judicial and administrative proceedings, but more broadly, in everyday life. In the absence of adequate parental responsibility, the child will be represented by his guardian, *i.e.* other persons who can be entrusted with the representation of the child in certain matters (e.g. special guardian *ad litem* appointed in cases provided for by law in order to protect individual rights and interests of the child).<sup>1</sup> Convention on the rights of the Child (CRC) prescribes that in order to provide "appropriate direction and guidance in the exercise by the child of the rights recognized" in the Convention, "State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, (...) other persons legally

<sup>1</sup> Lucić N, 'Zastupanje u vezi s bitnim osobnim pravima djeteta' (2021) 5(3) Zbornik radova Pravnog fakulteta u Splitu 815.

responsible for the child “(Art. 5 CRC), meaning the role of parents or other persons legally responsible for the child is indispensable in the process of realization of children’s rights.

In that sense, the CRC promotes the principle of parental equality prescribing that “both parents have common responsibilities for the upbringing and development of the child”. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child“, always considering the evolving capacities of children and the principle of primary protection of the best interest of the child. (Art. 18 para. 1 in conjunction with Art. 5 CRC).

Such a standpoint is confirmed by the Committee on the Rights of the Child, which points out that every action taken by the parents, *i.e.* legal representatives “on behalf of the child has to respect the best interests of the child“ (General Comment No. 12, para. 70). The Committee is of firm belief that an assessment of a child’s best interests must include respect for the child’s right to express his or her views freely and due weight should be given to said views in all matters affecting the child (General Comment No. 12., para. 70–71).

To protect the best interest of the child is ‘a mirage without knowledge of the child’s perspective’.<sup>2</sup> For that reason, the Committee rightly points to the interconnection and interdependence of two fundamental principles of the CRC – the child’s right to be heard from Article 12 CRC and the best interest of the child principle from Article 3 CRC. In this regard, the Committee concludes: “There can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives“ (para. 74 General Comment No. 12).

It can be said that the child’s right to express his/her views “grows with the child”<sup>3</sup> – “that is to say, the more mature the child is, the greater the influence his/her views have on the decision-making process”.<sup>4</sup>

Considering the implementation of the child’s right to be heard, the CRC leaves some discretion to State Parties, but the content of the rights set out in the Convention are the minimum human rights standard.<sup>5</sup>

It is noteworthy that Article 12 CRC “has acted as a catalyst for the (further) development of the child’s right to participate domestically and internationally”.<sup>6</sup>

In many cases (civil, criminal or administrative) there are risks of a conflict of interests between the child and his/her most obvious representative – the parent(s). In such situations,

2 Freeman M, *A Magna Carta for Children? Rethinking Children’s Rights* (Cambridge, United Kingdom; New York: Cambridge University Press, 2020) 231.

3 Korać Graovac A, ‘Pravo djeteta da bude saslušano – Opći komentar br. 12 Odbora za prava djeteta (2009)’ in Filipović G and Osmak-Franjić D (eds), *Dijete u pravosudnom postupku – Primjena Europske konvencije o ostvarivanju dječjih prava* (Pravobranitelj za djecu Zagreb 2012) 117–137.

4 Majstorović I, ‘The Realisation of the right of the child to express his/her views – How “visible” are children in Croatian family judicial proceedings?’(2017) 24(1) *Ljetopis socijalnog rada* 57.

5 Mol C, ‘Children’s representation in family law proceedings’ (2019) 27(1) *International Journal of Children’s Rights* 68.

6 Mol C, ‘Strengthening Child Participation rights in the Case Law of the ECtHR: A Plea to Consider Child participation systematically from a Children’s rights perspective’ <<https://www.humanrightsincontext.be/post/strengthening-child-participation-rights-in-the-case-law-of-the-ecthr>> p. 1 accessed 5<sup>th</sup> May 2024.

hearing the child *via* a parent(s) risks an infringement of the child's right to be heard, because there is reason to believe that views of the child are not going to be transmitted correctly to the decision maker.

Therefore, the protection of the best interest of the child is not a primary consideration to such a representative (General Comment No. 12, para. 36–37)!<sup>7, 8</sup> It is worth emphasizing that the representative must not confuse his/her role with the obligation contained in Article 3 of the CRC that the child's best interests must be a primary consideration.<sup>9</sup> The views of the child must be transmitted, and not those of the representative. That must be done accurately, irrespective of whether their representative considers that those views would be in the child's best interests.<sup>10</sup> In other words, the child's views are subject of representation and not the views of the child's representative as to what is in the best interest of the child concerned. Moreover, in terms of legal powers, there is an additional question regarding the representation of the child by the parents, how to reconcile – from the parent's point of view – his/her right to represent his/her interests, which potentially are in conflict with the interests of the child.

The Committee is even more explicit in General Comment No. 14, where it suggests that in situations where there is a potential conflict between the child and his/her representative (parent(s)), a procedure should be established to appoint an impartial legal representative (*guardian ad litem*) of the child and, in doing so, provide him/her separate representation of his/her best interests (General Comment No. 14, para. 90). "In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision" (General Comment No. 14, para. 96).

Another very important international legal source that precisely regulates the legal position of the child in judicial proceedings is the European Convention on the Exercise of Children's Rights (ECECR, Council of Europe, 1996). In other words, global legal standards set out in the CRC are further elaborated in the ECECR, *i.e.* at the regional supranational level.<sup>11</sup> It can be said that this Convention complements Art. 12 CRC and provides more detailed legal solutions,<sup>12</sup> as it represents a response of the Council of Europe to the general obligation contained within the provision of Article 4 of the Convention.<sup>13</sup> To be specific, the aim of this regional

7 Bruning M and Mol C, 'Child Participation in International and Regional Human Rights Instruments' in Schrama W, Freeman M, Taylor N and Bruning M (eds), *International Handbook on Child Participation in Family Law* (Intersentia, Cambridge – Antwerp – Chicago 2021) 23–26; Freeman M (n 2) 231–232.

8 Some authors rightly state that in proceedings in which the parents are at very opposite ends, such as, high conflict divorce proceedings or international child abduction proceedings, parents cannot be regarded able to objectively represent their children. See: Mol C (n 6).

9 Lansdown G, *Every child's right to be heard. A resource guide on the UN Committee on the Rights of the Child General Comment no.12* (UNICEF, The Save the Children Fund 2011) 24; Mol C (n 5) 70.

