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## The right of the child to be heard in the Croatian family law system

**ABSTRACT:** Croatian family law system positions children as legal subjects who can actively participate and make autonomous decisions in proceedings in which their rights and interests are decided. This is because children are holders of many substantive rights which are of little or no value if they cannot be realized in practice. Therefore, the Croatian legislator tried to ensure a system of procedural rights of the child authorizing them to protect their rights in all judicial and administrative proceedings either directly or, usually, through a legal representative. Pivotal procedural right of the child recognized by national and international sources of law is the right to be informed and heard in all matters affecting him/her. Hence, adequate understanding and implementation of this procedural right in the Croatian legislative and judicial system is essential. The goal of this article is to present a comprehensive analysis of relevant Croatian legislation, judicial practice, academic literature, and research studies in the context of the realization of the child's right to be informed and heard, as well as to point out the deficiencies which show that the Croatian family law system is yet to function perfectly in practice.

**KEYWORDS:** right of the child to be informed and heard, best interests of the child, Croatian Family Act, Convention on the rights of the child, special guardian ad litem.

### 1. Introduction

In the Croatian family law system, children are no longer just formal subjects (and *de facto* objects) of judicial and administrative proceedings. They can lawfully participate in these proceedings, and thus exercise the rights prescribed by national and international legal sources.<sup>1</sup> The need to position children as legal subjects who should actively participate and make autonomous decisions in proceedings in which their rights and interests are decided has long been established in the theory of substantive and procedural family law.<sup>2</sup>

Although children hold many substantive rights, especially in the field of family law, these rights are of little value if they cannot be realized in practice. Therefore, it is important to ensure a system of procedural rights of the child by prescribing them on the legislative level, authorizing the child to protect his/her substantive rights in judicial and administrative proceedings if those rights are threatened or violated by third parties.<sup>3</sup>

This is precisely why children's capacity to stand as parties to a suit (*ius standi in iudicio*) and litigation capacity (*locus standi in iudicio*) are important categories. They define the legal position of the child, which is realized in his/her right to participate as a party in all judicial proceedings in which their rights and interests are decided,<sup>4</sup> while undertaking procedural actions generally through a legal representative (parents, one parent with whom

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<sup>1</sup> Hrabar, 2012, p. 104; Majstorović, 2017a, p. 57; Šimović, 2021a, pp. 192–195.

<sup>2</sup> Hrabar, 2002, pp. 46–53; Korać, 2003, pp. 32–43; Hrabar, 2003, pp. 38–39; Uzelac and Rešetar, 2009, pp. 163–179.

<sup>3</sup> Aras, 2014, p. 35.

<sup>4</sup> Family Act, Official Gazette, No. 103/2015, 98/2019, 47/2020, Art. 358: The child is a party in all judicial proceedings in which his/her rights and interests are decided.

the child lives, adopters, individual guardians, social welfare centers, special guardians – Article 346 of the Family Act (hereinafter referred to as: FA) in connection with Article 80 of the Civil Procedure Act (hereinafter referred to as: CPA),<sup>5</sup> because of a lack of litigation capacity.<sup>6</sup> This means that, generally, a child cannot independently initiate judicial proceedings and undertake procedural actions in proceedings with a valid legal effect.<sup>7</sup> For this reason, the Croatian family law system has incorporated a legal principle that guarantees the child's right to objective and impartial representation as one of their basic procedural rights.<sup>8</sup>

The right of the child to be heard is part of the previously presented system of procedural rights of the child and is recognized by national and international law. Hence, although the child generally lacks litigation capacity, he/she is a party in all judicial proceedings in which his/her rights and interests are decided,<sup>9</sup> and has the right to be informed and express his/her opinion<sup>10</sup> always following the principle of primary protection of his/her best interests.<sup>11</sup> If the court did not give the child the opportunity to be heard in these proceedings, and there were no particularly justified reasons for this, this would represent a substantial violation of civil procedure rules,<sup>12</sup> as well as a violation of the constitutional right

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<sup>5</sup> Art. 346 of the FA: The provisions of the Civil Procedure Act and the Seizure Act shall apply accordingly to proceedings in family and status matters unless this Act stipulates differently; Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 148/2011 – official consolidated text, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, Art. 80: Parties who do not have the litigation capacity shall be represented by their legal representatives. The parties' legal representatives shall be designated by the law or by an act of the competent state body issued in accordance with the law.

<sup>6</sup> Šimović, 2021a, p. 195; Šimović, 2011, pp. 1626; 1629–1630.

<sup>7</sup> There are several exceptions to this rule. A) Art. 359 of the FA prescribes that in matters relating to personal rights and interests of the child, the court may permit the child to perform certain procedural actions if certain preconditions are met – the child that filed the request has turned fourteen and is capable of understanding the meaning and legal consequences of those procedural actions (as confirmed by the opinion of the social welfare centre); B) Art. 117(2) of the FA prescribes preconditions for the acquisition of legal capacity by the child – when reaching the age of majority or by entering marriage before majority. In those situations, a child can undertake procedural actions by himself or herself (full litigation capacity – Art. 79(1) of the CPA in connection with Art. 346 of the FA); C) Arts. 85, 88 of the FA prescribe preconditions for the acquisition of limited legal capacity by the child – when reaching the age of fifteen or sixteen, a child can partially represent his/her property or personal rights. In those situations, a child has not acquired full litigation capacity and shall have litigation capacity only within the limits in which his or her legal capacity is recognised (Art. 79(3) of the CPA in connection with Art. 346 of the FA); See: Šimović, 2021a, pp. 192–195; Aras Kramar, 2022, pp. 108–117.

<sup>8</sup> Art. 348 of the FA; Art. 346 of the FA in connection with Arts. 82, 83 of the CPA. Art. 348(1), (2) of the FA: A court shall pay particular attention during the proceeding to protect the rights and interests of children .... Art. 82 of the CPA in connection with Art. 346 of the FA: During the whole proceeding the court shall, *sua sponte*, pay attention to whether the person appearing as a party ... has litigation capacity, whether the party who lacks litigation capacity is represented by his/her legal representative. Art. 83(2) of the CPA in connection with Art. 346 of the FA: When the court establishes that a party has no legal representative ... it shall request the competent social welfare centre to appoint a guardian for the party lacking litigation capacity ... or it shall take other measures necessary for proper representation of the party lacking litigation capacity.

<sup>9</sup> Art. 358 of the FA.

<sup>10</sup> Arts. 86, 360 of the FA.

<sup>11</sup> Art. 5(1) of the FA: Courts and all public authorities conducting proceedings in which it is directly or indirectly decided on the rights of the child must above all protect the rights and the welfare of the child.

<sup>12</sup> Art. 346 of the FA, in connection with Art. 354(2) subpar. 6 of the CPA – violation of the principle of hearing the parties. Art. 354(2) subpar. 6 of the CPA: A substantial violation of civil procedure rules always exists if, because of unlawful actions, and especially because failure to make service, any of the parties was not given opportunity to be heard by the court. See Aras, 2014, p. 63; Aras Kramar, 2022, p. 122; Šimović, 2011, p. 1642.

to a fair trial.<sup>13</sup> This confirms that compliance with the procedural rights of the child, especially the right to be informed and express his/her opinion, is of essential importance within the Croatian family law system.

## **2. Protection of the right of the child to be heard in national and international legal sources**

### ***2.1. The Constitution of the Republic of Croatia and the Family Act***

The child's right to be heard has an important position within the FA and is prescribed by both, substantive and procedural provisions.<sup>14</sup> In part of the FA, which contains substantive provisions, this child's rights are regulated by Article 86 which reads:

Parents and other persons who take care of the child are obliged to respect the child's views in accordance with his/her age.

In all proceedings involving decisions on the child's right or interest, the child is entitled to be informed in an appropriate way of the relevant circumstances of the case, obtain advice and express his/her views and to be informed of the possible consequences of those views. The child's views shall be given due weight in accordance with his/her age and maturity.<sup>15</sup>

Paragraph 1 of Article 86 prescribed how this right of the child should be realized in everyday life, referring to family, school, health, diet, sports, and cultural issues.<sup>16</sup> This provision also prescribes who is, first and foremost, obliged to respect the child's right to be heard and help him/her realize this right in practice – the parents. Therefore, 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 derived from parental care (in accordance with the age and maturity of children).<sup>17</sup>

Paragraph 2 of Article 86 prescribes how this right of the child should be realized in all judicial and administrative proceedings in which his/her rights or interests are decided, emphasizing the child's right to be informed and obtain advice, before eventually deciding to exercise the right to express his/her opinion. This provision is a confirmation that Croatian legislators have implemented and they have further elaborated the constitutional requirement thus: 'Everyone's duty is to protect children and infirm persons.'<sup>18</sup> We align with the authors' interpretation of the provision 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,

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<sup>13</sup> Constitution of the Republic of Croatia, Official Gazette, No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010 and 5/2014., Art. 29(1): Everyone shall be entitled to have his/her rights and obligations ... decided upon fairly and within a reasonable time by an independent and impartial court established by law.

<sup>14</sup> Another Croatian legal source that is of relevance is the Bylaw on the Methods of Communication with the Child (Official Gazette, No. 123/2015), which prescribes in more detail methods of obtaining the opinion of the child in judicial proceedings. Provisions of this national legal source will be analyzed later in the text.

<sup>15</sup> A very similar procedural provision is contained in Art. 360(5) of the FA.