10 *Ibid.*

11 Majstorović I (n 4) 57.

12 Radina A, 'Praksa suda i posebnog skrbnika u postupcima radi odlučivanja o mjerama zaštite osobnih prava i dobrobiti djeteta' in: Rešetar B i Aras S (eds), *Represivne mjere za zaštitu osobnih prava i dobrobiti djeteta – Interdisciplinarni, komparativni i međunarodni osvrti* (Osijek Sveučilište J. J. Strossmayera u Osijeku Pravni fakultet 2014) 31.

13 Article 4 of the CRC prescribes: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention".

international document is to promote children's rights, to grant them procedural rights as well as to facilitate the exercise of children's rights by ensuring that children are informed and allowed to participate themselves, or through other persons or bodies, in proceedings affecting them before a judicial authority.<sup>14</sup> In the realization of this aim the core principle from the aforementioned CRC – the best interest of children – should be respected.

The ECECR applies exclusively to situations of a family law nature, before the courts that have the authority to resolve such cases. It is important to emphasize that its provisions are always applied when a child's right is affected in the proceedings, regardless of whether the child is the main or a secondary subject of the dispute.<sup>15</sup>

As a special procedural child's right, the aforementioned Convention states the right to apply for the appointment of a special representative. To be more specific, according to Art. 4 the child "shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter."

The ECECR also emphasizes the important role of the judicial authority in protecting the rights of the child, providing that the court *ex officio* appoints a special representative for the child. In fact, according to Article 9 "in proceedings affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, the judicial authority shall have the power to appoint a special representative for the child in those proceedings."

When the holder(s) of parental responsibility cannot represent the child in the proceedings due to a conflict of interests, Articles 4 and 9 provide for the right to the appointment of a special representative to the child (in conjunction with Art. 2(c)).

Another international document relevant to the topic of child representation is a non-binding instrument of the Council of Europe adopted in 2010 with the intention to enhance children's access to and treatment in justice – Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.<sup>16</sup>

These Guidelines enjoy strong acceptance and support within the Member States of the Council of Europe, as well as the European Union.<sup>17</sup> The Guidelines explicitly prescribe that in cases where there are, or could be, conflicting interests between parent(s) and children, the children should have the right to their own legal counsel and representation and a competent authority should appoint either a *guardian ad litem* or another independent representative for

14 See Preamble ECECR para. 2.

15 Hrabar D, 'Nova procesna prava djeteta – europski pogled' (2013) 4(1) Godišnjak Akademije pravnih znanosti Hrvatske 71; See also: Hrabar D, 'Europska konvencija o ostvarivanju dječjih prava – poseban zastupnik djeteta' in Filipović G i Osmak-Franjić D (eds), *Dijete u pravosudnom postupku – Primjena Europske konvencije o ostvarivanju dječjih prava* (Pravobranitelj za djecu, Zagreb 2012) 103–116.

16 Adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 (hereinafter: Guidelines), available at: <<https://rm.coe.int/16804b2cf3>> accessed 5<sup>th</sup> May 2024.

17 *Amplius*: Hrabar D, 'Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010) – family law aspect' in Kutsar D and Warming H (eds), *Children and non-discrimination, Interdisciplinary textbook* (Tartu, Children's Rights Erasmus Academic Network 2014) 77–90.

the child (para 37 and 42), and in doing so, ensure adequate protection of the child's interests. "Adequate representation and the right to be represented independently from the parents should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders" (para. 43).

We can conclude that in the Guidelines, as a practical instruction on how to adapt the judicial system with the aim of making it more appropriate, more child-friendly, the authority of the court to appoint a special representative of a child is emphasized. Timely appointment of a special representative (guardian *ad litem*) would ensure adequate protection of the child's interests in circumstances where it can not only be expected that the parents as legal representatives will protect the child's interests, but rather that their interests will be in conflict with the child's.

After this overview of the international legal framework concerning the child's representation in circumstances where there is a conflict of interest between a child and his/her parents, *i.e.* legal representatives, the next part of the paper will present domestic legal regulations on this issue in order to assess how these international standards and state obligations have been implemented in the Croatian family law system, as well as whether some improvements concerning participation and representation of a child are needed in order to strengthen the child's legal position and protection of his/her best interest.

### 3. THE CHILD'S IMPARTIAL LEGAL REPRESENTATION IN CASES OF CONFLICT OF INTEREST – DOMESTIC LEGAL FRAMEWORK

The Constitution of the Republic of Croatia<sup>18</sup> prescribes that the family enjoys special protection of the state (Art. 62 para. 1). Furthermore, "the state shall protect maternity, children and youth, and shall create social, cultural, educational, material and other conditions promoting the achievement of the right to a decent life" (Art. 63). Additionally, "everyone shall have the duty to protect children and infirm persons" (Art. 65 para. 1). The latter provision can be understood as the legal ground for all considerations regarding children, including their participation in judicial and other proceedings.<sup>19</sup> "It is the duty of the society, represented by administrative and judicial bodies, to protect the children, also by making them »visible«".<sup>20</sup> A special and unique role is entrusted to parents. To be more specific, according to the Croatian Constitution "(P)arents shall bear responsibility for the upbringing, welfare and education of their children, and they shall have the right and freedom to make independent decisions concerning the upbringing of their children. Parents shall be responsible for ensuring the right of their children to the full and harmonious development of their personalities" (Art. 64 paras. 1 and 2).

18 Official Gazette, Nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 5/2014 (hereinafter: Croatian Constitution).

19 Majstorović I (n 4) 59; Šimović I, 'The right of the child to be heard in the Croatian family law system' (2023) 19(1) European Integration Studies 3–4.

20 *Ibid.*

The set of parental rights, duties and responsibilities, *i.e.* parental responsibility is regulated in more detail in the Family Act<sup>21</sup> as a fundamental family law regulation. Parents have the right and duty to exercise parental responsibility equally, jointly and consensually (Art. 104 para. 1 FA). Part of the content of parental responsibility is the right and duty of the parents to represent their child, *i.e.* the child's personal and property rights and interests (Art. 92 para. 3 FA). Thus, their right and duty is to represent their child consensually in relation to third persons (Art. 99 para. 1 FA).

However, when some decisions are to be made, the consensus of parents is presumed, while when it comes to some other decisions, *i.e.* decisions that are crucial for the child, explicit written consent of the other parent is required (Art. 99 para. 2 in connection with Art. 108 paras. 1 and 2 FA). Decisions for which the express written consent of the other parent is required are decisions related to representation in connection with the essential personal rights of the child (this includes changing the child's personal name, changing the child's place of residence and the choice or change of the child's religious affiliation, Art. 100 paras. 1 and 2 FA) or for representation concerning the child's more valuable property when, in addition to the express written consent of the other parent who exercises parental responsibility, the approval of the court in non-contentious proceedings is additionally required (Art. 101 para. 1 FA). Such provision has the aim to ensure additional protection of property interests of the child. One parent independently represents the child in those areas of parental responsibility if the other parent is limited in this regard by the provisions of the FA or on the basis of a court decision (Art. 99 para. 3 FA).

The parents do not represent the child when undertaking certain legal actions explicitly prescribed by the FA. In this connection the FA prescribes the preconditions for the acquisition of limited legal capacity by the child. Limited legal capacity means that a child can independently enter into certain legal transactions and undertake certain actions prescribed by law, with a valid legal effect (Arts. 85 and 88 FA).<sup>22</sup> In cases where a special guardian is appointed for the child, the possibility of parental representation of the child will also be excluded (Art. 99 para 6 FA).

A special guardian for the child is appointed in various circumstances in order to ensure adequate protection of the child's rights and interests when, on the part of the parents as his/her most obvious representatives, there are reasons due to which they cannot be expected to be able to represent the child in accordance with the child's well-being. Thus, according to the provision of Art. 240 para. 1 FA, the court or the Croatian Social Work Institute (CSWI) will appoint a special guardian for the child in order to protect particular personal and property

21 Official Gazette, Nos. 103/2015, 98/2019, 47/2020, 49/2023, 156/2023 (hereinafter: FA).

22 For example, when reaching the age of fifteen or sixteen, a child can partially represent his/her property or personal rights if preconditions prescribed by the FA are met: a fifteen-year-old child who earns money by work can independently dispose of his/her income provided that he/she does not endanger his/her maintenance (Art. 85(1) in connection with Arts. 98(2) and 99(5) FA). Also, a sixteen-year-old child can independently give consent for a preventive, diagnostic or therapeutic medical procedure if this medical procedure is not related to the risk of serious consequences to the physical or mental health of the patient child (Art. 88 FA). For a detailed analysis see: Šimović I, 'Procesna sposobnost i pravne radnje djeteta' in Hrbar D (ed) *Obiteljsko pravo* (Zagreb, Narodne novine 2021) 192–195; Aras Kramar S, *Komentar Obiteljskog zakona – II. knjiga* (Zagreb, Organizator 2022) 70–71, 78–82 and 108–117; Čulo A, 'Pravo djeteta pacijenta na informirani pristanak' in Rešetar B (ed), *Dijete i pravo* (Pravni fakultet u Osijeku, Sveučilište Josipa Jurja Strossmayera 2009) 139–157; Turković K, Roksandić Vidlička S and Brozović J, 'Informirani pristanak djece u hrvatskom zakonodavstvu' in Turković K, Roksandić Vidlička S and Maršavelski A (eds), *Hrestomatija hrvatskoga medicinskog prava* (Pravni fakultet Sveučilišta u Zagrebu, 2016) 572–584.

rights and interests of the child, *inter alia*, in cases when the parents as legal representatives cannot represent their child due to a conflict of interests with the child (for example, in challenging maternity or paternity proceedings, in disputes concerning parental responsibility and contacts concerning the child). The decision to appoint a special guardian, which determines his/her duties and powers is made by the CSWI, unless the FA prescribes that the decision on the appointment of a special guardian will be made by a court (Art. 242 paras. 1 and 2 FA).

The FA doesn't comprehensively enumerate all possible situations when a special guardian is to be appointed to a child and thus ensure adequate representation of his/her rights and interests but leaves open the possibility for the competent authorities to assess and appoint a special guardian in cases that are not explicitly stated, when appointment of a special guardian is needed for the protection of the child's rights and interests (Art. 240 para. 1 subpara. 8 FA).

The obligations of the appointed special guardian are prescribed in the provision of Art. 240 para. 2 which is read in conjunction with Art. 99 para. 6 of the FA: to represent the child in the proceedings for which he/she is appointed; to inform the child about the subject, course and possible outcome of the proceeding in an appropriate way and assure that the child's right to express his/her opinion is exercised (Art. 240 para. 2 in conjunction with Art. 360 paras. 3, 5 and 6 FA). The special guardian is a person who has passed the bar exam and is employed at the Special Guardianship Centre (SGC) (Art. 240 para. 3 FA). Only in exceptional cases set forth by the FA can a special guardian be a person outside of the SGC who fulfills preconditions for a guardian prescribed by the FA. However, if a child is fourteen years old and his/her ability to take action in the procedure of proxy authority is recognized in a judicial decision, there will be no need for the appointment of a special guardian, unless the child is unaccompanied. To be specific, a child of foreign citizenship or stateless child who is found unaccompanied by a legal representative on the territory of the Republic of the Croatia shall be appointed a special guardian outside the SGC (Art. 240 paras. 5 and 6 FA). The work of the SGC has been regulated by the FA and the Statute of the SGC from its establishment until April 2020, when the Special Guardianship Centre Act (SGCA)<sup>23</sup> entered into force.<sup>24</sup> SGC is a public institution whose activity is the representation of children, as well as adults with disabilities, in proceedings before courts and other bodies prescribed by the FA (Art. 3 para. 1 SGCA).<sup>25</sup>

Parents and other persons who take care of the child are obliged to respect the opinion of the child in accordance with his/her age and maturity (Art. 86 para. 1 FA). For that reason, this provision is connected to Article 91 paragraph 3 of the FA, where it is prescribed that parents have an obligation to talk to their children and try to reach an agreement regarding the exercise of their parental obligations, duties and rights that derive from parental responsibility (of course, in accordance with the age and maturity of children).<sup>26</sup> Furthermore, the child has the right to be informed, in an appropriate manner, about the important circumstances of the case, as well as to receive advice, before eventually deciding to exercise the right to express his/

23 Special Guardianship Centre Act, Official Gazette No. 47/2020.

24 See more in: Lucić N, 'Child's special guardian – International and European expectations and Croatian reality' (2021) 17 *Balkan Social Science Review* 105.

25 *Ibid.*, 98.

26 Korac Graovac A (n 3) 121; Majstorović I (n 4) 57; Knol Radoja K, 'Pravo na saslušanje i izražavanje mišljenja u posebnim ovršnim postupcima radi predaje djeteta i ostvarivanja osobnih odnosa s djetetom' (2021) 42(1) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 171.



her opinion. Moreover, the child has a right to be informed about the possible consequences of respecting his/her opinion in all proceedings in which a decision concerning his/her right or interest is being made. The child's expressed opinion is taken into account in accordance with his/her age and maturity (Art. 86 para. 2 FA).