<sup>16</sup> Similar opinion in Hrabar, 2020, p. 664; Rešetar, 2022, p. 352.

<sup>17</sup> Age and maturity of the child are factors that should be considered, because the older and more mature the child is, the greater the influence his/her opinion has on the decision-making process. See Korać Graovac, 2012, p. 121; Majstorović, 2017a, p. 57; Šimović, 2021a, pp. 194–195; Knol Radoja, 2021, p. 171.

<sup>18</sup> Art. 64(1) of the Constitution; Alinčić et al., 2013, p. 108.

represented by judicial and administrative bodies, to protect the children, also by making them “visible.”<sup>19</sup>

The logic behind this standpoint of Croatian family law theory is that if the child’s opinion is not established because he/she was not given the opportunity to express his/her considerations, thoughts, wishes etc., then the child cannot be protected as it will be impossible to determine what is in the child’s best interest and how to protect it!<sup>20</sup>

Paragraph 2 of Article 86 confirms that the Croatian legislature has implemented requirements prescribed by international global and regional legal sources that represent a component of the domestic legal order of the Republic of Croatia<sup>21</sup> – for example, Article 12 of the Convention on the rights of the child: CRC,<sup>22</sup> Article 3 of the European Convention on the Exercise of Children’s Rights: ECECR,<sup>23</sup> Article 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms: ECHR,<sup>24</sup> Article 24 of the Charter of fundamental rights of the European Union: Charter<sup>25</sup>.

## ***2.2. Convention on the Rights of the Child and the Family Act***

The Convention on the rights of the child (hereinafter referred to as: CRC) is the most important global legal document for the protection of children’s rights. It rests on four principles that form the basis for all actions regarding children: prohibition of discrimination,<sup>26</sup> protection of the best interests of the child as the primary consideration,<sup>27</sup> the right of the child to full and harmonious development,<sup>28</sup> and the right of the child to be informed and heard in any judicial and administrative proceedings affecting him or her.<sup>29</sup> Some studies that have been conducted with the goal of ascertaining the influence of the CRC on national legal systems imply that Article 12 of the CRC was the most incorporated provision after Article 3.<sup>30</sup> The full text of Article 12 of the CRC reads:

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.

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

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<sup>19</sup> Majstorović, 2017a, p. 59.

<sup>20</sup> Hrabar, 2007, pp. 274–276; Hrabar, 2020, p. 664; Šeparović, 2014, pp. 52, 75–76, 205–206, 216; Rešetar and Rupić, 2016, pp. 1179–1180; Rešetar, 2022, p. 349.

<sup>21</sup> Art. 134 of the Constitution: International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law.

<sup>22</sup> Convention on the rights of the child (1989), Official journal of the SFRY, No. 15/1990., Official Gazette – International treaties, No. 12/1993, 20/1997, 4/1998, 13/1998.

<sup>23</sup> European Convention on the exercise of Children’s Rights, Official Gazette – International treaties, No. 1/2010, 3/2010.

<sup>24</sup> Convention on the protection of human rights and fundamental freedoms, Official Gazette – International Treaties, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010.

<sup>25</sup> Charter of fundamental rights of the European Union (2012), Official Journal of the European Union, C 326, 26.10.2012.

<sup>26</sup> Art. 2 of the CRC.

<sup>27</sup> Art. 3 of the CRC.

<sup>28</sup> Arts. 6, 18 of the CRC.

<sup>29</sup> Art. 12 of the CRC.

<sup>30</sup> Daly and Rap, 2019, p. 300.

directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Committee on the Rights of the Child has long emphasized that a strong link exists between the right of the child to be informed and to be heard<sup>31</sup> and the principle of primary protection of the best interests of the child.<sup>32</sup> In this regard, General Comment No. 12<sup>33</sup> prescribes (par. 74.):

There is no tension between Articles 3 and 12, only a complementary role of the two general principles ... In fact, 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.

Relying on this standpoint of the Committee on the Rights of the Child, Croatian family law theory concluded that the same link exists between Articles 86 and 5 of the FA and thus formed a standpoint that proper exercise of the child's right to be informed and heard is somewhat of a precondition for the correct assessment and protection of the best interest of the child.<sup>34</sup> This standpoint of Croatian family law theory has also been accepted and implemented in Croatian judicial practice. In this regard, the standpoint of the County Court in Zagreb is as follows:

In the proceedings of the first-instance court, the relevant provision of Article 86 Paragraph 2 was properly applied in accordance with the principle of primary protection of the best interests of the child from Article 5 of the FA, thus primarily protecting the rights and interests of the child – in accordance with the provision of Article 3 of the CRC.<sup>35</sup>

### **3. Expressing an opinion – the right of the child, not an obligation**

Another legal standpoint that has been emphasized in international legal sources is that expressing an opinion is the right of the child, not his/her obligation. This standpoint was implemented in General Comment No. 12 (par. 16), Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (further: Guidelines on Child-Friendly Justice – par. 46)<sup>36</sup> and most recently in the Brussels II *ter* Regulation, where it is prescribed that ‘...while remaining a right of the child, hearing the child cannot constitute an absolute

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<sup>31</sup> Art. 12 of the CRC.