In this regard "the special guardian is obliged to take into account the child's view in accordance with his or her age, maturity and best interests. In matters of representation, the special guardian is obliged to accept the view and wishes of the child, unless it is contrary to his or her welfare (FA Art. 243 para. 1, and in conjunction with Art. 230, Art. 257 para. 2)."<sup>27</sup>

Our opinion is that the aforementioned provisions of the Croatian legal order are harmonized with the international global and regional (European) standards for the protection of the child's right to a special guardian, *i.e.* the right to express his/her opinion. However, the implementation of these regulations in the practice of competent authorities represents a great challenge.<sup>28</sup> To be more specific, on the one hand, the scope of competence of the SCG is very broad and, on the other, there is an insufficient number of special guardians, who are objectively overloaded, which is reflected in the quality of representation of children.<sup>29</sup> As a result, "representation of children by special guardians is often reduced to simply filling out the form prescribed by law"<sup>30</sup> Therefore, improving the organization and personnel capacities of SGC represents one of the challenges for better protection and realization of children's rights in national legal system.<sup>31</sup>

Although the European Convention on Human Rights (ECHR) doesn't include a special provision on the rights of children or specifically children's right to participate, child participation has increasingly been addressed and considered in the case law of the European Court of Human Rights (ECtHR).<sup>32</sup>

Therefore, in the next part of our paper we will present some problems concerning child's participation, *i.e.* representation of his/her interests before this international court that have been recognized in practice. Finally, in the last part, based on the overall analysis, we will make proposals of possible solutions with the aim of strengthening the protection of children's rights and the objective and independent representation of their interests in court proceedings, especially before the ECtHR.

27 Lucić N (n 24) 106.

28 Majstorović I, 'O odjecima strasbourškog *acquisa* u hrvatskom Obiteljskom zakonu iz 2015. godine' in Bubić S (ed), *The reflections of the case law of the European Court of Human Rights in national family legislation* (Mostar Law Faculty – University Džemal Bijedić 2017) 101–117.

29 Lucić N (n 24) 110; Šimović I (n 19) 11.

30 Lucić N (n 24) 110; On numerous weaknesses of the special guardianship institute points out the Croatian Ombudsman for children. See, for example, the last Annual Report on the work of the Ombudsman for children (2023) 89 available at: <<https://dijete.hr/en/izvjesca/izvjesca-o-radu-pravobranitelja-za-djecu/>> accessed 5<sup>th</sup> May 2024.

31 More about the role of the special guardian in the context of the child's right to express his/her opinion see: Šimović I (n 19) 1–15; Rešetar B and Rupić D, 'Posebni skrbnik za dijete u hrvatskom i njemačkom obiteljskopravnom sustavu' (2016) 37(3) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1175–1198; Regarding problems that special guardians encounter in everyday practice, see more in Lucić N (n 24) 108–112.

32 Mol C (n 6) 1.

#### 4. CASE LAW OF THE ECtHR CONCERNING (POSSIBLE) CONFLICT OF INTEREST BETWEEN A CHILD AND HIS/HER LEGAL REPRESENTATIVE

In many cases before the ECtHR, the issues of adequate representation and protection of the rights and interests of children have been debated.

When it comes to *locus standi* according to Art. 34 of the ECHR, in *T. A. and Others v. the Republic of Moldova* (App. No. 25450/20, Judgment 30 November 2021, para. 31) the Court emphasized that the position of children “deserves careful consideration, as they must generally rely on other persons to present their claims and represent their interests and may not be of an age or capacity to authorize any steps to be taken on their behalf in any real sense. A restrictive or technical approach in this area is therefore to be avoided and the key consideration in such cases is that any serious issues concerning respect for a child’s rights should be examined”.<sup>33</sup> Furthermore, the Court pointed out that “minors can apply to the Court even, or indeed especially, if they are represented by a person who is in conflict with the authorities and criticizes their decisions and conduct as not being consistent with the rights guaranteed by the Convention. In the event of a conflict over a minor’s interests, there is a danger that some of those interests will never be brought to the Court’s attention and that the minor will be deprived of effective protection of his rights under the Convention” (*T. A. and Others v. the Republic of Moldova*, App. No. 25450/20, Judgment 30 November 2021, para. 32).<sup>34,35</sup>

A question that has arisen in the jurisprudence of the ECtHR is “whether and how the Court should be trained on adopting a children’s rights perspective so that it can meaningfully consider the implementation of children’s right to be heard in their own proceedings” (*A. M. and Others v. Russia*, App. No. 47220/19, Judgment 6 July 2021, para. 43–44).

In its decision the ECtHR refers to the UN Committee on the Rights of the Child’s General Comment No. 12, 2009 (CRC/C/GC/12) claiming that “there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.” An almost identical standpoint can be found within the family law theory.<sup>36</sup>

“Therefore, in addition to the Court’s claims concerning the importance of the best interests of the child, more meaningful considerations in terms of children’s right to be heard and practical ways for the Court to involve children and hear their views and perspectives could

33 See also: ECtHR, *Hromadka and Hromadkova v. Russia*, Appl. No. 22909/10, Judgment 11 December 2014, para. 118.

34 See also: *E. M. and Others v. Norway*, Appl. No. 53471/17, Judgement 20 January 2022, para. 64.

35 Freeman M (n 2) 231–232. “The input and participation of the child, without a representative, will be limited and the court will miss critical information. (...) There will often be a conflict of interests between parents and children. In such cases, the parents aren’t adequate representatives of the child’s interests.”

36 Khazova O A and Dawit Mezmur B, ‘UN Committee on the Rights of the Child, Reflections on Family Law Issues in the Jurisprudence of the CRC Committee: The Convention on the Rights of the Child’ in Brinig M (ed), *International Survey of Family Law* (Cambridge – Antwerp – Chicago, Intersentia) 313–314; Khazova O A, ‘Interpreting and applying the best interests of the child: the main challenges’ in M Sormunen (ed), *The best interests of the child – A dialogue between theory and practice* (Strasbourg, Council of Europe Publishing 2016) 29–30; Zermatten J, ‘The Best Interests of the Child Principle: Literal Analysis and Function’ (2010) 18 *International Journal of Children’s Rights* 496–497.

contribute to the implementation of children's best interests in practice. "(A.M. and others v. Russia, para. 44).

Moreover, judge Elósegui in the aforementioned judgment in A. M. and others v. Russia, in his concurring opinion, concludes that "(i)n family-law cases of this kind, and first and foremost in the case of children with parents in conflict, the Court should find a way of making sure that the children have been informed or have a representative. It is not very logical or indeed reasonable that someone can represent a minor before an international court when the minor or another representative has not been properly informed."

We concur with this opinion since it is in line with the child-centered approach that must be respected, especially in cases when there are conflicts between parents as the most obvious representatives of the child. Obviously, other legal scholars are of the same opinion and advocate for the independent representation of children at the ECtHR, especially in complaints regarding family law proceedings where there is a possibility of conflicts of interest.<sup>37</sup>

In *N. TS. and Others v. Georgia* (App. No. 71776/12, 2 February 2016, para. 55; reiterated in *T.A. and Others v. the Republic of Moldova*, App. No. 25450/20, 30 November 2021, para. 33), the Court referred to three criteria which must be met in order for a person to have standing as a representative of the child in a case before the Court: (a) existence of a sufficiently close link between the child and the person lodging the complaint before the Court in the name of that child, (b) the risk that in the absence of this complaint, the child will be deprived of effective protection of his/her rights, and (c) the absence of any conflict of interests between the child and the person representing him or her.

The last mentioned criterion represents a special challenge since considering the Court's case law, unfortunately, we are not convinced that the Court itself adheres to that third criterion.

For example, in *K.B. and Others v. Croatia* (App. No. 36216/13, 14 March 2017, para. 109; reiterated in *C. v. Croatia*, App. No. 80117/17, 8 October 2020, para. 55; as well as in the already mentioned *A. M. and Others v. Russia*, App. No. 47220/19, 6 July 2021, para. 43), the Court formed a standpoint that in cases arising out of disputes between parents, it is the parent entitled to custody who is entrusted with safeguarding the child's interests, meaning that only this parent can represent the child in the proceeding before the Court. There are at least two questions that must be considered: whether independent and objective representation of the child is ensured by this standpoint and, additionally, whether the rights of the other parent with whom the child does not reside, but who has the right to parental responsibility, which includes the right to represent the child, are disproportionately limited.

On the other hand, when it comes to cases concerning both custody issues and alleged abuse of children, the Court finds that a parent as the holder of parental responsibility in respect of his/her children, although they no longer live with him/her, has standing to lodge an application on behalf of his/her minor children and has standing to act on their behalf (*H.P. and others v. Croatia*, App. no. 58282/19, Judgment 19 May 2022, para. 12; See also:

37 See: Rittossa D, 'Strengthening the Rights of Sexually Abused Children in front of the European Court of Human Rights - a Tale of Justice, Fairness and Constant Normative Evolution' (2020) 4 EU 2020 - Lessons from the Past and Solutions for the Future, EU and Comparative Law Issues and Challenges Series (ECLIC) 549-550 and 552; Mol C (n 6).

Petrov and X v. Russia, no. 23608/16, 23 October 2018, para. 83 and R.B. and M. v. Italy, no. 41382/19, 22 April 2021, para. 42).

What we would emphasize here is precisely the problem that the parent entitled to custody, i.e. parent who has parental responsibility in respect of his/her children can in fact be in a conflict of interest with the child whose interests he/she is (inadequately) representing before the Court (in that sense see: C. v. Croatia, para. 13, 15, 21, 23, 49 and 54). Additionally, the other parent may not even be aware of the proceeding initiated before the ECtHR and, thus, is completely excluded from representing the child in such an important proceeding.

Concerning the problem of inadequate representation due to the conflict of interests of the parents and the child, which was recognized by the ECtHR during the proceedings, we would specially refer to A. and B. v. Croatia. In this case the ECtHR, for the first time in its history, requested the appointment of a representative for the child in proceedings initiated by his mother as a legal representative. Such a court request was therefore a precedent and, although neither the ECHR nor the Rules of Court regulated the issue of child representation under such circumstances, “the Court has decided to fill the lacuna with an ad hoc solution relying on the relevant European rules within the context of child friendly justice”.<sup>38</sup> Due to the above, we will analyze this case in more detail.

#### 4.1. A. AND B. V. CROATIA AS A PRECEDENT CONCERNING CHILD REPRESENTATION BEFORE ECTHR

As mentioned above, the question of representation of the child before the ECtHR was raised in this case, *inter alia*, and at the request of the Court the Croatian Bar Association appointed a lawyer for the child with the aim of adequately representing her rights and interests. That included submitting observations on behalf of the child as the second applicant so that her rights and interests are duly presented and considered. In fact, due to the nature of the relationship between a mother as the first applicant and the father as the alleged perpetrator, as well as a possible conflict of interest between the applicants, mother and the child, adequate representation of the child’s rights and interest was doubtful.

Judge Wojtyczek points out the important general problem of child representation in circumstances of conflict between his/her parents in his concurring opinion. Specifically, he states: “The instant application was brought by one of the parents (the mother) in the context of an acute conflict with the other parent. If there is a conflict between the two parents, there is a strong risk that the rights of the child will be invoked in an instrumental way with the purpose of detrimentally affecting the interests of the other parent. The parents engaged in the conflict may no longer be able to identify and pursue the best interests of the child. In this context the question arises as to who should represent a minor if there is a conflict between the parents.” The judge concludes that this issue isn’t regulated either in the ECHR or in the Rules of Court and that there is a legal gap which can be detrimental to the interests of the children concerned.

<sup>38</sup> Rittossa D (n 37) 549.

As a result of that conflict in this case, as mentioned above, the Court requested that the Croatian Bar Association appoint a representative for the child applicant, although in accordance with the relevant domestic regulations relating to the representation of the child in cases of a possible conflict of interest of the child and parent(s), the appointment of a special guardian as the child's representative is within the competence of the court or the CSWI.<sup>39</sup> The child's special guardian, *i.e.* the appointed lawyer, submitted observations that contained information and claims that were not presented by the mother or by the Government of the Republic of Croatia in the proceedings. This fact actually confirms the importance of appropriate representation of the child, which would be safe from possible manipulations by the parents as legal representatives in circumstances of a certain collision of their interests and, consequently, their inability to protect the best interests of the child.

We would agree with judge Wojtyczek's opinion that „in very exceptional situations in which one parent lodges an application in a case involving the rights of a child and there is an acute conflict between the parents, there may be a need to appoint a guardian *ad litem* to protect the interests of the child”. At the same time, it is absolutely necessary to grant both the mother and the father the right to present their own observations before the Court, in parallel to those of the guardian. Concerning the appointment of the guardian *ad litem*, judge Wojtyczek considers that he/she “should be appointed by the competent domestic court, which is usually much more familiar with the situation of the persons concerned and the potential guardians.” We certainly support this opinion and its argumentation. In this sense, the Rules of Court should be amended, and additional emphasis should be given to ensuring impartial and objective representation of children in proceedings before the Court.