<sup>32</sup> Art. 3 of the CRC.

<sup>33</sup> Committee on the rights of the child (2009). General comment No. 12 (2009) – The right of the child to be heard, CRC/C/GC/12, 1 July 2009.

<sup>34</sup> Hrabar, 2007, pp. 274–276; Hrabar, 2020, p. 664; Majstorović, 2017a, p. 56; Šeparović, 2014, pp. 52, 75–76, 205–206, 216; Rešetar and Rupić, 2016, pp. 1179–1180; Seršić–Gržetić, 2011, pp. 726, 732; Šimović, 2011, p. 1639; Lucić, 2021, p. 112; Rešetar, 2022, p. 349; Knol Radoja, 2021, p. 179.

<sup>35</sup> County Court in Zagreb, Gž Ob 436/2017, 25 April 2017; See also Constitutional Court of the Republic of Croatia, U-III/1008/2015, 1 July 2015, para. 8.1. and 11.2; Constitutional Court of the Republic of Croatia, U-III/4069/2013, 10 September 2014, para. 2. and 4.2.

<sup>36</sup> Committee of ministers of the Council of Europe, 2010. It can rightly be said that the General Comment or the Guidelines on child-friendly justice are not direct legal sources of the Croatian legal order, but they have a strong impact on both Croatian family law, theory, and judicial practice. Thus, it was necessary to accentuate their relevance in this field of law.

obligation but must be assessed taking into account the best interests of the child...' (recital 39).<sup>37</sup>

To improve the family law system, the Croatian legislature implemented the following legal standpoint into the procedural provisions of the FA and prescribed: 'In proceedings concerning the personal or proprietary rights and interests of the child, the court will enable the child to express his or her opinion, unless the child declines.'<sup>38</sup>

This provision confirms that the right to be heard is solely a right and never the obligation of the child, but at the same time, it imposes an obligation to inform the child that he/she can decide not to participate at any point in the proceeding.<sup>39</sup> In connection with this, the FA prescribes that the competent court is not obligated to obtain a child's opinion in cases where there are particularly important reasons that need to be explained in the decision.<sup>40</sup> For example, if the child is exposed to a conflict of loyalty or a high amount of stress or manipulation (by parents, household members, third persons, etc.), the competent court's duty is to assess whether these are justified reasons not to obtain the child's opinion.<sup>41</sup> Analyzed judgments confirm that the stated duty has been accepted and implemented in Croatian judicial practice; that is, the courts generally provide an adequate explanation of justified reasons for not obtaining the child's opinion.<sup>42</sup> A few examples are considered below. Constitutional Court of the Republic of Croatia, U-III/1525/2015, judgment from July 17, 2015, par. 12.

It is true that the CRC stipulates that the child has the right to freely express his/her views, but during the proceeding it was unequivocally established that in this particular case the child cannot freely express his opinion because the mother constantly exerts a negative influence on the child.<sup>43</sup>

County Court in Dubrovnik, Gž 319/2014, Judgment of 2 April 2014.

Although the CRC in Article 12 stipulates that children shall be provided the opportunity to express their views on all important issues that may affect their lives, as is referred to in the FA as well, appreciating all the circumstances of the case, this court considers that it would not be in the best interest of a minor child to be heard before the court. Namely, a direct question about whether she would be against moving to Austria brings the child into a conflict of loyalty because she is in a situation where she must choose between her parents.<sup>44</sup>

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<sup>37</sup> Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, Official Journal of the European Union, L 178/1.

<sup>38</sup> Art. 360(1) of the FA.

<sup>39</sup> Majstorović, 2017a, p. 58; Hrabar, 2020, p. 663.

<sup>40</sup> Art. 360(4) of the FA.

<sup>41</sup> Majstorović, 2017a, p. 66; Parać Garma, 2012, p. 147; Rešetar, 2022, p. 351; Knol Radoja, 2021, p. 170; Lucić, 2017, p. 414.

<sup>42</sup> If the court would not provide an adequate explanation of the particularly justified reasons for not obtaining the child's opinion, this would represent a substantial violation of civil procedure rules (Art. 346 of the FA in connection with Art. 354(2) subpar. 11 of the CPA – the judgment has defects because of which it cannot be examined). It would also represent a violation of the procedural requirements set forth in the Grand Chamber judgment of the ECtHR in *X v. Latvia* App. No. 27853/09, 26 November 2013, para. 107.