The role of the appointed guardian *ad litem* “would consist in assessing the actual and legal situation of the child and evaluating, in particular, whether new legal remedies and especially an application to this Court would serve the best interests of the child in the concrete situation.”<sup>40</sup>

In fact, “multiplying legal proceedings by exercising new remedies does not always serve the best interests of the child”.<sup>41</sup> A conflict that appears between parents has negative and, in more severe cases, detrimental effects on their child. Therefore, in cases of parental conflict it is undoubtably in the child's best interests to secure a prompt reaction and assistance to the family in crisis in order to deescalate the conflict and to find solutions that provide a more secure and emotionally stable environment for the child. In that sense, it is important to promote and develop different models of peaceful resolution of family law conflicts, especially

39 See Art. 240. FA. More about SGC: Aras Kramar S and Ljubić B, 'O djelovanju Centra za posebno skrbništvo: rezultati, dvojbe i perspektiva – I. dio' (2017) 17(6) Hrvatska pravna revija 22–33 and Aras Kramar S and Ljubić B, 'O djelovanju Centra za posebno skrbništvo: rezultati, dvojbe i perspektiva – II. dio' (2017) 17(7–8) Hrvatska pravna revija 16–25.

40 Concurring opinion of judge Wojtyczek, p. 7.

41 *Ibid.*

family mediation.<sup>42</sup> Notwithstanding, in such proceedings the voice of the child must be heard, *i.e.* child's right to express his/her views must be respected equally as in other proceedings.<sup>43</sup>

In their concurring opinion judges Koskelo, Eicke and Ilievski emphasize that "this case provides a particularly stark example of a problem this Court is not infrequently confronted with when considering applications brought jointly by one parent on their own behalf as well as for and on behalf of a child" (p. 2).

In fact, cases like this usually involve the breaking up of a family union, "in which the interests of one parent and the child are being represented together, by the same lawyer, no doubt on the instructions from the adult applicant" (p. 18.). In such circumstances, "the absence of separate representation of the child (and its best interest) makes it extremely difficult if not impossible for this Court to ascertain in any meaningful way what the best interests of the child, in fact, are or were". (p. 18).

Furthermore, their opinion is that "the very nature of the proceedings before this Court means that any mechanism that would leave it to the Court to direct or request the appointment of a legal guardian/separate representative for a child applicant in cases of established or suspected conflict of interest (...) would in the vast majority of cases be far too late and, therefore, ineffective to protect the best interests of the child" (p. 20).

Since "the Court and the Court's Rules of Procedure are currently not particularly well adapted to these difficulties" (p. 20), a solution that, according to them, would be worth considering, and which we support, is "to identify or establish domestic mechanisms for the appointment of a legal guardian/separate representation for a child in proceedings before this Court (or to continue the mandate of those appointed in domestic proceedings where that has occurred), at least in cases that have been communicated to the respondent Government and

42 This is indicated by the following documents: European Convention on the Exercise of Children's Rights (Art. 13), European Convention on Contact concerning Children ( Art. 7 and 8), Recommendation No. R (98) 1 of the Committee of Ministers to member states on family mediation, Recommendation 1639 (2003), on family mediation and gender equality, Green Paper on alternative dispute resolution in civil and commercial law, COM(2002) 196 final, European Parliament resolution on the Commission's Green Paper on alternative dispute resolution in civil and commercial law, P5\_TA (2003) 0084), Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

43 The rights guaranteed by the CRC need to be respected and their realization ensured in these proceedings as well, because in them many issues are discussed and decided upon that concern the child and therefore, in accordance with Art. 12 CRC, the exercise of the child's right to be heard in the procedure that concerns him/her must be ensured. This is also confirmed by the Committee for the Rights of the Child in General Comment no. 12. To be specific, in point 32, it is emphasized that this right of the child applies to all judicial and administrative procedures, where, for example, some of them are listed, and it is emphasized that they also include alternative procedures such as mediation and arbitration. Furthermore, point 52 of the General Comment points out the necessity to include in the legal provisions the right of the child to be heard in the mediation process, of course, when deciding on issues concerning the child in connection with the divorce or the termination of the family union. Child participation is also one of the fundamental principles of the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice. Thus, it is stated that "(t)he right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them should be respected" (III. A. p.1.). Family mediation and other "alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children's rights as described in these guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings" (IV. B. p. 26). According to Recommendation 1639 (2003) Family mediation and equality of sexes, "when the bone of contention is the child, he or she should also be heard in the mediation process because he or she is recognised as having rights. Children should be allowed their say if a solution is to be found that is genuinely in their best interests" (p. 6). *Amplius*: Parkinson P and Cashmore J, *The Voice of a Child in Family Law Disputes* (Oxford University Press. New York 2008); Čulo Margaletić A, 'Prava djeteta u obiteljskoj medijaciji' (2017) 8(special issue) *Godišnjak Akademije pravnih znanosti Hrvatske* 156-165.

where there is an established or suspected conflict of interest between the two applicants“ (p. 21).

When it comes to the representation of children by persons other than parents, below we will refer to the case of *N. TS. v. Georgia* in which Court has considered that the aunt has standing to lodge an application on behalf of her nephews since the application concerned important interests of the boys, and the case of *L. R. v. Northern Macedonia*, in which a civil society organization lodged an application to the Court on behalf of the children.

#### 4.2. (LEGAL) PERSONS COMPLAINING BEFORE THE ECtHR ON BEHALF OF A CHILD

The case of *N. TS. v. Georgia* is significant in terms of representing a child before the ECtHR, given that the court allowed an aunt to represent her nephews in the proceedings. In fact, although the children refused to live with their father and lived with their mother's family after their mother's death, the competent domestic authorities decided that the children should live with their father. Because of that decision, the aunt submitted a request to the court claiming that the competent authorities did not act in the best interest of the children and that the children were not included in the proceedings before the courts. The Court's conclusion was that the children were in a vulnerable position, that the aunt had a close relationship with them since they had lived together and that the aunt took care of them. Finally, although the father had the right to parental responsibility (which includes the right to represent his children) and considering the hostile relationship between him and the mother's family (including the aunt), the aunt was actually in the best position to protect the interests of the children.<sup>44</sup>

In fact, in cases of flawed representation of the child, the failure to duly present and hear the child's views undermines the procedural fairness of the decision-making process. In this case this was exacerbated by inadequate and one-sided consideration of the children's best interests, in which their emotional state of mind was simply ignored, and the Court concluded that, for that reason, there was a violation of the children's right to respect for their family and private life, as guaranteed by Article 8 of the ECHR (para. 84).

The next significant case in which the Court opened the possibility for civil society organizations to submit a request to the court on behalf of children whose rights they consider violated is the case of *L. R. v. Northern Macedonia*. The case concerned a child with developmental disabilities who had been in the care of state-run institutions since he was three months old, with allegations of inadequate care and ill treatment. This case came to the attention of an NGO after the Ombudsman visited the child in an institution which could not cater for his needs, and found him tied to his bed. The Helsinki Committee for Human Rights initiated proceedings before the ECtHR on behalf of that child, who had severe mental and physical disabilities, due to the violation of the rights from Art. 3 ECHR. During the proceeding, it was established that the applicant, an 8-year-old mentally disabled child, was vulnerable in mul-

44 Fenton-Glynn C, *Children and the European Court of Human Rights* (Oxford, Oxford University Press 2021) 258–259.

multiple ways, unable to express his wishes and protect his interests and that the authorities had been responsible for the inhuman and degrading treatment he had endured. In addition, the child's guardian did not authorize the Helsinki Committee to represent the child, moreover, criminal proceedings had been initiated against that institution.<sup>45</sup> As the child was found tied to a bed in inhumane conditions by the children's ombudsman who, although he had legal authority, failed to initiate proceedings before national courts, this was an additional argument for granting authority to the mentioned civil society organization to initiate proceedings before the ECtHR (para. 1–3, 46–50).<sup>46</sup>

Hence, having in mind the aforementioned facts, the Court concluded that “in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, the HCHR should be granted standing to act as the applicant's representative“ (para. 53).

This case raises a procedural issue of child representation before ECtHR that presents a great challenge since there is a legal gap in the relevant Rules of Court, especially in a situation where the parents are unable to represent their child. The judge Wojtyczek warns about that fact in his partly dissenting opinion. To be specific, the child's representative should identify and defend his/her best interests (para. 12); therefore, representation of a child by an NGO may be problematic because of two reasons, as judge Wojtyczek argues. First of all, it is preferable that the child's guardian is a natural person who is personally responsible for his/her actions and omissions. On the other hand, “non-governmental organizations have their own views, objectives and interests, which are not necessarily identical with the best interests of the minor they represent. They are involved in numerous cases and are often engaged in lobbying for the promotion of their views as well as the interests they have decided to defend“ (para. 12). So, the potential risk that the case of the child may be “instrumentalized for the sake of achieving the organization's general objectives“ (para. 12) should be kept in mind.

We would agree with judge Wojtyczek that the best interest of the child can collide with the interest and agendas of an organization or institution which would represent a child as guardians both before domestic and international courts. The best solution would be, as judge Wojtyczek pointed out, a court-appointed legal representative – guardian *ad litem* (natural person), who would be responsible for safeguarding and would exclusively represent the child's best interest throughout the proceedings before the Court.

Having in mind the presented ECtHR case law and open questions concerning the realization of the child's participatory rights, especially in situations when the child's right to be heard is being exercised indirectly by his/her representative who might be in conflict of interest with the child, where the application of the fundamental principle, *i.e.* the highest legal standard of protecting the child's best interests becomes doubtful, we will now present some of our own reflections on the challenges of better protection of the child's interest before the

45 In fact, the appointed guardian was not a natural person but an institution which failed in its responsibilities to protect the child's welfare. Moreover, the director of that institution was investigated for allegations of criminal offences linked to the case, so there was more than evident conflict of interest. Besides, no intervention by competent domestic authorities was made to resolve the issue of the conflict of interest.

46 Erdem Türkelli G, 'Who can represent a child (with disabilities) before the ECtHR? Locus Standi requirements and the issue of curator ad litem in L. R. v. North Macedonia', Strasbourg Observers, 2020. <<https://strasbourgobservers.com/2020/02/27/who-can-represent-a-child-with-disabilities-before-the-ecthr-locus-standi-requirements-and-the-issue-of-curator-ad-litem-in-l-r-v-north-macedonia>> accessed 5<sup>th</sup> of May 2024.



ECtHR that could lead to a more child-centered approach which should have primacy in all cases regarding children and their rights.

## 5. CHALLENGES OF BETTER PROTECTION OF CHILD'S INTEREST BEFORE THE ECtHR

In recent cases before the ECtHR, some of which we have presented *supra*, one constant discussion has concerned the extent to which a parent, who is in conflict with the other parent or with the child, can come to the Court and represent the rights and interests of that child, when in either case there is no agreement about the best interest of the child. It is very disputable whether the parent in such cases can be regarded as capable to objectively represent a child in proceedings before the Court.

This was especially emphasized in cases in which one of the parents as the applicant filed an application with the Court in his/her own behalf, but also in the name and on behalf of the child as a co-applicant with whom he/she may have a conflict of interests. Some authors rightly conclude that “*it is striking that children are not required to confirm their intention to be represented by a parent or may not even be aware of the application made on their behalf*”.<sup>47</sup> Also important is the fact that such unilateral representation of the child by only one of his/her parents exposes the problem of the complete exclusion of the other child's parent from representing the child in such an important proceeding, notwithstanding the fact that the other parent is also the holder of parental responsibility and the child's *ex lege* representative.<sup>48</sup>

Very often one parent lodges an application in his/her own name, but also on behalf of his/her children, claiming that both their rights and the rights of the children have been violated by the judgments of the domestic courts. There is a risk that this practice can lead to a sort of instrumentalization of the child's rights by this parent in order to achieve his/her own aims, i.e. obtain a judgment in his/her favour. This is especially the case when the child's participation complaints are included.<sup>49</sup> In other words, the child's participation must be considered from a child-centred approach. Children's rights, not their parents' complaints, should be in the focus of the Court when considering issues of child participation.

A special problem arises in situations in which the child was exposed to violence, *i.e.* abuse by his/her parent(s), or where there is more than obvious conflict of interest between the child and the parent(s). Therefore, the Court began to develop a new approach to child representation, recognizing the right for a third party to initiate proceedings before the court on behalf of a child.<sup>50</sup>

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47 Mol C (n 6).

48 Hrabar D *et al.*, *Presude o skrbištvu i lišenju poslovne sposobnosti Europskoga suda za ljudska prava protiv Republike Hrvatske* (Pravni fakultet Sveučilišta u Zagrebu 2021) 163.

49 Cf. Mol C (n 6).

50 Fenton-Glynn C (n 44) 258.

Recent jurisprudence of the ECtHR has paved the way for changes when it comes to representing a child before the Court in circumstances of obvious conflict between parents or the appointed guardian as legal representatives and the child, and consequently the lack of protection of the child, giving the right to represent the child to a person who is in close connection with the child and is in the best position to protect the interests of the child concerned, *i.e.* a civil society organization whose mission is the protection of human rights.