<sup>43</sup> The Constitutional Court of the Republic of Croatia confirmed that the negative influence from one of the parents towards the child was the reason why the competent court was not under an obligation to obtain a child's opinion in this proceeding.

<sup>44</sup> The County Court in Dubrovnik concluded that the conflict of loyalty was the reason why it was not under an obligation to obtain a child's opinion.

These examples also confirm that Croatian judicial practice is in line with the standpoint of Croatian family law theory – not to expose the child to additional stress, inconveniences, and conflicts of loyalty<sup>45</sup> – as well as with the standpoint of the Court of Justice of the European Union expressed in Case C-491/10 PPU:

... the conflicts which make necessary a judgment awarding custody of a child ... and the associated tensions, create situations in which the hearing of the child ... may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly, while remaining a right of the child, hearing the child cannot constitute an absolute obligation but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights.<sup>46</sup>

#### **4. Expressing an (authentic) opinion in an appropriate place**

In the Croatian family law system, not only does a child have the right to express his/her own opinion in all judicial and administrative proceedings in which their rights or interests are decided, but the child also has the right to express his/her opinion in an appropriate place. The rights of the child are prescribed in Article 360 Paragraph 2 of the FA which reads: ‘The court shall enable the child to express his or her opinion in an appropriate place and in the presence of a professional if it considers that necessary in the circumstances of the case.’

Hearing a child in an appropriate place is a precondition that must be met for the court to obtain an authentic opinion of the child (deprived of any external influences).<sup>47</sup> Therefore, the question remains: What is considered an appropriate place in the Croatian family law system? The answer to this question cannot be found within the provisions of the FA, but within provisions of the Bylaw on the Methods of Communication with the Child (further: Bylaw).

The Bylaw defines that an appropriate place is ‘...a premises other than a courtroom that is equipped and adapted for working with the child, where the child is ensured privacy and safety.’<sup>48</sup> This may be the child’s home (also the home of the parents, foster parents, or an institution where the child is living) or special premises in the building of the court,<sup>49</sup> competent social welfare center, special guardianship center, or any other place determined by the court, as long as it meets the preconditions prescribed in Article 5 of the Bylaw. In addition, a child’s opinion can be heard through a video link in his/her parents’ home, foster home, or an institution where he/she is living. Notwithstanding the (appropriate) place where

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<sup>45</sup> Majstorović, 2017a, p. 66; Parać Garma, 2012, p. 145–148; Knol Radoja, 2021, pp. 171–172, 179–180.

<sup>46</sup> Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, 22 December 2010, para. 64.

<sup>47</sup> The problem of authenticity of the child's opinion, i.e., possible manipulation of the child, is often accentuated in relevant Croatian family law theory. See Hrabar, 2019, pp. 29–34, 46–54; Hrabar, 2012, p. 107; Hrabar, 2020, p. 665; Majstorović, 2017a, pp. 57; Parać Garma, 2012, p. 147; Knol Radoja, 2021, p. 179.

<sup>48</sup> Art. 5 of the Bylaw on the Methods of Communication with the Child.

<sup>49</sup> The problem is that most Municipal courts in Croatia do not have financial resources to implement this provision in their daily work. This is an important criticism as regards the Bylaw, since it oversees the fact that insufficient budgetary resources are secured for these matters, making the normative solutions only a list of good wishes. See Majstorović, 2017a, p. 65; Parać Garma, 2012, p. 146.

the child is being heard, he/she should always express his/her opinion in the absence of his/her parents or other people who care for him/her.<sup>50</sup>

The relevance of hearing a child in an appropriate place was also emphasized in Croatian judicial practice: County Court in Pula, Gž Ob 257/2020, judgment of 1. September 2020. In that case, the parties debated whether the child was heard in an appropriate place and, consequently, whether the opinion obtained from the child was authentic. The Court concluded that the child was unlawfully detained in the father's household for two months, where he was heard by a special guardian. The court correctly determined that the child's opinion was not authentic but was the result of the father's inappropriate and harmful pressure on the child.

## **5. Deficiencies in Croatian family law regulation of the right of the child to be heard**

After a detailed analysis, it is possible to determine two deficiencies in the provisions of the FA that regulate the right of the child to be informed and heard in all proceedings in which their rights or interests are decided. The first deficiency that needs to be addressed is presented in Article 360 Paragraph 3 of the FA. This provision is as follows:

In an exception to Paragraph 2 of this Article, in the case of a child younger than fourteen, the court shall enable his or her opinion to be expressed by way of a special guardian ad litem or another professional person.

According to General Comment No. 12. (par. 35 and 41) and Guidelines for Child-Friendly Justice (par. 44), not only does the child have the right to express his/her opinion in an appropriate place, but the child also has the right to choose how to express his/her opinion, either directly or through a representative.<sup>51</sup> The problem is that according to the provisions of Article 360 Paragraph 3 of the FA, a child younger than 14<sup>52</sup> years cannot express his/her opinion directly, but only through a representative. As a result, this category of children is denied the right to choose how they would be heard in proceedings in which their rights or interests are decided. This is in direct contradiction to the fundamental principles laid down in ECECR, one of which is that the child decides how he/she will be heard – directly or through a representative.<sup>53</sup>

The second deficiency that needs to be presented refers to the realization of rights of the child to express his/her views in the mandatory counselling<sup>54</sup> and family mediation<sup>55</sup> proceedings. Both are extra-judicial proceedings in which decisions are made concerning the child's rights and interests, which are important if not crucial for the child's future. Article

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<sup>50</sup> Art. 4 of the Bylaw on the Methods of Communication with the Child. For a detailed analysis of the provisions of the Bylaw regarding the appropriate place, see Majstorović, 2017a, pp. 65, 67; Rešetar and Lucić, 2021, pp. 150–151; Aras Kramar, 2021, pp. 119–122.

<sup>51</sup> Lucić, 2017, pp. 396, 417; Lucić, 2021, p. 99.

<sup>52</sup> It is unclear why the element of maturity was omitted? Hence, the principle of cumulating of age and maturity, as legacy of the CRC is not respected. See Majstorović, 2017a, p. 66; Hrabar, 2020, p. 663.

<sup>53</sup> Rešetar, 2022, p. 350.

<sup>54</sup> Art. 321(1), (2) of the FA: Mandatory counselling is a form of aid provided to family members to reach an agreement on family matters, within the framework of which the counsellors show great concern for the protection of family relations affecting the child and present the legal consequences of a failure to reach such an agreement and initiation of judicial proceedings regulating children's rights. Mandatory counselling is conducted by an expert team at the social welfare centre situated in the place of the child's residence or in the place of the parents' last common residence.

<sup>55</sup> Art. 331(1) of the FA: Family mediation is a procedure in which the parties, assisted by one or more family mediators, try to amicably resolve family matters.



325 Paragraph 3 of the FA prescribes that during the mandatory counselling proceeding, a child can be allowed to express his/her opinion if the parents consent to it.<sup>56</sup> Also, Article 339 Paragraph 2 of the FA prescribes that a child can be allowed to express his/her opinion in the family mediation proceeding, again if the parents consent to it. Notwithstanding the faith that the legal system has in parents, who are first in line to protect their children, the fact that children's participation depends upon the decision of the parents cannot be considered as a proper solution, which is in line with Article 12 of the CRC or the recommendations prescribed in General Comment No. 12. (par. 32 and 52).<sup>57</sup>

## 6. The role of a child's special guardian *ad litem*

The child's special guardian *ad litem* plays an important role in the realization of the child's right to be heard. As already mentioned, the FA prescribes that in case a child is younger than 14, the court shall enable his or her opinion to be expressed through a special guardian *ad litem* or another professional person (for example, psychologist, social worker, or another qualified professional, Article 360 Paragraph 3). The position and duties of the child's special guardian *ad litem* come to the fore in proceedings in which the interests of the child conflict with those of the parents as their most common legal representatives, or in cases where there is the risk of such a conflict.<sup>58</sup>

The special guardian *ad litem* represents the child in proceedings for which he/she was appointed, informs the child about the subject, evolution, and possible outcome of the proceeding in an appropriate way, and assures that the child's right to express his/her opinion is realized.<sup>59</sup> This means that, in matters of representation, the special guardian *ad litem* is obliged to consider the child's views in accordance with his/her age, maturity, and best interest and is obliged to accept the views and wishes of the child, unless it is contrary to his/her best interest.<sup>60</sup> Other duties of a child's special guardian *ad litem* are to contact the parent or other persons close to the child<sup>61</sup> as well as to inform the child of the content of the decision and the right to appeal.<sup>62</sup>

The aforementioned provisions of the FA demonstrate that the Croatian family law system has specified the position and duties of a child's special guardian *ad litem* in

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<sup>56</sup> An identical provision is contained in Art. 329(2) of the FA.

<sup>57</sup> Majstorović, 2017a, pp. 60, 66; Čulo Margaletić, 2017, pp. 155–157; Aras Kramar, 2015, pp. 246–247; For a different standpoint on this issue see Lucić, 2017, pp. 411–413.