On the basis of the analyzed judgments of the ECtHR, what we find extremely important for the protection of the child's interests and the stronger implementation of a child-centered approach is to create a mechanism which would enable children who cannot be considered to be adequately represented by the parent-applicant to have an objective and impartial representative *ad litem* appointed for them, and have their rights and interests properly protected in the proceeding before the ECtHR. As could be seen above, proposals for solutions to this problem are given by some judges of the ECtHR in their separate opinions.<sup>51</sup>

One way to achieve this aim is certainly to strengthen the system of special guardianship in the domestic legal system. In fact, timely recognition of the conflict of interests between parents and children in proceedings before national courts and ensuring adequate representation of the child by an independent representative is certainly a primary step that can achieve, on the one hand, that the child's voice is heard in the proceedings, which is of utmost importance, meaning at the same time that his/her interest are being protected, and that those interests are of primary consideration when making decisions in proceedings related to the child. Second, but no less important, is to prevent, in some cases, the completely pointless initiation of proceedings before the ECtHR, the aim of which is unfortunately not to protect the violated rights of the child, but to deal with the other parent in circumstances of permanent and intense parental conflict, by ensuring adequate representation of the interests of the child which are far away from the focus of parents in conflict. In this sense, it is certainly worth emphasizing the importance of available and timely family law assistance to families in crisis, primarily through the further strengthening and development of family mediation.

On the other hand, if this domestic mechanism would not yield results and a situation appears before the ECtHR in which a child is represented by a person, usually a parent, who is suspected of not being able to represent the child's interests because his/her interests are in conflict with those of the child concerned, a mechanism of action by the ECtHR needs to be in place for ensuring that this child's interests will not be unnoticed and consequently not taken in consideration.

Therefore, we agree with the judges who presented proposals for amending the Rules of Procedure in their opinions. However, the question that arises is how to implement the proposal to appoint a special representative of the child in the proceedings before the Court. One option is for the appointment to be made by the Court, and the other option, which we tend to favor, is for the court to notify the respondent Government and request that the competent domestic authorities appoint a special guardian for the child who will represent the child in the proceed-

<sup>51</sup> Besides those in A. and B. v. Croatia, it is worth mentioning that judges Ravarani and Elósegui in their joint concurring opinion also declared that protection of rights and interest of the child in those circumstances can be achieved "by establishing a mechanism whereby a representative *ad litem* would be appointed for children whose rights or interests are at stake in proceedings before the Court but who cannot be considered to be represented by the applicant or the respondent Government." (judgement A. M. and others v. Russia, para. 11).

ings before the ECtHR. It is certainly doubtful at what moment the Court will be able to suspect the inappropriate representation of the child, and it is certainly more likely that this information will come to the Court from the respondent Government, and in this sense, a proactive approach at the national level should be encouraged in order to strengthen the protection of the best interests of children in proceedings before the court in general, and then additionally before the ECtHR. With the successful implementation of the child-centered approach at the national level, the action of the ECtHR in terms of ensuring and protecting the child's right to independent representation of his/her rights and interests would truly be a last resort.

## 6. CONCLUSION

Based on the presented relevant international and domestic legal framework, the analysed relevant jurisprudence of the ECtHR and our reflections concerning challenges of better protection of the child's interest before the ECtHR, our concluding remarks will include summarized propositions aiming to contribute to the appropriate representation of the child's interests in such proceedings.

Representation of the child before domestic courts as well as before ECtHR deserves special attention. Bearing in mind the vulnerability of children in general, and especially in the circumstances when they find themselves in the middle of a family law conflict, particularly considering children with disabilities who are incapable of expressing any wishes or views regarding their own needs and interests, or when their guardian doesn't fulfil his/her obligation in line with child's best interest, leading to the welfare of the child being unprotected, the question of the child's representation and protection of the child's rights and interest necessitates adequate and applicable solutions.

Based on the analyzed legal framework and recent jurisprudence of the ECtHR it can be concluded that there is an urgent need to ensure first of all domestic mechanisms for the appointment of a guardian *ad litem* to a child in proceedings before the ECtHR, at least in those cases when the respondent Government has been informed and in which it has been evident or there is a justified suspicion of the existence of a conflict of interest between the two applicants, one of whom is a child, as well as when application is lodged by a third party on behalf of the child, such as an NGO or another organization or institution, who do not have guardianship rights, when protection of the child's interest by their parents or legal guardians failed.

It is noteworthy that, in cases when such domestic mechanism has failed, *i.e.* when a special representative of the child wasn't appointed, we think that it would be crucial to consider possibilities for adequate and independent representation of children before the ECtHR by a mechanism that would be set out by the Rules of Court, which should be amended accordingly, as was proposed by some judges of the ECtHR in the presented and analyzed judgements.

To be specific, both the ECtHR and the national court should have the possibility, as a last resort of protection of the child's rights and interests, to appoint a special guardian, *i.e.* guardian *ad litem* in the aforementioned situations. Such a mechanism would prevent flawed representation of the child before the ECtHR, ensure adequate transmission of the views of the child to the Court and, consequently, ensure protection of the best interests of the child.

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## ZASTUPANJE DJETETA U POSTUPCIMA PRED EUROPSKIM SUDOM ZA LJUDSKA PRAVA

### Sažetak

Zastupanje djeteta dio je sadržaja roditeljske skrbi. Roditelji kao nositelji prava na roditeljsku skrb zastupaju prava i interese svojeg djeteta ravnopravno, zajednički i sporazumno kako u svakodnevnom životu tako i u postupcima pred sudskim ili upravnim tijelima. Međutim, u određenim životnim situacijama može se pojaviti sukob između roditelja (primjerice zbog prestanka životne zajednice, razvoda, otmice djeteta, lišenja poslovne sposobnosti) te se nameće pitanje koji bi od njih u takvim okolnostima trebao zastupati dijete te bi li zastupanje od strane samo jednog roditelja predstavljalo povredu načela ravnopravnosti u ostvarivanju roditeljske skrbi kao i načela ravnopravnosti spolova.

Uz navedeno, moguće su i situacije u kojima se pojavljuje sukob interesa između roditelja s jedne strane te njihova djeteta s druge (zbog, primjerice, pokretanja sudskog kaznenog, prekršajnog ili obiteljskog izvanparničnog postupka radi zaštite prava i dobrobiti djeteta protiv jednog ili oba roditelja), čime se pravni sustav stavlja pred izazov kako osigurati objektivno i nepristrano zastupanje djeteta i njegova najboljeg interesa.

Illoženo predstavlja kako društveni tako i pravni problem koji će biti pobliže analiziran u ovome radu polazeći od relevantnih pravnih izvora, akademske literature te novije prakse Europskog suda za ljudska prava.

*Ključne riječi: zastupanje djeteta, pravo djeteta na izražavanje mišljenja, najbolji interes djeteta, posebni skrbnik djeteta, sukob interesa*



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