<sup>58</sup> Art. 240(1) of the FA: In order to protect certain personal and proprietary rights and interests of the child, the social welfare centre or the court shall appoint a special guardian: 1. to a child in matrimonial disputes and in proceedings for contesting maternity or paternity, 2. to a child in other proceedings in which it is decided on parental care, certain contents of parental care and personal relations with the child when there is a dispute between the parties, 3. to a child in the proceedings of imposing measures for the protection of personal rights and welfare of the child within the jurisdiction of the court when it is prescribed by the provisions of FA, 4. to a child in the process of making a decision that replaces the consent to adoption, 5. to a child when there is a conflict of interest between him or her and his or her legal representatives in property proceedings or disputes, or when concluding certain legal transactions, 6. to children in case of a dispute or a legal transaction between them \*when the same person has parental care over them, 7. to a child of foreign citizenship or a stateless child found on the territory of the Republic of Croatia unaccompanied by a legal representative, 8. in other cases as prescribed by the provisions of FA, i.e. special regulations or if it is necessary for the protection of the rights and interests of the child.

<sup>59</sup> Art. 240(2) in connection with Art. 360(3), (5)–(6) of the FA.

<sup>60</sup> Art. 243(1) in connection with Art. 230, Art. 252(2), (3), Art. 257(2) of the FA.

<sup>61</sup> Art. 240(2) of the FA.

<sup>62</sup> Art. 361(2) of the FA. About the role of a child's special guardian *ad litem* see also Šimović, 2021b, p. 176; Lucić, 2021, pp. 100–101, 104–106, 109; Lucić, 2017, pp. 415–417; Rešetar and Lucić, 2021, pp. 149–150; Aras, 2014, pp. 58–59.

accordance with the requirements prescribed by international global and regional legal sources that represent a component of the domestic legal order.<sup>63</sup> However, as pointed out in Croatian family law theory, the challenges are often not related to legislation but to its effective implementation in practice.<sup>64</sup> This thesis was confirmed by the judgment of the European Court of Human Rights in *C v. Croatia*<sup>65</sup> in which the Court concluded that proceedings carried out in front of Croatian courts did not meet the procedural requirements derived from Article 8 of the ECHR because the special guardian was not appointed to the child (a party to the proceeding), nor was the child given the opportunity to be heard.<sup>66</sup> As a result: ‘...the combination of flawed representation and the failure to duly present and hear the applicant’s (minor child’s) views in the proceedings irremediably undermined the decision-making process in the instant case.’

A similar conclusion was reached in the judgment of the Constitutional Court of the Republic of Croatia<sup>67</sup> in which the Court concluded that there was a violation of the procedural rights of children as parties to the proceedings (including their right to be informed and heard) because their special guardian *ad litem* was completely passive in representing their rights and interests during the proceedings.<sup>68</sup> However, in another judgment, the Constitutional Court of the Republic of Croatia<sup>69</sup> concluded that there was no violation of the procedural rights of the child because her special guardian *ad litem* was active in representing the child’s rights and interests during the proceedings. This shows the importance of the role of the special guardian *ad litem* in the context of the realization of the child's right to be heard and the protection of the child’s right to objective and impartial representation in judicial and administrative proceedings.

## 7. Concluding remarks

There is no doubt that Croatia has created solid legal foundations for enabling the active participation of the child in judicial and administrative proceedings in which their rights or interests are decided. The FA and the Bylaw clearly and unequivocally prescribe the child's right to be informed and heard, as well as his/her right to professional and impartial representation by a special guardian *ad litem* in proceedings in which his/her interests conflict with those of the parents. These provisions of the FA and the Bylaw are, for the most part<sup>70</sup>, in line with the requirements derived from international global and regional legal sources that represent a component of the domestic legal order of the Republic of Croatia: CRC, ECECR, ECHR, and Charter.

However, as pointed out in the previous chapter, the problem is not legislation, but the exercise and effective implementation of legislation and the prescribed standards relating to

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<sup>63</sup> Art. 12(2) of the CRC; Arts. 4, 9, 10 of the ECECR, procedural obligations derived from Art. 8 of the ECHR.

<sup>64</sup> Majstorović, 2017b, p. 103, 117; Korać Graovac, 2016, pp. 130, 142.

<sup>65</sup> *C v. Croatia* Appl. No. 80117/17, 8 October 2020, para. 76–78, 81.

<sup>66</sup> The question of inadequate representation of children and violation of their right to be heard was also addressed in other cases in front of the ECtHR. See: *Case M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, para. 129, 181, 184–187; *Case of N. Ts. and others v. Georgia*, App. No. 71776/12, 2 February 2016, para. 75, 77.

<sup>67</sup> U-III/1674/201, 13 July 2017, para. 9.4, 12.

<sup>68</sup> See also: Judgment of the Constitutional Court of the Republic of Croatia, U-III/249/2022, 12 July 2022, para. 10.7–10.9.

<sup>69</sup> U-III/3665/2020, 12 September 2021, para. 6.1.

<sup>70</sup> Two deficiencies of the FA provisions that regulate the right of the child to be informed and to be heard have been elaborated in Chapter 5.

children's procedural rights in practice.<sup>71</sup> The question is, why is that so? Let us consider the main structural problems and their possible solutions.

- Croatian family law theory has often accentuated that there are no specialized family courts that would enjoy adequate logistical support from auxiliary professions such as social workers, psychologists, and social pedagogues.<sup>72</sup> We believe that this should change and that the path towards the recognition of children's procedural rights, as well as their more efficient legal protection, demands the reorganization of the judicial system in that direction. Unfortunately, it appears that there are not enough financial resources to cover the cost of such an organization.<sup>73</sup>
- Most Municipal Courts in Croatia lack the financial resources to implement the provisions of Article 5 of the Bylaw in their daily work. This means that most courts do not have an appropriate place for working with the child, which is a precondition that must be met to obtain an authentic opinion of the child.<sup>74</sup> We hope that insufficient budgetary resources will not be an obstacle to the effective implementation of children's procedural rights in the future.
- Competent Municipal Courts often use social welfare centers as auxiliary bodies for hearing the child, which is a party to the proceeding. This is because their expert teams, apart from lawyers, also include social workers and psychologists with more experience and specific competencies for communicating with children that are not acquired during legal education. This is, of course, a good solution "on paper" but in practice, it needs additional support from the competent Ministry. The problem is that social welfare centers are often overburdened and under capacitated and are therefore exposed to the risk of making poor assessments.<sup>75</sup>
- The special guardianship center employs an insufficient number of special guardians' *ad litem* that can adequately fulfil all duties required by law. A recent study has shown that '...the biggest problem of the successful work of special guardians has been the excessive number of cases of representation in relation to the number of employed special guardians.'<sup>76</sup> The total number of child representation cases in 2021 was 5274 and the number of special guardians was 18, which means that each special guardian had an average of 293 cases that year.<sup>77</sup> When the number of child representation cases is added to 195 adult representation cases that year, it is clear that such a heavy caseload must have an impact on the quality of representation provided by the special guardians.<sup>78</sup> Another research study has shown that it is not possible for special guardians to adequately fulfil all duties requested by law with such a large number of representations and wide territorial jurisdiction.<sup>79</sup> Due to all the above-mentioned insufficiencies, the representation of children by special guardians *ad litem* is often reduced to the mere fulfillment of a form prescribed by the law. Such a system of child

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<sup>71</sup> Majstorović, 2017b, p. 103, 117; Korać Graovac, 2016, pp. 130, 142; Rešetar and Lucić, 2021, p. 155.

<sup>72</sup> Jakovac-Lozić, 2001, pp. 26–40; Majstorović, 2017a, p. 68; Korać Garovac, 2013, pp. 50–51; Šimović, 2022, p. 75; Aras, 2014, p. 64.

<sup>73</sup> However, some reform activities are under way. In every city that represents the centre of a county (Croatia is divided into 21 counties), a family law department has been formed within the Municipal Court.

<sup>74</sup> Majstorović, 2017a, p. 65; Rešetar and Lucić, 2021, p. 154; Parać Garma, 2012, p. 146.

<sup>75</sup> Korać Garovac, 2013, pp. 50–51; Lakić, 2016, p. 57.

<sup>76</sup> Lucić, 2021, p. 108.

<sup>77</sup> Annual Report of the Croatian Ombudsman for children, 2021, p. 104.

<sup>78</sup> Research conducted in 2021 by the Croatian Ombudsman for children shows that the special guardians were present at only 15% of the court hearings in which they were representing minor children. See Annual Report of the Croatian Ombudsman for children, 2021, p. 105.

<sup>79</sup> Lucić, 2021, pp. 108–109.

representation does not enable quality representation of the child's best interest in judicial proceedings nor does it establish a quality relationship with the child and is ripe for reform.<sup>80</sup>

The deficiencies listed above show that the Croatian family law system is yet to function perfectly in practice, despite all the legal standards for the protection of children's procedural rights that have been incorporated into legislation. If we do not rectify the deficiencies that occur in the implementation of legislation in practice, we can expect that new violations of children's procedural rights will continue to occur.<sup>81</sup> To conclude, the analysis of relevant legislation, judicial practice, academic literature, and research studies show that the Croatian family law system, at the moment, is not fully capable of fulfilling the ultimate goal – giving every child the opportunity to participate in every judicial and administrative proceeding that is crucial for his/her future, i.e., making every child and his/her opinion visible.

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<sup>80</sup> Annual Report of the Croatian Ombudsman for children, 2021, p. 105; Lucić, 2021, pp. 110–112.

<sup>81</sup> This thesis is confirmed by recent judgments of the ECtHR (Case *C v. Croatia*, Appl. No. 80117/17, 8 October 2020, para. 76–78, 81; Case *M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, para. 129, 181, 184–187), as well as the Constitutional court of the Republic of Croatia (U-III/1674/201, 13 July 2017, para. 9.4, 12; U-III/249/2022, 12 July 2022, para. 10.7–10.9).

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